Expedited Appeal No. 20-cv-0535

DISTRICT OF COLUMBIA
COURT OF APPEALS

ROSE'S 1, et al.,

Plaintiffs-Appellants,

v.

ERIE INSURANCE EXCHANGE,

Defendant-Appellee.

ON APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION
No. 2020 CA 002424B
(The Honorable Kelly A. Higashi)

BRIEF OF *AMICI CURIAE* UNITED POLICYHOLDERS AND NATIONAL INDEPENDENT VENUE ASSOCIATION IN SUPPORT OF THE PLAINTIFFS-APPELLANTS

November 3, 2020

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ROSE'S 1 d/b/a ROSE'S LUXURY, et al. v.
ERIE INSURANCE EXCHANGE
Expedited Appeal No. 20-cv-0535

CERTIFICATE REQUIRED BY RULE 28(a)(1) OF THE RULES OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

The undersigned counsel of record for *amici curiae* United Policyholders ("UP") and National Independent Venue Association ("NIVA") certify the following as required by Rule 28(a)(1) of this Court's Rules:

Except for amici UP and NIVA, all parties, intervenors, and amici are, to the best of the knowledge of amici UP and NIVA, listed in the Brief for Defendant-Appellee Erie Insurance Exchange ("Erie").

Amicus UP is a not-for-profit educational organization, which is tax-exempt under § 501(c)(3) of the Internal Revenue Code, dedicated to educating and advancing the interests of individual and commercial policyholders and consumers across the country about their rights and duties under all types of insurance policies.

Amicus NIVA is a trade association formed to represent the interests of independent performing-arts venues adversely impacted by the COVID-19 pandemic.

It is the position of amici UP and NIVA that the Superior Court's order granting summary judgment to Erie was wrongly decided, as set forth in the accompanying brief.

These representations are made so that judges of this Court, *inter alia*, may evaluate possible disqualification or recusal.

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RULE 29(a)(4)(A) DISCLOSURE STATEMENT

United Policyholders is a nonprofit 501(c)(3) organized under the laws of the District of Columbia. It has no parent corporation or publicly held corporation that owns 10% or more of its stock.

National Independent Venue Association is a non-profit organization based in the state of New York. It has no parent corporation or publicly held corporation that owns 10% or more of its stock.

STATEMENT OF INTERESTS OF *AMICI CURIAE*

Policyholders across the country – businesses and individuals alike – buy insurance for protection against unexpected disaster. Confidence that insurance will pay spurs growth of our economy and encourages people and businesses to take risks and pursue innovation. Insurance therefore is a crucial engine of the economy and, given its protective purpose, is imbued with a public purpose.[2]

At the same time, insurance is woven into the fabric of our economy through mandatory purchase requirements, personal and business risk management, and pricing of goods and services. Each jurisdiction regulates insurance contracts and transactions separately; yet most insurers operate across jurisdictions. Most insurers serve three masters – insurers, policyholders, and investors and shareholders – meeting their own revenue objectives, reasonable expectations of policyholders, *and* demands of their investors and shareholders. However, it is crucial that insurance fulfil its "dominant purpose of indemnity."[3]

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[2] *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 429-30 (1914) ("insurance is affected with a public interest"); *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 53 (Tex. 1997) (insurance "peculiarly affected with a public interest."); *Tank v. State Farm Fire & Cas. Co*., 715 P.2d 1133, 1136 (Wash. 1986) (same).

[3] *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1041 (D.C. Cir. 1981); *accord Am. Ins. Co. v. Tutt*, 314 A.2d 481, 485 (D.C. 1974) (discussing "the principle of indemnity"); *see also* American Law Institute, *Restatement of the Law, Liability Insurance* § 2, cmt. c (2019) ("*Restatement Liability Insurance*") (insurance-policy interpretation helps "effect[] the dominant protective purpose of insurance").

Judicial oversight is essential to maintain the purpose and value of insurance in this complex system. Courts require insurance, the classic adhesion contract, to pay pursuant to the plain meaning of the policy language and put the burden on insurers, as the drafters of the boilerplate language, to show that theirs is the only reasonable interpretation of the contract terms.

Amici Curiae United Policyholders ("UP") and National Independent Venue Association ("NIVA") respectfully seek to assist this Court in rendering a decision here that likely will be influential around the country on COVID-19 insurance specifically and policy interpretation generally.

A. Interests of United Policyholders

Founded in 1991, United Policyholders has served as a respected voice for the interests of consumers and policyholders across the country for nearly 30 years. Individual policyholders routinely call upon UP for help in the wake of large-scale national disasters such as hurricanes in the Gulf and across the Eastern Seaboard; floods and windstorms in the Midwest; and wildfires in the West.

In 2020, UP has assisted business owners whose operations have been impacted by COVID-19 and public safety orders. UP has educated policyholders on COVID-19 insurance issues and maintains a library of resources at uphelp.org/COVID. Also, UP routinely engages in nation-wide policy work to assist and to educate the public, governmental agencies, legislators, and the courts on

policyholders' insurance rights. Grants, donations, and volunteers support UP's work in three program areas: Roadmap to Recovery™, Roadmap to Preparedness, and Advocacy and Action.

Public officials, regulators, legislatures, academics, and journalists routinely seek UP's input on insurance and related legal matters. UP serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and U.S. Treasury Department. UP has been an official consumer representative to the National Association of Insurance Commissioners ("NAIC") since 2009, monitoring policy language and claim practices and developing model laws and regulations.

UP has advocated for the rights of policyholders and consumers across the country throughout the pandemic, addressing coverage related to COVID-19 and public safety orders.[4] As explained below (§ II.B.), UP presented evidence that insurers were not fully candid with regulators in seeking regulatory approval in the

[4] *See Special Session One: COVID-19: Lessons Learned*, NAIC (Aug. 10, 2020), https://www.youtube.com/watch?v=J2QmaZqd9Vk&feature=youtu.be, and https://content.naic.org/sites/default/files/national_meeting/speakerbios_covid-19_lessons_learned_summer_nm_2020_0.pdf (speakers' biographies); Amy Bach, Co-Founder & Exec. Dir., UP, Business Interruption Policies and Claims, Presentation at NAIC Summer Nat'l Mtg. of Prop. & Cas. Ins. Comm. (Aug. 12, 2020), https://www.uphelp.org/sites/default/files/attachments/8-12-20_bach_c_committee_final_3.pdf; Amy Bach, *Co-Founder & Exec. Dir., UP*, COVID-19 Related Business Interruption Claims, Coverage Issues, Disputes and Litigation, NAIC Summer Nat'l Mtg. of Consumer Liaison Comm. (Aug. 14, 2020), https://content.naic.org/sites/default/files/national_meeting/Version%202%20-%20Slideshow%20-%20Consumer%20Liaison%20Cmte%20-%2008.14.20.pdf.

mid-2000s for virus exclusions. Although the Appellants' Policies contain no virus exclusion, those insurance-industry representations remain relevant, showing that the policy language here, unfettered by a virus exclusion, can apply.

UP has filed amicus briefs in federal and state appellate courts across 42 states and in more than 450 cases. The U.S. Supreme Court and state supreme courts have cited UP amicus briefs. *See, e.g.*, *Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005).

B. Interests of National Independent Venue Association

Formed in 2020, NIVA already boasts approximately 2,900 charter members, in each of the 50 states and D.C. As independent performing-arts venues, NIVA members employ thousands, and are a cultural backbone of communities. Members in D.C. include the 9:30 Club and Union Stage. Outside of D.C., well-known members include the Apollo Theater in New York and the Red River Cultural District in Austin, Texas.

The pandemic and related civil authority orders have devastated venues, who rely on in-person performances for revenue. In Washington, D.C. alone, NIVA members have cancelled or delayed hundreds of performances, incurring substantial losses and putting livelihoods in jeopardy.[5] This Court's decision will significantly affect NIVA members here in the "DMV," and across the country.

[5] More information is available on NIVA's website, https://www.nivassoc.org.

C. Role of Amici in This Case

UP and NIVA seek to fulfill the classic role of amici, supplementing the efforts of the parties and their counsel, and drawing the Court's attention to points that are core to their missions. That is an appropriate role for amici as an amicus often can "focus the court's attention on the broad implications of various possible rulings." Robert L. Stern, et al., Supreme Court Practice 570-71 (6th ed. 1986) (quoting Bruce Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)). UP and NIVA do that here.

INTRODUCTION

Appellants have shown why the plain meaning of the Policies afford coverage here. UP focuses here on background that further supports Appellants' claims for coverage; and on the need for courts to apply a complete analysis of disputed policy language. As the first court of last resort in the country likely to rule on these crucial issues, this Court's decision, and the reasoning employed, will affect not only Appellants, but cases for COVID-19 coverage across the country. Because principles of policy interpretation governing these "form contracts" are universal and apply across lines of insurance – to general property, liability, life, homeowners, and renters insurance – the Court's decision will likely have far-reaching effects.

UP thus seeks to stress the importance of a complete policy analysis in insurance-coverage disputes.

SUMMARY OF ARGUMENT

In addressing any dispute about insurance coverage, courts must first decide what the disputed terms mean. Once the meaning is determined, then the court applies that meaning to the facts at issue. Decisions by this Court, like those across the country, follow, and endorse, this "two-step" process.

In conducting the requisite analysis, the court looks first to plain meaning, as it applies to the claim at issue.[6] When there are two or more reasonable interpretations of the policy, as applied to the claim, the court applies the presumption that construes ambiguities against the insurance-company drafter.[7] This Court, like courts across the country, applies this presumption due to the adhesion-contract nature of insurance policies, imposed, as they are, without negotiation of substantive policy terms by policyholders.[8] This presumption goes one way – in favor of the policyholder, who does not negotiate those terms and, in almost all cases, has no power to do so. This helps right the imbalance of power

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[6] *See Cameron v. USAA Prop. & Cas. Ins. Co.*, 733 A.2d 965, 968-69 (D.C. 1999) (construing terms them "consistently with the meaning which common speech comports"); *see also Restatement Liability Insurance* § 3 (The "Plain Meeting Rule," as the majority rule).

[7] *See Tutt,* 314 A.2d at 484; *see also Restatement Liability Insurance* § 4 ("Ambiguous Terms," again as the majority rule).

[8] *Restatement Liability Insurance* § 4, cmt. d (*contra proferentem* "applied especially frequently in the interpretation of insurance contracts, where the standard-form terms are drafted generally by the insurer.").

between the policyholder and insurer, enforcing the public's interest in well-functioning insurance processes.

The Superior Court failed to analyze the Policies here as a whole, and failed to give effect to every term. It thus negated the presumption that favors the policyholder, in effect shifting the burden of proof on policy interpretation from the insurer, which drafted the policy terms at issue, to the insured restaurants, which had no power to change them. As a result, the court upended black-letter insurance protections afforded to policyholders under decades of case law adopted by this Court and courts around the country. Not only was that an error, it was an error of national consequence. Although ostensibly about one modest set of insurance policies, the issues in this case will affect businesses around the country that paid substantial premiums to protect their business income, and the livelihoods of millions of employees and their families. Beyond that, it will affect the millions of insureds who have purchased homeowners and other kinds of insurance policies using wording at issue, as well as liability and other insurance policies, which are governed by the same rules of policy interpretation.

Insurers across the country (including Erie) have employed a calculated strategy to deny coverage for all COVID-19-related losses for all policyholders, regardless of the policy language at issue. Instead, often without investigation, they uniformly assert a blanket position that any policy using the terms "direct,"

"physical," "loss," or "damage" requires – without regard to nuances in policy language or facts of a claim – "structural alteration" of property before coverage will apply. They have adopted a strategy to oppose amicus briefs in these cases at every turn and refused consent to amici's Motion for Leave here. By properly interpreting the Policies, this Court can set the stage for a proper analysis of these cases around the country, and help ensure that courts in DC employ a complete policy analysis when they face issues of insurance-policy interpretation.

ARGUMENT

Contrary to Erie's arguments, the policies here do not require the policyholder to show some kind of "structural damage" or "alteration." As demonstrated below, this Court should reject this narrow view of the Policies and reverse the Superior Court's ruling, which is inconsistent with proper insurance policy analysis.

I. Courts Should Employ a Full and Proper Analysis of Insurance Policies.

A. As Prototypical "Form Contracts," Insurance Policies Are Subject to Presumptions That Uphold the Public Role Served by Insurance.

This Court repeatedly has held that insurance policies, like other contracts, must be read as a whole, in light of all of the circumstances at the timing of the contracting, giving effect to every term. *E.g.*, *Carlyle Inv. Mgmt., LLC v. Ace Am. Ins. Co.*, 131 A.3d 886, 894-96 (D.C. 2016). Courts should not rewrite the parties' contract or "inject" other provisions. *Auger v. Tasea Inv. Co.*, 676 A.2d 18, 20 (D.C.

1996). It is the insurer's duty to "spell out *in plainest terms – terms understandable to the [person] in the street* – any exclusionary or delimiting policy provisions . . ." *Tutt*, 314 A.2d at 484 (emphasis added).

Insurers bear this duty because insurance policies are "'form contracts,'" presented to insurance regulators for approval; and policyholders "generally play no role in" drafting, or negotiating, their substantive terms. *Richardson v. Nationwide Mut. Ins. Co.*, 826 A.2d 310, 315-16, 324 (D.C. 2003), *vacated pursuant to settlement*, 844 A.2d 344 (Mem.) (D.C. 2004)[9]; *Cameron*, 733 A.2d at 968 (rule on ambiguities "not a rule of convenience or a mere technicality of legalists"). Because insurance contracts are written exclusively by insurers, this Court has held that any unclear provisions must be interpreted "in a manner consistent with the reasonable expectations of the purchaser of the policy." *Smalls v. State Farm Mut. Auto. Ins. Co.*, 678 A.2d 32, 35 (D.C. 1996).

D.C. courts thus have long recognized the obligation of insurance companies, as drafters of the boilerplate contract language, to draft and use policies and policy language that are clear. Courts in the first instance consider whether there is a "plain meaning." If there is no plain meaning, considered in the context of the entire

[9] After the decision by the three-judge panel in *Richardson,* the insurer moved for *en banc* reconsideration. Before resolution *en banc*, the parties settled on the ground that the policyholder agree to move to vacate the decision by the three-judge panel. Thus, *vacatur* was not on the merits.

insurance policy and the claims at issue, courts put the burden for those ambiguities on the insurer, construing them in favor of the policyholder. As this Court has stated, "[f]ailing such unambiguous [policy] language, doubt should be resolved in favor of the insured." *Tutt*, 314 A.2d at 484. Policy language is considered ambiguous when it is subject to two or more reasonable interpretations.[10] *E.g., Carlyle*, 131 A.3d at 895; *Am. Bldg. Maint. Co. v. L'Enfant Plaza Props., Inc.*, 655 A.2d 858, 861 (D.C. 1995). The insurer must show that its interpretation of the policy as drafted is the *only* reasonable interpretation. *E.g., Carlyle*, 131 A.3d at 896; *Tutt*, 314 A.2d at 486 (rejecting insurer's argument that its interpretation was the "most reasonable").

This Court, like courts across the country, applies this presumption due to the adhesion-contract nature of insurance policies, imposed, as they are, without negotiation of substantive policy terms. Those presumptions go one way – in favor of the policyholder, who does not negotiate the terms.

B. A Court First Considers the "Plain Meaning" of an Insurance Policy, Which Here Favors Coverage.

As in all contract interpretation cases, determining whether an all-risk policy covers a particular loss begins with the plain language and accords with a "common speech" understanding. *Cameron*, 733 A.2d at 968. To restrict coverage, an insurer

[10] *Restatement Liability Insurance* § 4 (term is ambiguous "if there is more than one meaning to which the language of the term is reasonably susceptible when applied to the facts of the claim at issue in the context of the entire [] policy").

must use language that clearly excludes the damage at issue in the case; "it is the insurer's duty to spell out in plainest terms – terms understandable to the man in the street – any exclusionary or delimiting policy provisions." *Holt v. George Washington Life Ins. Co.*, 123 A.2d 619, 621 (D.C. 1956).

C. Decisions Around the Country Interpret Policy Language Like Erie's in Favor of Coverage, Showing That the Appellants' Interpretation Here Is Reasonable.

There is "considerable support in reason and authority" to find that the Policies are ambiguous. *Richardson*, 826 A.2d at 325. On October 7, 2020, a North Carolina state court ruled that "all-risk" policies covered COVID-19 business-interruption losses suffered by 16 restaurants, finding that the terms loss and damage were ambiguous. *N. State Deli, LLC v. Cincinnati Ins. Co.*, No. 20-CVS-02569 (N.C. Sup. Ct. Oct. 7, 2020). This is the first judgment to find coverage for losses resulting from the COVID-19 pandemic. The decision also illustrates that a proper analysis of the operative policy provisions requires a finding of coverage.

North State Deli held that government orders mandating the suspension of business operations and prohibiting "all non-essential movement by all residents" caused "physical loss" of the policyholders' property. *Id.* at 4. The court also rejected the insurer argument that "all-risks" policies require an "actual, tangible, permanent, physical alteration of property" to trigger coverage. *Id.* at 6.

The policies there promised to pay for loss of "business income" and for "extra expense[s]" caused by "direct 'loss' to property . . . caused by . . . any Covered Cause of Loss." They defined "loss" as "accidental physical loss or accidental physical damage" to property. The policyholders moved for partial summary judgment that their losses were covered because the government orders caused them to lose the physical use of and access to their restaurants. *Id.* at 4.

Consistent with well-settled principles of insurance-policy interpretation, which give undefined terms their ordinary meanings, the court turned to dictionary definitions of "direct," "physical," and "loss." *Id.* at 4-6. The court then determined that the government decrees caused an "immediate loss of use and access without any intervening conditions." *Id.* at 6; *accord Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-cv-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020).[11]

D. Terms in the Commercial Property Coverage Part Show That Erie Cannot Meet Its Burden to Show That Its Interpretation Is the Only Reasonable One.

To prevail, Erie must show, consistent with D.C. law and law around the country, that its interpretation is the only reasonable one and that the Appellants'

[11] Other COVID-19 cases upholding proper coverage principles include, *inter alia: Lombardi's, Inc. v. Indem. Ins. Co. of N. Am.*, No. DC-20-05751-A (Tex. Dist. Ct. Oct. 15, 2020) (restaurants); *Best Rest Motel, Inc. v. Sequoia Ins. Co.*, No. 37-2020-00015679-CU-IC-CTL (Cal. Super. Ct. Sept. 30, 2020) (motels); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, No. 20-cv-00383-SRB, 2020 WL 5637963 (W.D. Mo. Sept. 21, 2020) (dental office); *Ridley Park Fitness, LLC v. Phila. Indem. Ins. Co.*, No. 01093 (Pa. Dist. Ct. Aug. 31, 2020) (fitness center).

interpretation of the form language, drafted by Erie and imposed without negotiation, is unreasonable. Erie cannot do so. The Policies nowhere require any kind of "structural alteration," and a plain reading of their terms does not compel that result. Indeed, competing and potentially contradictory terms in the Commercial Property Coverage Part of the Policies at the least shows that Erie's reading is not, as it must be, the only reasonable one.

The Appellants' Brief well summarizes the various policy provisions that undercut Erie's ability to meet that burden here. *See* Appellants' Br., Chart at 17-19; *id.* at 22-23, 46, 48. UP and NIVA focus here on provisions that most directly affect UP's clientele and NIVA's members and the broader consideration of COVID-19 that are related to these issues in other claims, for losses that are related to COVID-19 and those that are not.

Section I of the Commercial Property Coverage Part includes three coverages, Coverage 1 (Buildings), Coverage 2 (Personal Property), and Coverage 3 ("Income Protection"); and begins with the following "INSURING AGREEMENT" that ostensibly applies to all three:

> We will pay for direct physical "loss" of or damage to Covered Property at the premises described in the "Declarations" caused by or resulting from a peril insured against.

JA 169-72. Defined terms are shown in quotation marks. The Commercial Property Coverage Part defines "loss" as the "direct and accidental *loss* of or damage to covered property." JA 205 (emphasis added). It does not define "damage."

Coverage 1 and Coverage 2 both begin with clauses identifying the property that is covered, in subsections entitled "Covered Property" and "Property Not Covered." JA 169-70. Coverage 3, "Income Protection," begins differently with the following paragraph:

> Income Protection means loss of "income" and/or "rental income" you sustain due to partial or total "interruption of business" *resulting directly from "loss" or damage to property* on the premises described in the "Declarations" from a peril insured against.

JA 171 (emphasis added). Like the "Insuring Agreement" at the beginning of Section I, this provision, on page 3 also appears to define the grant of coverage and has no parallel in Coverages 1 and 2. Unlike the "Insuring Agreement," it does not include the term "direct physical 'loss.'" It includes the defined term "loss" and also the word loss, an undefined term. The Policies further include a number of exclusions that would not be necessary if the grant of coverage required some structural or other alteration or destruction.[12]

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[12] For example: Exclusions precluding coverage for "'loss' or damage caused by or resulting from:

(i) "acts or decisions, including *the failure to act or decide,* of anyone" – § III.A.3.b. (JA 173) (emphasis added);

Under the rule that each contract term must be given effect, each of these terms must be given effect. The defined term "loss" must mean something different than either (or both) of the undefined terms, damage and loss. Because it does not repeat the term, "direct physical loss," the introductory paragraph in the Income Protection section, is broader, or certainly different from, the Insuring Agreement at the beginning of Section I. In addition, because it uses terms that appear to define the scope of coverage and nowhere refers to the Insuring Agreement (either to incorporate it or to replace it), the introductory paragraph appears to take the place of the "Insuring Agreement." That paragraph may be read to include coverage for the loss of use of properties, like the insured restaurants here, that do not suffer "direct physical loss" (whatever that might be found to mean); or those that suffer the kind of physical loss caused by COVID-19 – or by any other elusive substance, like E. coli, asbestos, smoke, etc., – that property insurance policies typically cover. *See infra* § II.

E. Terms in the CGL Coverage Part Also Show That Erie Cannot Meet Its Burden to Show That Its Interpretation Is the Only Reasonable One.

(ii) "faulty, inadequate, or defective: (1) planning, zoning, development, surveying; (2) Design, specifications. . ." – § III.A.3.c.(1), (2) (JA 173);

(iii) "change in flavor, color . . .," "smog," "latent . . . defect" – §§ III.B.1.b., e., f.; and (v) "presence . . . of 'fungus,' . . . or bacteria" – III.B.4. (JA 175).

The CGL Coverage Part includes an expansive definition of "property damage" which makes a distinction between "physical injury" and "loss of use of property that is not physically injured," including both as covered "property damage." JA 235. That definition was drafted by insurance-industry organizations and has been included since 1973 in the standard-form definition of "property damage" in countless CGL policies, sold to businesses, large and small. It includes two prongs. The second one on "loss of use" is quoted extensively in this case by Appellants (*e.g.*, Appellants' Br. §§ II-III; *see also* Pls.' Mot. Summ J. Br. § I; Pls.' Cross-Mot. Summ. J. Opp'n §§ II, IV.). The first relating to "physical injury" also provides important context or, at the least, bears consideration when this Court (or any court) is considering what the undefined term, damage, might mean as used in the Property Coverage Part.

That definition states:

> "Property damage" means:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property. . . .
>
> b. Loss of use of tangible property that is not physically injured. . . .

JA 235.

As in the Commercial Property Coverage Part, "loss of use" here is not defined. However, when the second prong is contrasted with the first, its use must mean or include what in insurance parlance is called "pure loss of use" – loss of use that is unconnected to some kind of physical injury – or, as Erie would have it,

"structural alteration." In addition, consistent with policy-interpretation principles that forbid rendering policy terms as "surplusage," "property damage," as defined in this part of the Policies, must mean something different than either (and, again, both) "loss" and damage. Indeed, one could consider "property damage," as defined, to be a subset of damage as used in the Commercial Property Coverage Part. That is certainly one reasonable interpretation. Under that interpretation, because "property damage" is both "physical injury to tangible property" and "loss of use of property that *is not physically injured,*" JA 235 (emphasis added), the undefined term damage must be something different, and either more, or perhaps less, than "property damage."[13]

Amici here, and more importantly the Appellants, need not prove which it is. They did not write, or negotiate, the terms at issue; and under the black-letter law here in D.C. and across the country, because there is more than one reasonable interpretation of the Policies, at the least any such ambiguities should be construed in favor of coverage.[14]

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[13] The CGL Coverage Part, like the Commercial Property Coverage Part, includes an exclusion that does not require "structural alteration"; in the absence of the exclusion, an insured could seek recovery. *See, e.g.*, "Recall Of Products, Work Or Impaired Property." CGL Coverage Part, § I, Coverage A., 2.n. (JA 226).

[14] Policyholders here and across the country reasonably believed that they had purchased true "Income Protection," as the title of Coverage 3 in the Policies promises. Now, Erie says, no. Erie could have avoided this confusion, for example, by: avoiding use of loss both as a generic and undefined term and also as a defined

Under D.C. law, it is Erie – not the non-drafter policyholders – that should bear the burden of that confusion. Because Erie exclusively drafted the Policies, this Court should interpret the insurer's unclear language in a manner consistent with the reasonable expectations of Appellants (and other policyholders) – namely, that the all-risk policies they purchase protect them when they experience loss of use of covered property as a result of a government shutdown order. *Smalls*, 678 A.2d at 35 (adopting "reasonable expectations" doctrine).

The Superior Court focused on a single clause in finding that loss "must be caused, without the intervention of other persons or conditions, by something pertaining to matter – in other words, a direct physical intrusion to the insured property. JA 5. The Court's constricted definition forgoes proper policy analysis and is at odds with other language in the policies, which uses broad and conflicting language about what sorts of losses are covered and, at a minimum, is ambiguous about whether a "physical intrusion" is required.

II. The Requisite Consideration of All of the Background Circumstances Further Supports a Finding of Coverage.

A. D.C. Law Compels Consideration of All Terms in the Policies Against the Backdrop of Facts Relevant to Creation of the Form Contracts at Issue.

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term, denoted as "loss"; including a definition of "damage"; or perhaps most importantly, state – if that were the intended meaning – that "direct physical loss" requires a "structural alteration." It did not do so.

In interpreting contracts, "[i]t is a fundamental rule that . . . the courts may look not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made." *Merriam v. United States,* 107 U.S. 437, 441 (1883).[15] *Richardson* provides a case in point. There, the Court relied upon an amicus brief filed by the D.C. Department of Securities and Insurance Regulation (now the Department of Securities, Insurance and Banking) providing information about the history of the policy provision at issue, the "absolute pollution exclusion," so that the Court could assess the exclusion in its full factual context. Noting that the "business of insurance is closely regulated," the Court specifically considered the Department's submissions about "statements made by representatives of the insurance industry to obtain approval of proposed policy language," observing that those representations "can . . . be quite significant." *Richardson,* 826 A.2d at 316. Relying in part on the decision by the New Jersey Supreme Court in *Morton,* the Court noted that, because policyholders had "no role in the drafting of such contracts," the only "arms-length evaluation" of the policy language by "interests adverse to the insurance industry" was from "state regulatory authorities." *Id.*

[15] *Accord* American Law Institute, *Restatement (Second) of Contracts* § 202 cmt. b (1981); *see also Restatement Liability Insurance* § 2.

(quoting *Morton Int'l, Inc. v. Gen. Accident Ins. Co. of Am.*, 629 A.2d 831, 852 (N.J. 1993)).

That same situation applies here. The policy language at issue was drafted by the insurance industry, and the only parties giving an arms-length evaluation were insurance regulators. UP and NIVA present the background below to provide context they believe relevant to a full consideration of the issues here.

B. The Factual Background Shows That Erie's Proposed Interpretation of the Policies Is Not, as It Must Be, the Only Reasonable One.

Property insurance began in the 1800s and, for decades, was a "named peril" coverages covering only those risks named in the policy. In the mid-to later 20th century, the insurance industry began selling "all-risks" property policies in response to demands of the market. The Policies, like all all-risk policies, cover all risks except for those specifically excluded. Jean Massey Draper, *Coverage Under All-Risk Insurance*, 30 A.L.R.5th 170 (1995) (all-risk policy "generally allows recovery for all fortuitous losses, unless the policy contains a specific exclusion expressly excluding the loss from coverage.").

The Policies also contain no exclusion that explicitly precludes coverage for the losses at issue, despite the fact that such an exclusion had been approved for use almost 15 years earlier. In 2006, in the wake of the SARS (Severe Acute Respiratory Syndrome) epidemic, property & casualty insurers, represented by two industry

groups, the Insurance Services Office, Inc. ("ISO"), and the American Association of Insurance Services ("AAIS"), sought approval of a new "virus exclusion." Both groups claimed that property policies "have not been," and were not "intended to be," protection against loss from "disease-causing agents." For example, the ISO Circular[16] presented to regulators stated in part that "property policies have not been a source of recovery for losses involving contamination by disease-causing agents...." JA 342.

These representations were not completely candid. By 2006, courts had repeatedly found that standard-form property insurance policies covered a variety of claims involving disease-causing agents, including e. coli bacteria, asbestos, mold, lead, [17] among others. Such cases specifically had found that such agents caused "direct physical loss," and resulting losses were covered. Second, insurers seeking regulatory approval of virus exclusions told regulators that they (the insurers) had *never* paid virus-related losses and that therefore regulators should not require any reductions in rates, or premium. However, media reports in 2003 confirm that insurers that year had paid for losses from hotel reservation cancellations due to

[16] ISO Circular, New Endorsements Filed To Address Exclusion of Loss Due to Virus or Bacteria (July 6, 2006) (JA 336-48).
[17] *See*, *e.g.*, *Atl. Mut. Ins. Cos. v. Lotz,* 384 F. Supp. 2d 1292, 1300 (E.D. Wis. 2005) (finding coverage for mold and rot damage); *Cooper v. Travelers Indem. Co. of Ill.*, No. C-01-2400-VRW, 2002 WL 32775680 at *5 (N.D. Cal. Nov. 4, 2002) (finding coverage for bacterial contamination).

SARS. This history is important. Although the Plaintiffs' policies contain no virus exclusion, insurance-industry representations about the exclusion remain relevant here as they support the argument that the policy language here, unfettered by a virus exclusion, applies to protect against virus or related losses.

III. The Court's Decision Here Will Have Impact Far Beyond This Case.

This case of course is of enormous importance to the Appellant policyholders. They are facing devastation from the effects of COVID-19 and seek to enforce the insurance protection they reasonably expected from Erie. Certainly, they did not expect to be on the front lines fighting a nationwide effort by the insurance industry to rewrite both the history of standard-form business-interruption contracts and the language in their policies as well. However, the decision by the Court here will reach far beyond the confines of this one case and far beyond D.C.

Small businesses make up 44% of the economy and provide over 60 million jobs,[18] creating the majority of new jobs in the United States.[19] However, the average

[18] Press Release No. 19-1 ADV, U.S. Small Business Administration Office of Advocacy, Small Businesses Generate 44 Percent Of U.S. Economic Activity (Jan. 30, 2019), https://advocacy.sba.gov/2019/01/30/small-businesses-generate-44-percent-of-u-s-economic-activity/#:~:text=WASHINGTON%2C%20D.C.%20%E2%80%93%20Small%20businesses%20are,percent%20of%20U.S.%20economic%20activity.

[19] U.S. Small Business Administration Office of Advocacy, Frequently Asked Questions About Small Business (Sept. 24, 2019), https://advocacy.sba.gov/2019/09/24/frequently-asked-questions-about-small-business/ (in 8 years, small businesses created almost 65% of new jobs).

small business has $10,000 in monthly expenses and less than one month of cash on hand at any given time.[20] As many as 110,000 small businesses across the country decided to shut down permanently between early March and early May,[21] and those negative effects continue to ripple across the country.[22] Thus, predictably, small businesses have been disproportionately hurt by the pandemic, and millions of them bought business-interruption insurance to protect against this kind of catastrophe.[23] All of that stands in stark contrast to the massive insurance companies that insure small businesses – for example, Erie Insurance, the insurer in this case, made over

[20] Alexander Bartik, et al., *How Are Small Businesses Adjusting to COVID-19? Early Evidence From a Survey* (Harvard Law Sch. Working Paper Summary, 2020), https://hbswk.hbs.edu/item/how-are-small-businesses-adjusting-to-covid-19-early-evidence-from-a-survey.

[21] Emily Flitter, 'I Can't Keep Doing This:' Small-Business Owners Are Giving Up, nytimes.com (July 13, 2020), https://www.nytimes.com/2020/07/13/business/small-businesses-coronavirus.html?auth=login-email&login=email.

[22] Alexander Bartik, et al., How Are Small Businesses Adjusting to COVID-19? Early Evidence From a Survey (Harvard Law Sch. Working Paper Summary, 2020), https://hbswk.hbs.edu/item/how-are-small-businesses-adjusting-to-covid-19-early-evidence-from-a-survey.

[23] The Insurance Information Institute, an organization of more than 60 insurers, advertises: "Because insurers know so much about what can go wrong, they can provide your business with the insurance coverages your particular type of enterprise requires. Without appropriate insurance, property losses can easily cause the entire enterprise to fail." Insurance Information Institute, Insuring Your Business: Small Business Owners' Guide to Insurance: Property Insurance: Role of Property Insurance (2020), https://www.iii.org/publications/insuring-your-business-small-business-owners-guide-to-insurance/specific-coverages/property-insurance.

$141 million in the first six months of 2020 alone.[24]

The form contracts promising "Income Protection" that Erie and other insurers sold to other businesses across the country, small and large alike, includes the "direct physical loss" language and uses the terms, often undefined, "damage," "loss." The ambiguities in those policies should be construed against the insurance-company drafters. Because that language is found in insurance that ordinary people, homeowners, renters, buy also, the Court's decision here will affect the insurance purchased by millions of consumers in D.C. and beyond.

Finally, a decision by this Court confirming that, in interpreting insurance policies, courts must follow a complete policy analysis – giving effect to all relevant terms and requiring insurers to meet their burden to show that theirs is not a reasonable interpretation, *but the only reasonable interpretation* – will affect insurance policies across the board. As the principles of insurance-policy interpretation advanced by *amici* here apply not just to business-interruption and business-income insurance, the Court's decision will confirm the decades of D.C. precedent and majority rules across the country requiring a complete policy analysis. It will also have applicability to all kinds of insurance, from business, homeowners';

[24] Press Release, Erie Insurance, Erie Indemnity Reports Second Quarter 2020 Results (July 30, 2020), https://www.erieinsurance.com/news-room/press-releases/2020/q2-2020-earnings-release#:~:text=%2D%20July%2030%2C%202020%20%2D%20Erie,the%20second%20quarter%20of%202019.

and automobile liability insurance, to property and homeowners' first-party insurance, to life insurance, and beyond. It is for these reasons that UP and NIVA submitted this amicus brief and urge the Court to reverse the decision by the trial court below.

CONCLUSION

As the drafter of the Policies, Erie now carries the burden of showing that its interpretation is the only reasonable interpretation. For the reasons set forth above and in Appellants' brief, it cannot do so. As a result, amici UP and NIVA respectfully request that this Court reverse the Superior Court's grant of summary judgment to Erie.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2020, this Brief of *Amici Curiae* United Policyholders and National Independent Venue Association In Support of The Plaintiffs-Appellants was filed and served via the District of Columbia Court of Appeals' electronic filing system, which will serve as notice of such filing upon all counsel of record, and a copy was emailed to each of the following:

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