No. 21-1203

In the United States Court of Appeals for the Seventh Circuit

TJBC, INC.,

Plaintiff-Appellant,

v.

THE CINCINNATI INSURANCE COMPANY, INC.

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:20-cv-00815.
The Honorable **David W. Dugan**, Judge Presiding.

UNITED POLICYHOLDERS'S MOTION FOR LEAVE TO FILE AMICUS BRIEF

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1. Rule 29 of the Federal Rules of Appellate Procedure permits the filing of Amicus Briefs.

2. UP is a non-profit, tax-exempt, charitable organization founded in 1991 that provides valuable information and assistance to the public on insurers' duties and policyholders' rights. UP monitors developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in sales and claim practices. Grants, donations and volunteers support the organization's work. UP does not accept funding from insurance companies. State insurance regulators, academics, and journalists throughout the U.S. routinely engage with UP on issues impacting policyholders. UP's Executive Director, Amy Bach, Esq., has served as an official consumer representative to the National Association of Insurance Commissioners since 2009.

3. In furtherance of its mission, UP regularly appears as *amicus curiae* in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. UP's *amicus* brief was cited in the U.S. Supreme Court's opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999). UP has been actively involved as *amicus curiae* in Illinois courts since 1995 and submitted briefs in recent cases.[1]

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[1] *See West Bend Mutual Insurance Co v. New Packing company, Inc.* (Illinois Appellate Court First District Appeal No. 11-1507); *Maremont Corporation v. Edward William Chesire, et al.* (Illinois Appellate Court First District Appeal No 96-0146); *Employers Insurance of Wausau v. City of Waukegan, et al.* (Illinois Appellate Court Second District Appeal Nos. 2-97-0606 and 2-97-0901); *Country Mutual Insurance Company v. Livorsi Marine, Inc., et al.* (Supreme Court of Illinois No. 99807); *Board of Education of Township High School District No. 211 v. International Insurance Company* (Illinois Appellate court First Judicial District Appeal No. 98-0084); *Benoy Motor Sales, Inc. v. Universal Insurance Company* (Illinois Appellate court, Appeal No. 96-0536); *Avery v. State Farm Mutual Automobile Insurance Company* (Illinois Supreme Court Appeal No. 91494).

4. UP seeks to fulfill the classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that may have escaped consideration. *Miller-Wohl Co., Inc. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). As commentators have stressed, an *amicus* is often in a superior position to focus the court's attention on the broad implications of various possible rulings. R. Stern, *E. Greggman & S. Shapiro, Supreme Court Practice*, 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 608 (1984)).

5. The importance of this issue to policyholders nationwide cannot be overstated as losses from this global pandemic are in the hundreds of billions.

6. United Policyholders' amicus brief is attached hereto as Exhibit A.

WHEREFORE, United Policyholders seeks the leave of this court to file an amicus brief.

April 5, 2021

Respectfully submitted,

UNITED POLICYHOLDERS,

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Exhibit A

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United Policyholders ("UP") submits this *amicus curiae* brief in support of Appellants ("Main Street"). UP has a special interest in this litigation[1] and can offer a unique perspective to the Court as it considers the issues raised by this case.

The uncontrolled spread of SARS-COV-2 ("coronavirus") throughout Illinois, like a spreading wildfire, constitutes a natural disaster that insurance should cover. Businesses that were habitable and safe for their ordinary and intended use one day now have become unsafe for their ordinary and intended use due to the infiltration of the COVID-19 disease. The inability to use property because it has become unsafe due to a physical condition outside the policyholder's control is the exact type of "physical loss" of property the "all-risk" insurance policy here was purchased and sold to address. The very courthouse of this Court is now unsafe for its intended use by judges, court personnel, litigants and the public in resolving vital conflicts. Little more than a year ago, the courthouse was safe—now it is unsafe due to the spread of coronavirus. Court proceedings have to take place through video conferences. The physical use of the courthouse is impaired. This loss of use constitutes a "physical loss" well within the ordinary meaning of those terms.

It is undeniable that the policyholder here, Main Street, sustained losses because of the pandemic. In an effort to avert illness and injury to citizens and to

[1] As detailed in its Motion for Leave to File Amicus Curiae Brief, UP is a non-profit, charitable organization founded in 1991 that provides valuable information and assistance to the public on insurers' duties and policyholders' rights. UP monitors developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps to preserve the integrity of the insurance system by educating consumers and advocating for fairness in sales and claim practices. Grants, donations and volunteers support the organization's work. UP does not accept funding from insurance companies.

slow or prevent community spread of the coronavirus—which itself is a tangible, physical thing—Illinois Governor Pritzker issued Executive Orders that required the closure of bars and restaurants, including Main Street's properties. (A13, Compl. ¶¶ 79-104.) These orders recognize "the virus's propensity to physically impact surfaces and personal property" (A13, Compl. ¶ 80) and verify what is apparent to all: the presence of coronavirus on or around Main Street's premises rendered the premises unsafe and unfit for their intended use. (A13, Compl. ¶¶ 10, 130.) As a result, Main Street alleges it sustained significant losses that continue to this day. (A13, Compl. ¶¶ 84, 101, 106-109, 111, 113-14.)

Nevertheless, Cincinnati Insurance Company, Inc. ("Cincinnati") denied Main Street's claim. In ruling on Cincinnati's Motion to Dismiss, the district court agreed with Cincinnati that the term "direct physical loss" in the policy at issue "unambiguously requires some form of 'tangible' loss or damage to the physical dimension of [Main Street's] property. *Mere loss of use* or diminishment in value of [Main Street's] business without underlying tangible damage or loss to the business' property or structure is not enough to trigger coverage under the policy" (emphasis added.) (A10, at 9). In reaching this conclusion, the district court misconstrued the meaning of "direct physical accidental loss *or* damage" to Main Street's property. The policy does not require "tangible" change, or "deformation" of the property, or any of the other terms that Cincinnati now wishes were actually in the policy.

The nature of property—the subject of Cincinnati's policy— supports Main Street's position that, among other things, its loss of use of property due to the

presence of COVID-19 on or about Main Street's premises constitutes a "direct physical accidental loss" of property. The loss of an important legal right (the right to use) associated with a thing (here, a building housing a restaurant and banquet hall) by physical causes (the alleged presence of coronavirus on or around Main Street's premises) is covered. Both "loss" *and* "damage" are specified as within the protection of the policy. The word "loss" is not mere surplussage.

In reaching its decision, the district court also declined to follow the majority case law, from both Illinois and the rest of the country, which rejects a narrow construction of these coverage terms. These cases hold that when physical conditions arise that make a property unsafe to use, the policyholder has suffered a "direct physical accidental loss." Importantly, this holding comes from an array of appellate decisions issued prior to the present pandemic.

Finally, the Court should not be swayed by the insurers' claims that paying these losses will wreck the insurance industry. That is not a proper point of argument in a policy interpretation case. The Court has no authority to speculate about which party will be worse off if it loses, or what constitutes good economic policy. If insurers are in dire straits after paying covered COVID-19 losses, then they can ask elected officials for relief. The Court cannot—and should not—rewrite the policy to accommodate an insurers' regret that it agreed to insure too many risks.

Regardless, any warnings of impending doom are entirely unfounded. Financially, insurers did very well during the pandemic. Not only have they

reported massive profits, but also they raised rates on consumers in every quarter of 2020. They are poised to do so again in 2021. Virtually all of them have reinsurance. They can weather losses that most entities—such as Main Street and other policyholders—cannot bear. The Court's only role in this case is to ask whether Main Street's interpretation of the policy is reasonable. If so, then it must reverse the judgment below and let the chips fall where they may.

ARGUMENT

I. Properly Construed, Cincinnati's Property Policies Provide Coverage for the Loss of Use of Property Sustained by Plaintiffs

In ascertaining the meaning of the phrase "direct physical accidental loss or damage" to property, it is critical not to minimize the significance and legal import of the word "property." At law, a thing is not "property" unless and until legal rights attach to it:

> *There is nothing which so generally strikes the imagination, and engages the affections of [humankind], as the right of property; or that sole and despotic dominion which one [person] claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.*

Sir William Blackstone, Commentaries of the Laws of England, Vol II, Of the Rights of Things (1756-1770).[2] The Supreme Court has described the nature of "property" in the context of the federal tax lien statute as a "'bundle of sticks,' a collection of individual rights which, in certain combinations, constitute property." *United States v. Craft*, 535 U.S. 274, 278 (2002) (*citing* B. Cardozo, Paradoxes of Legal Science 129 (1928)). "State law determines only which sticks are in a person's bundle." *Id.*

[2] Substituting modern spelling and gender-neutral references.

Black's Law Dictionary defines "ownership" as "[t]he bundle of rights allowing one to *use*, manage, and enjoy property, including the right to convey it to others. Ownership implies the right to possess a thing, regardless of any actual or constructive control. Ownership rights are general, permanent, and heritable." Black's Law Dictionary 1215 (9th ed. 2009) (emphasis added); *see also Detrana v. Such*, 368 Ill. App. 3d 861, 868, 859 N.E.2d 142 (2006) (quoting Black's Law Dictionary seventh edition's definition of "ownership").

Whatever concept of property one adopts, the right and ability to *use* the property is at its core. An early listing of the bundle of rights for example, includes: (1) the right to possess; (2) the *right to use*; (3) the right to manage; (4) the right to the income; (5) the right to capital; (6) the right to security; (7) the power of transmissibility; (7) the absence of term; (8) the prohibition of harmful use; (9) liability to execution; and (10) residuary character.[3] The courts have long agreed that the concept of "property itself, in a legal sense, is nothing more than the exclusive right 'of possessing, enjoying and disposing of a thing,' which, of course, includes the *use* of a thing." *Chicago & W. Ind. R.R. v. Englewood Connecting Ry.*, 115 Ill. 375, 385, 4 N.E. 246, 249 (1886) (emphasis added). "The owners of real property have the constitutional right to *use* their property in any manner they desire, providing that such use does not interfere with the welfare of the people generally." *Ave. State Bank of Oak Park v. Village of Oak Park*, 99 Ill. App. 2d 329, 337, 241 N.E.2d 630, 634 (App. 1st Dist. 1968) (emphasis added).

[3] Johnson, Denise R., *Reflections on the Bundle of Rights*, Vermont Law Review, Vol. 32, 253 (2007).

This "use" right is not "intangible" but physical: Main Street uses its property as a restaurant and banquet hall, and its right to use was and is directly impacted by community spread of the very "physical" coronavirus. (A13, Compl. ¶¶ 10, 11.)[4] As noted in Appellant's Brief, the word "loss" means, among other things, "failure to … utilize," or use. (Appellant's Brief at 19.) Main Street's property right of use has been lost, for now, and consequently, it has suffered damage, *i.e.*, the revenue it could have received had its property right of use not been lost due to the community spread of coronavirus (and the necessary countermeasures taken to combat the pandemic).

Cincinnati's use of "direct accidental physical loss" recognizes that the loss of an important legal right (the right to use) associated with a thing (here, a building housing a restaurant and banquet hall) by physical and accidental causes (the alleged presence of coronavirus on or around Main Street's premises) must be protected. Both "loss" and "damage" are separately specified as within the protection of the policy.[5] The policy is bereft of any language supporting the district court's conclusion that Main Street must show some tangible injury or alteration to property or structure to trigger coverage. Indeed, other district court judges in this state (*Derek Scott Williams PLCC v. Cincinnati Ins. Co.*, No. 20 C 2806, 2021 WL

[4] Often, the only property right enjoyed by the operator of a restaurant or bar is the right to use the premises for the business, because someone else owns the building.

[5] Under the rules of construction, the words "loss" and "damage" in the phrase, "accidental loss *or* damage," cannot mean the same thing—and numerous courts have so held. *See, e.g.*, *In re: Society Insurance Co. COVID-19 Business Interruption Protection Insurance Litigation*, MDL 2964, 2021 WL 679109 (N.D. Ill. Feb. 22, 2021) (applying Illinois, Minnesota, Tennessee and Wisconsin law) ("The disjunctive 'or' in that phrase means that 'physical loss' must cover something different from 'physical damage'").

767617, at *4 (N.D. Ill. Feb. 28, 2021)) and others (*Studio 417, Inc. v. The Cincinnati Ins. Co.*, 20 CV 3127-SRB, 2020 WL 4692385, *5 (S.D. Mo., August 12, 2020)) have held to the contrary, each concluding that under the same Cincinnati policy language, a physical loss may occur when the policyholder simply cannot use the property.

In sum, the district court's conclusion that "mere loss of use … of the Plaintiff's business without underlying tangible damage or loss to the business property or structure is not enough to trigger coverage under the policy" ignores both the rights-based fundamental modern notion of property and the rules of construction that apply to insurance policies.

II. Decades of Case Law Put the Insurers on Notice That "Physical Loss" Is Broad and Not Limited to Tangible Damage.

Beginning at least as early as the 1960s, courts warned insurers that "physical loss," and its variants, covers loss-of-use claims. *See, e.g.*, *Hughes* v. *Potomac Ins. Co.*, 199 Cal.App.2d 239 (Cal. Ct. App. 1962). In case after case, appellate courts—including those in Illinois—rejected a "tangible damage" requirement, holding the "physical loss" language provides coverage where property becomes too dangerous for its intended use.[6] Because of the ambiguous breadth of the term "physical loss," courts also "begged carriers to define the phrase to avoid the precise issue before the Court now"—closures caused by a pandemic. *E.g.*, *Cherokee Nation* v. *Lexington Ins.*

[6] *See United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64 (Ill. 1991) and *Bd. of Educ. v. Int'l Ins. Co.*, 308 Ill.App.3d 597, 720 N.E.2d 622 (Ill. 1999) (decisions rejecting the idea that "physical loss" to property require alteration to property's physical structure).

Co., 2021 WL 506271, *3 (Cherokee Cnty., Okla., Jan. 14, 2021).

Those pleas went unheeded. Insurers are still using the same broad language despite decades of fair warning that "physical loss" includes "loss of use" and is not limited to "tangible damage." Cincinnati *chose* not to heed those warnings. Instead, Cincinnati continued selling broad coverage that does not require or even mention "tangible alteration." Courts lack power to alter Cincinnati's wording, and it was error for the district court to do so here. Cincinnati, like everyone, ought to be held to the words it used—not the words it now wishes it had used.[7]

Before the pandemic, five states' high courts[8] and seven other states' intermediate appellate courts[9] held in binding decisions that "physical loss" and its

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[7] In a different context, the Third Circuit chastised the insurance industry's continued use of a term that caused years of divergent judicial opinions, and on that basis, found the language ambiguous. *See New Castle County DE v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 243 F.3d 744, 755-56 (3d Cir. 2001) ("A single phrase, which insurance companies have consistently refused to define, and that has generated literally hundreds of lawsuits, with widely varying results, cannot, under our application of commonsense, be termed unambiguous. As such, we hold that an 'invasion of the right of private occupancy' must be construed liberally.") Likewise, the insurance industry's continuing use of the "ensuing loss" clause has caused years of interpretive struggle. In 1988, the United States Court of Appeals for the Fifth Circuit called this policy language "self-contradictory gibberish." *Lake Charles Harbor & Terminal Dist. v. Imperial Cas. & Indem. Co.*, 857 F.2d 286, 288 (5th Cir. 1988) (finding that catastrophic damage to a machine caused by its own mechanical breakdown was covered).

[8] *W. Fire Ins. Co.* v. *First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (gasoline fumes); *Sentinel Mgmt. Co.* v. *Aetna Cas. & Sur. Co.*, 615 N.W.2d 819 (Minn. 2000) (asbestos); *Mellin* v. *N. Sec. Ins. Co.*, 115 A.3d 799 (N.H. 2015) (urine odor); *Dundee Mut. Ins. Co.* v. *Marifjeren*, 587 N.W.2d 191 (N.D. 1998) (power outage); *Murray* v. *State Farm Fire & Cas. Co.*, 509 S.E.2d 1 (W. Va. 1998) (threat of rockfall).

[9] *Hughes* v. *Potomac Ins. Co.*, 199 Cal.App.2d 239 (Cal. Ct. App. 1962) (erosion of land beneath a house); *Azalea, Ltd.* v. *Am. States Ins. Co.*, 656 So. 2d 600 (Fla. Ct. App. 1995) (death of bacteria colony in treatment plant); *Bd. of Educ.* v. *Int'l Ins. Co.*, 720 N.E.2d 622 (Ill. Ct. App. 1999) (asbestos); *Widder* v. *La. Citizens Prop. Ins. Corp.*, 82 So. 3d 294 (La. Ct. App. 2011) (lead contamination); *Wakefern Food Corp.* v. *Liberty Mut. Fire Ins. Co.*, 968 A.2d 724 (N.J. App. Div. 2009) (electrical grid shutdown); *Farmers Ins. Co.* v. *Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993) (meth odor); *Graff* v. *Allstate Ins. Co.*, 54 P.3d 1266 (Wash. Ct. App. 2002) (meth residue).

variants included property that is rendered unsafe or unusable, even without tangible or structural damage. Federal appellate courts reached the same conclusion under the law of four other states.[10] Illinois numbers among the states that follow this majority rule and allow recovery without "tangible damage." *Wilkin Insulation Co.,* 578 N.E.2d at 931; *Elco Industries, Inc. v. Liberty Mut. Ins. Co.*, 414 N.E.2d 41, 45 (Ill. App. 1980); *Pittway Corp. v. American Motorist Ins. Co.*, 370 N.E.2d 1271, 1274 (Ill. App. 1977).

Only New York has generally taken the insurers' side—though it has not done so all of the time. Some states generally provide coverage without "tangible damage," with only minor exceptions. *Compare, e.g.*, *Hughes*, 18 Cal. Rptr. at 655 (rapid erosion of land underneath property caused "direct physical loss" to the home, even when the building was undamaged), *with MRI Healthcare of Glendale, Inc.* v. *State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 798-99 (2010) (when an MRI machine would not "ramp up" due to an excluded inherent defect, the machine did not experience "direct physical loss").[11]

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[10] *Essex Ins. Co.* v. *BloomSouth Flooring Corp.*, 562 F.3d 399 (1st Cir. 2009) (Massachusetts law) (chemical odors); *Hampton Foods, Inc.* v. *Aetna Cas. & Sur. Co.*, 787 F.2d 349 (8th Cir. 1986) (Missouri law) (risk of collapse); *Am. Alliance Ins. Co.* v. *Keleket X-Ray Corp.*, 248 F.2d 920 (6th Cir. 1957) (Ohio law) (radium contamination); *Intermetal Mexicana, S.A.* v. *Ins. Co. of N. Am.*, 866 F.2d 71 (3d Cir. 1989) (Pennsylvania law) (theft).

[11] *Compare also Fuiji v. State Farm*, 857 P.2d 1051, 1052 (Wash. Ct. App. 1993) (no "physical loss" to a "dwelling" when only the "engineering unit" had actually suffered damage) *with Graff*, 54 P.3d at 1269-70 (rejecting a "visibility" standard for "physical damage" and holding that meth residue triggered coverage) (Washington law). There is also variation in some other states. *See Mastellone* v. *Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130, 1143 (Ohio Ct. App. 2008) (construing the term "physical injury" as requiring structural damage); *Source Food Techs., Inc.* v. *U.S. Fidelity & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006) (narrowing Minnesota law on "physical loss"). This does not diminish the fact that fifteen jurisdictions allow recovery without "tangible damage."

If Cincinnati wants to keep score, then it is at least 15-1 *in favor of* policyholders. Insurers—including Cincinnati[12]—have cited a swath of unpublished and trial-court orders to try to overcome this deficiency. It is wrong, however, to equate a ruling from a trial court with the considered judgment of a state or federal appellate court, announced in a published opinion. Considering *precedent*—which is what matters—reveals that appellate courts have almost universally rejected Cincinnati's position. To be sure, the law in some jurisdictions is variable. It is, however, false to claim that most states require "tangible alteration" to trigger the broader term "physical loss" in a business-interruption policy, or that there is some "consensus" that the insurers are correct.

To support their "majority of states hold" argument, insurers frequently reference a single section from one treatise—10A STEVEN PLITT, ET AL., COUCH ON INSURANCE §148:46 (3d ed., 2020 update)—that purports to summarize the law on this point.[13] That treatise section, however, distorts the state of things. It cites only *First Presbyterian* and *Hampton Foods* as pro-policyholder cases—even though there are many, many more that find for the policyholder. *Id.* This treatise cites five cases supporting the insurers' restrictive view: two from New York, the *MRI* case from California, an Oregon federal district court opinion (abrogated three years later in *Trutanich*, *supra*), and an unpublished disposition from the Sixth Circuit. *Id.*

[12] At the district court level, Cincinnati listed some of these cases in its Memorandum in Support of Motion to Dismiss at page 10, footnote 7.
[13] Cincinnati's listed this treatise and section in its Memorandum in Support of Motion to Dismiss at page 10, footnote 8.

This is a markedly incomplete survey, and the Court should be skeptical of insurer assertions that it is intended to be comprehensive. Moreover, Couch's attempt to reconcile the split actually supports Main Street. Couch posits that the key factor in the "physical loss" analysis is whether a fortuitous, external force changed the condition of the property. *Id.* The circumstances here meet that test: the pandemic was fortuitous, and the alleged presence of coronavirus on or about the premises made Main Street's property unsafe and unusable.

Given that Illinois has rejected the "tangible damage" test multiple times, there is no reason to believe the Illinois Supreme Court would follow the *one* state where the insurers' position has generally prevailed, rather than the fifteen states that have generally rejected it. While the sheer volume of cases makes it impossible to discuss each case here, the key decisions illustrate why Cincinnati's position has persuaded few appellate judges.

In *Hughes* and *Murray*, the policy promised to pay for "direct physical loss to the property." In *Hughes*, the policy insured against "all physical loss to their dwelling and dwelling building." Erosion swept away the building's support, causing cosmetic damage but making it unsafe to inhabit. 199 Cal.App.2d at 248. In *Murray*, the policy promised to pay for "direct physical loss to property." There, unstable rocks above a house prompted an evacuation order from the government. 509 S.E.2d at 16-17.

The insurers denied coverage in both cases. Like here, they contended that their policies "only insured the physical damage to the dwelling." 509 S.E.2d at 16-17.

Both courts disagreed. The reasoning in *Hughes* is persuasive:

> To accept [the insurer's] interpretation of its policy would be to conclude that a building which has been overturned or which has been placed in such a 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 insurer] would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected.* Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner.

Hughes, 199 Cal.App.2d at 248-249 (quotations omitted, emphasis added).

Both courts stressed that the property was not safe—giving weight to the most important sort of property "loss." *Hughes* reasoned that "[i]t goes without question that [homeowners]' 'dwelling building' suffered real and severe damage when the soil beneath it slid away and left it overhanging a 30-foot cliff." 199 Cal.App.2d at 249. *Murray* echoed this, pointing out that the houses beneath the cliff "could scarcely be considered 'homes' in the sense that rational persons would be content to reside there." 509 S.E.2d at 17. That was a "physical loss."

These arguments have generally prevailed over the insurance industry's cramped positions. Other cases include *First Presbyterian*, where the Colorado Supreme Court held that loss of use can be a "physical loss." 437 P.2d at 55. There, "the accumulation of gasoline around and under the church building . . . ma[de] further use of the building highly dangerous" and caused a "direct physical loss." *Id.* In *Wakefern*, the court rejected "the narrowly-parsed definition of 'physical damage' which the insurer urges us to adopt" and held that "loss of function" sufficed. 968 A.2d at 735-38.

Similarly, in *General Mills, Inc. v. Gold Medal Insurance Co.*, 622 N.W.2d 147 (Minn. Ct. App. 2001), the court held that the policyholder sustained a "direct physical loss to insured property" when FDA regulations prevented it from selling food products treated with an unapproved pesticide, despite the fact the food products were safe for human consumption. In this case, an independent contractor hired by General Mills to treat its oats with an FDA-approved pesticide instead used a cheaper but unapproved pesticide. Although the pesticide had been approved by the FDA for treatment of other foods, and there was no dispute that the pesticide presented no hazard to the consuming public, its application to General Mills' oats violated FDA regulations on adulteration of food products. *Id.* at 150. General Mills could not sell its oat stocks or finished products that incorporated them under federal law. General Mills tendered the loss for coverage under a first party property policy, and its insurer denied the claim.

In the coverage litigation that ensued, the trial court found that General Mills had suffered a direct physical loss of insured property under its all-risk property policy. On appeal, the insurer argued that the district court had erred because the use of the unapproved pesticide did not render the oats (and products made from the oats) unfit for human consumption. The insurer argued that instead, the loss occurred because of government regulation and not "because of direct damage to the insured property," and thus there was no covered loss. *Id.* at 151-152. The appellate court rejected the insurer's argument, stating that "we have previously held that direct physical loss can exist without actual destruction of property or structural

damage to property; it is sufficient to show that insured property is injured in some way." *Id*. at 152, *citing Sentinel Mgmt. Co. v. New Hampshire Ins. Co.,* 563 N.W.2d 296, 300 (Minn. App. 1997) (finding the safe housing function of apartment building was "seriously impaired or destroyed by the presence of asbestos fibers, although the building itself did not suffer a 'tangible injury'"). Because the "function" of the food products produced by the insured was "not only to be sold, but to be sold with an assurance that they meet certain regulatory standards," that function was "seriously impaired" by the inability to lawfully distribute the goods due to FDA regulations. *Id*.

This discussion could go on for pages, but UP will stop here. The Court will find guidance in the many other pre-COVID-19 cases that found coverage. *See, e.g.*, *Motorists Mut. Ins. Co.* v. *Hardinger*, 131 F. App'x 823, 827 (3d Cir. 2005 (e-coli contamination); *Manpower Inc*. v. *Ins. Co. of Pa.*, 2009 WL 3738099 (E.D. Wis., Nov. 3, 2003 (police order forbidding access to unstable building); *TRAVCO* v. *Ward*, 2010 WL 2222255 (E.D. Va., June 3, 2010) (toxic gas); *Or. Shakespeare Festival Ass'n* v. *Great Am. Ins. Co.*, 2016 U.S. Dist. LEXIS 74450 (D. Or., June 7, 2016) (wildfire smoke), *vac'd as a condition of settlement*.

Having failed to "defin[e] direct physical loss or damage as they (and others before them) have argued it should be interpreted," Cincinnati must honor its broadly worded promise of coverage. *Cherokee Nation*, 2021 WL 506271, *4. The Court of Appeals is not in the business of rescuing insurance companies who regret their choice to sell vaguely worded insurance policies, especially where the lack of

clarity was well established in prior case law.

III. The Court Should Not Be Swayed by Self-Serving Warnings About Ruining the Insurance Industry—Insurers Make These Claims After *Every* Disaster, and They Are Always Overstated.

This pandemic has imposed hardship and losses for a wide range of business concerns—some have gone out of business already, and others likely will before the pandemic is over. Insurers and industry-focused commentators have asserted that if insurers have to pay for policyholder losses caused by community spread of coronavirus, then they too will go out of business.

This is no basis to decide coverage: insurance policies should not be interpreted with the thumb on the scale to the benefit of either insurer or policyholder because of the impact the result would have to party's industry. The insurance industry should not be favored over the hotel and restaurant industries, for example. Rather, insurance contracts should be interpreted according to long-standing precedent and rules of construction, and in accordance with public policy favoring the spread and transfer of risk through the purchase of insurance.

Indeed, this is a threadbare cry. Too often, when they have faced a significant new loss, or when laws change that may lead to a proverbial avalanche of claims, insurance companies have sounded a false alarm of industry-wide insolvency. Typically, this is paired with a claim that their property insurance policies "never meant to cover that." That predicted collapse, however, has never arrived. Going back thirty years, insurers attempted to color the coverage discussion by asserting that the liability from claims launched by the passage and enforcement of the then-

new strict liability environmental statute, CERCLA would bankrupt them.[14] Yet, insurers survived despite the fact that many courts found coverage for claims in CGL policies. The same can be said for the dire predictions about the losses insurers faced from asbestos claims, the aftermath of Hurricane Katrina, the World Trade Center attacks on 9/11, and SARS. Despite catastrophic events that affected millions of people, businesses, and properties, the insurance industry survived. It would be unwise and unjust to allow concerns about the number of claims and amount of losses facing the industry to guide the interpretation of the terms of the policy before the Court. Rather, the appropriate thing to do is to follow the rules of construction and let precedent and sound legal reasoning guide us where they may. To the knowledge of United Policyholders, no insurance company has entered insolvency due to the pandemic. Few other industries have been so fortunate.

Indeed, insurers have done *very* well during the pandemic. The precipitous drop in claims (and claim payments) in the last year have led to enormous windfalls for insurers. For example, in July 2020, Progressive Insurance Company "boasted about an 83% year over year increase in net income" which works out to about $800 million per quarter.[15] Chubb Ltd. reported net income of $1.19 billion in Q3 2020—

[14] In testimony given before Congress in 1990, insurance industry representatives sounded the alarms, claiming that the cost of cleaning up even part of the pollution issues will be five times their total "surplus" and could be ruinous. *See Insurer Liability for Cleanup Costs of Hazardous Waste Sites*, No. 101-175 (101st Cong., 2d Sess., Sept. 27, 1990) (Committee on Banking, Finance, and Urban Affairs), pp. 18-29 and 75-76.

[15] R. Holober, *Progressive Insurance Hoards Covid-19 Windfall Profits*, Consumer Federation of California (Aug. 13, 2020), available at https://uphelp.org/wp-content/uploads/2021/02/cfc_progressive.pdf

up 9.4%, or $100 million, from the year before.[16] CNA Insurance similarly reported a $106 million increase in net income in the same period.[17] Berkley Insurance reported a massive 161% increase ($312.2 million) in Q4 2020.[18] Rather than pay the COVID-19 claims their policies cover, the insurers have been hoarding this surplus. Not only that, but virtually all insurers *increased* rates on consumers in 2020, across all lines of business. The Arthur J. Gallagher Co., a large broker in Chicago, reported that 89% of its clients saw a rate increase for their property insurance— the "highest number recorded since the early 2000s."[19] From April through June 2020, property insurance rates spiked 22%, despite the insurers refusal to pay COVID-19 claims and despite the historically low rate of insurance claims in general.[20] Insurers ratcheted up prices again between July and September, with a total increase of 24% for commercial property coverage.[21] From

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[16] C. Wilkinson, *Chubb reports gains in Q3 profit, net premium written*, Business Insurance (Oct. 8, 2020), available at https://www.businessinsurance.com/article/20201028/NEWS06/912337411?template=printart

[17] A. Childers, *CNA Reports Higher Net Income Despite Cat Losses*, Business Insurance (Nov. 2, 2020), available at https://www.businessinsurance.com/article/20201102/NEWS06/912337508?template=printart

[18] J. Greenwald, *Berkley Reports 161% Jump in Profits*, Business Insurance (Jan. 26, 2021), available at https://www.businessinsurance.com/article/20210126/NEWS06/912339367/Berkley-reports-161-jump-in-profits

[19] M. Lerner, *Most Policyholders See Rate Hikes Across Multiple Lines*, Business Insurance (Oct. 26, 2020).

[20] M. Lerner, *U.S. Commercial Property Pricing up 22% in Q2*, Business Insurance (Aug. 10, 2020), https://www.businessinsurance.com/article/20201102/NEWS06/912337508?template=printart

[21] C. Wilkinson, *Insurance Prices Increased Sharply in Third Quarter*, Business Insurance (Nov. 5, 2020), available at https://www.businessinsurance.com/article/20201005/NEWS06/912337014?template=printa

October to December 2020, property insurance premiums increased—again—by 20%.[22] Finally, in late 2020, insurers told consumers to expect increases of 15% to 25% for property insurance in 2021—again, despite their refusal to pay any COVID-19 claims.[23]

In all likelihood, the industry will be fine if it must pay COVID-19 claims. It enjoyed substantial windfalls in 2020 while the rest of the economy suffered. Clearly, it is hedging future exposure with drastic premium increases.

Ultimately, if some insurance company eventually lacks the resources to pay claims and liquidates, then the insurance industry funds state insurance guaranty associations to help pay the covered claims owed by insolvent insurance companies. Likewise, elected legislatures (not unelected judges) have the province to help industries that are failing due to catastrophic losses. With the pandemic, both federal and state legislatures have taken steps, and are considering additional steps, to relieve industries pummeled with losses from COVID-19. It is those bodies that are tasked with making policy choices in that regard, and that is where those decisions should rightfully remain.

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[22] M. Lerner, *Global Prices Rise 22% in Q4: Marsh*, Business Insurance (Feb. 4, 2021), available at https://www.businessinsurance.com/article/20210204/NEWS06/912339588/Global-prices-rise-22-in-Q4-Marsh-Global-Insurance-Market-Index-

[23] J. Greenwald, *Continued Rate Increases Expected: Willis*, Business Insurance (Nov. 19, 2020), available at https://www.businessinsurance.com/article/20201119/NEWS06/912337904?template=printart

IV. Conclusion

Cincinnati's Policy covers "direct physical accidental loss" of property. The right of use is at the core of modern concepts of property. For more than 50 years, courts around the nation, including in Illinois, have recognized that a "physical loss" includes more than tangible, structural alteration. That is particularly true as to losses from causes that render the property unsafe to use for its intended purpose. The pre-COVID-19 case law put insurers on notice that use of the phrase "direct physical loss" did not require tangible physical alteration. Yet still they sold policies which continued to use this very language, including the policies at issue here. Insurance companies cannot import limitations into the policies that they failed to make express. The insurers' insistence that the sky will fall should not free them from the broad obligation they sold. For all these reasons, Main Street's losses due to COVID-19 are covered.

April 5, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Circuit Rule 29 because, according to the word count function of Microsoft Word 2016, this brief contains 5,539 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and Circuit Rule 32 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 12-point Century Schoolbook Font for the main text and 11-point Century Schoolbook Font for the footnotes.

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April 5, 2021

CERTIFICATE OF SERVICE

I, John S. Vishneski III, an attorney, hereby certify that on April 5, 2021, I caused the Brief of Amicus Curiae United Policyholders to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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