IN THE INDIANA COURT OF APPEALS

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CASE No. 21A-PL-00628

INDIANA REPERTORY THEATRE, Appellant, v. THE CINCINNATI CASUALTY COMPANY Appellees.	Appeal from the Marion County Superior Court D01 Trial Court Cause No. 49D01-2004-PL-013137 The Honorable Heather A. Welch, Judge

BRIEF OF UNITED POLICYHOLDERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

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I. STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

United Policyholders ("UP") is a non-profit organization whose mission is to serve as a voice and a source of information and guidance for insurance consumers around the country and an advocate for their interests. UP is funded by donations and grants. It does not sell insurance or accept money from insurance companies.

UP works to provide an intellectual counterweight to the widespread and well-funded lobbying efforts of the insurance industry in courts, legislatures and regulatory bodies, in order to help facilitate the evenhanded development of the law. During the pandemic, UP's commitment to advocating for policyholders' rights to coverage for their devastating COVID-19 losses is vital to upholding the paid-for business interruption coverage promises made by insurers before the pandemic. UP seeks to assist the Court on this issue of immense public importance by contextualizing the arguments and the current state of the law for this essential coverage, and for the existential risk threatening many business policyholders today as a result of the losses caused by the COVID-19 pandemic.

In this brief, UP discusses the unique and broad structure of "all-risk" insurance policies like the one policyholder-Appellant (Indiana Repertory Theatre, "IRT") purchased from its insurer-Appellee (The Cincinnati Insurance Company, "Cincinnati"). UP details the insurance industry's pre-COVID knowledge, including a public filing where an insurer admitted there is coverage for pandemic events under standard-form policies that lack a virus exclusion and stated that some insurers have an economic interest in insuring that risk. UP addresses the unsubstantiated subtext running through the insurers' arguments in COVID-19 cases—that the industry will become insolvent if they must pay these claims, and so courts should not force them to do so. Finally, UP corrects the record on the state of the nationwide litigation over insurance coverage for COVID-19, which is still in the first inning.

II. SUMMARY OF THE ARGUMENT

Property insurance policies have long recognized that it is impossible to predict in advance every way in which a covered loss might occur. To accommodate this uncertainty, property insurance policies like the one Cincinnati issued to IRT are written on what is termed an "all-risk" basis, meaning they cover all risks of physical loss or damage that are not specifically excluded in the policy. Indiana law places the burden on insurance companies to clearly and unmistakably exclude any losses they want to exclude when issuing these "all-risk" policies. Any losses not so excluded, are covered.

The insurance industry has similarly long recognized that losses like those caused by the recent COVID-19 pandemic are within the broad scope of all-risk insurance policies. Indeed, some insurers have argued to regulators that it is *in their interest* to insure these losses because that is what their customers want. The industry developed virus and pandemic exclusions to allow insurers to exclude those losses if they did not want to cover them. Under Indiana Supreme Court precedent, the existence of these exclusions shows (1) that the insurance industry understood virus and pandemic losses were covered in the absence of any of these exclusions, and (2) that it was reasonable for policyholders like IRT to expect coverage if their policies did not contain any of these exclusions.

In ruling for Cincinnati on summary judgment, the trial court was persuaded by its view of the trend developing elsewhere; but that view is irrelevant, premature and misleading. Regardless of the current state of the law elsewhere, this Court and the Indiana Supreme Court will decide the extent to which Indiana law will continue to adhere to its historical precedent (and, as IRT points out, historical precedent around the country) favoring coverage and disfavoring insurance companies' attempts to deny coverage to Indiana policyholders under anything less than clear and unmistakable policy language—language that is not present here.

III. ARGUMENT

A. All-Risk insurance policies like the policy IRT purchased from Cincinnati cover all fortuitous losses not clearly and unmistakably excluded from coverage.

IRT purchased an "all-risk" insurance policy from Cincinnati. As this Court has recognized, an all-risk policy "extends coverage to risks not generally covered under other insurance policies." *Associated Aviation Underwriters v. George Koch Sons, Inc.*, 712 N.E.2d 1071, 1073 (Ind. Ct. App. 1999). All-risk insurance policies "generally permit recovery for all fortuitous losses in the absence of fraud or misconduct of the insured, unless the policy contains a specific provision expressly excluding the loss from coverage." *Id.*

Under Indiana law, exclusions must "clearly and unmistakably" apply and "any doubts to the coverage under the policy shall be construed against the insurer to further the policy's basic purpose of indemnity." *American Family Life Assur. Co. v. Russell*, 700 N.E.2d 1174, 1177 (Ind. Ct. App. 1998). Ambiguous policy language anywhere in the policy must be construed in favor of coverage. *E.g.*, *State Farm Mut. Auto. Ins. Co. v. Jakubowicz*, 56 N.E.3d 617, 619 (Ind. 2016).

B. The insurance industry knew and intended for all-risk policies to cover pandemic risk.

One line of subtext in the insurance industry's COVID-19 arguments is that they "never intended" to insure these risks because they are practically "uninsurable." As discussed in the briefs of IRT and fellow amicus Independent Colleges of Indiana (ICI), loss-of-function and pandemic-related losses are insurable, as courts and the insurance industry have recognized. That aside, the insurers' cry that the sky is falling is both immaterial and incorrect.

At the outset, any argument that the policies were not "priced or designed" for pandemic risk should be a non-starter. These policies are not negotiated: "[W]e buy their forms or we do not buy insurance." *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 947 (Ind. 1996) (quotations omitted). Insurers set the terms and the premium rates unilaterally, with some regulatory oversight. If their actuaries and underwriters fail to accurately match the policy *text* with the *risks* they wish to cover, then the insurer—not the public or individual policyholders—must bear the cost of that error. The Court's task is not to ask what the policy *should* cover; it is to determine what the policy language *reasonably does* cover. *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470-71 (Ind. 1985) (barring the insurer, as a matter of law, from introducing extrinsic evidence of its "intent" in drafting a term, and instead construing the ambiguity in favor of coverage).

Even if one incorrectly assumes that insurers did not intend to cover pandemic-related or other loss-of-function losses, courts do not rewrite policies to correct underwriting or pricing errors that the insurers claim they missed. *Keckler v. Meridian Sec. Ins. Co.*, 967 N.E.2d 18, 28 (Ind. Ct. App. 2012). The policy has been sold, the premium collected, and the risk has materialized. To change the policy terms now unfairly gives the insurer the chance to re-underwrite after the casualty event occurs—at which point, of course, it is not underwriting risk at all, but rather a windfall for the insurer.

At any rate, the premise is false. The insurance industry *subjectively intended* for these policies to cover virus-based losses in the absence of a virus exclusion. As fellow amicus ICI explains, one of the most sophisticated property insurers in the world affirmatively argued that standard-form policies were intended to cover risks arising from disease-causing agents. (*See* Brief of ICI as *Amicus Curiae*, pp. 24-26.) It argued that these policies cover cases where a substance "destroy[ed] the aseptic environment and render[ed] [the pharmaceutical facility] unsafe for its intended use." (*Id.*, p. 24.)

There is more. The Insurance Services Office (ISO), which represents insurers in drafting new forms, acknowledged viruses might trigger coverage and said this was why a virus exclusion was necessary. *See Legal Sea Foods, LLC v. Strathmore Ins. Co.*, No. 1:20-cv-10850 (D. Mass.), ECF #36 (Second Amended Compl.), ¶36 (quoting ISO's justification for the virus exclusion, which was that "building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria" and that such contamination could trigger business-interruption coverage).

Further support for this conclusion is that some insurers asked regulators if they could omit the virus exclusion (making it "optional" rather than "mandatory," as ISO proposed), in order to offer their customers broader coverage. *Id.*, ECF#36-2 (GNY[1] Explanatory Memorandum, Response to Objection 1 Dated 4-30-2012). GNY's explanations for this proposal illustrate why the industry's premise lacks merit.

In its memorandum to New York regulators, GNY acknowledged that coverage exists for "this type of loss ('pandemic')" in the absence of a virus exclusion. *Id.* It told regulators that that viruses and pandemics could result in potential covered losses in "Business Interruption/Time Element coverage segments." *Id.* It gave specific examples of diseases spreading in indoor, highly trafficked spaces (like restaurants or doctors' offices) that may create a covered loss. *Id.* It acknowledged that a "pandemic" loss from "contagious disease" could involve a wide variety of vectors, including losses "transmitted to third parties via ingestion," "direct contact to an insured's products," or "spread through the HVAC system" in a building—the last of which has, unfortunately, been proven true during the COVID-19 pandemic. *Id.* GNY downplayed the possibility that a virus "would spread throughout a vast

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[1] Strathmore is a GNY insurance company, which is why the memorandum appears in the *Strathmore* case. In a Covid-19 suit against Strathmore, the policyholder offered this memorandum as evidence that the policy covered Covid-19 related losses. That case is currently on appeal in the First Circuit. *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, No. 1:20-cv-10850 (D. Mass.).

proportion of the apartments and condominiums across NYC that we insure," but it nonetheless admitted that it was deliberately insuring that kind of risk. *Id.*

Crucially, GNY admitted what all standard-form property insurers knew: policyholders reasonably expect this coverage and would never willingly part with it. GNY said:

> [W]e do not anticipate that any of our insureds will voluntarily request this [virus] exclusion; some (habitational risks) because *it would never enter their minds as a problem for which they would voluntarily reduce coverage*; others (restaurants) because they feel that *such an event is well within the realm of possible fortuitous occurrences and should be covered* should such an event arise.

Id. (emphasis added).

This illustrates that IRT's interpretation is reasonable under Indiana law. *Kiger*, 662 N.E.2d at 948 ("When the insurance industry itself has offered differing interpretations of the same language, we must assume that the insured understood the coverage in the more expansive way."). It also shows that the industry's doomsday arguments (discussed below) are nothing but a smokescreen—an insurance company *itself* admitted that this risk was insurable, that the insurer *wanted* to insure against it (in exchange for premiums), that standard policies covered it, and that policyholders *would never willingly surrender it*. The insurance industry understood it was insuring these risks.

The ISO and GNY filings conflict with the insurance industry's current legal argument that a virus or pandemic cannot cause "direct physical loss of or damage" to property. GNY expressed its intent to sell its policyholders insurance against pandemic risk. Insurance companies understood the meaning of "direct physical loss of or damage" to property includes the impact of a pandemic or disease-causing agents on the operation and profitability of a business. And, the GNY filings show that at least one insurance company *specifically expected* that merely removing a virus exclusion from a property insurance policy restores the expected coverage for virus-caused losses that existed before the introduction of virus exclusions.

C. The trial court incorrectly called the lack of a virus exclusion "moot;" to the contrary, it further supports the intent to cover COVID-19 related losses.

The trial court ruled that the absence of a virus exclusion in Cincinnati's policy was "moot" as a result of its conclusion that IRT had not alleged physical loss or physical damage. The trial court's ruling is based on the analysis used to determine whether an exclusion *actually in the policy* applies—i.e., an exclusion generally does not apply unless coverage is first granted. But, that is not the relevance of the absence of the virus exclusion here. The absence of a virus exclusion in the Cincinnati policy instead is relevant to understanding what is a "physical loss." It shows: (1) the understanding of the insurance industry that virus-related losses are covered by all-risk policies if not excluded, and (2) that Cincinnati's decision not to include a virus exclusion evinces the parties' intent—and IRT's reasonable expectation—that virus-related losses would be covered.

The Indiana Supreme Court has acknowledged the significance of the insurance industry's knowledge in interpreting policy language. In *Kiger*, for example, the Court considered the "sudden and accidental" exception to the industry's pre-1987 pollution exclusion. In finding the exclusion ambiguous, the

Court noted, "If one considers the insurance industry's own interpretation of the contractual language, it becomes clear that there exists a lack of clarity." *Kiger*, 662 N.E.2d at 947.

The Court reviewed the different interpretations of industry representatives of the new exclusion, which were not consistent. The exclusion had an exception if the pollution was "sudden and accidental." Some industry representatives described the new exclusion as a mere confirmation of the exclusion of deliberate acts of pollution. Others claimed it expressed an exclusion of all pollution claims that were not temporally quick, whether deliberate or not. The Court explained:

> That this interpretation [that the exclusion was a mere restatement of limitations already in the policy] was advanced simply demonstrates the presence of the ambiguity that requires this Court to construe the insurance policy in favor of the insured and against the insurer who drafted it. When the insurance industry itself has offered differing interpretations of the same language, we must assume that the insured understood the coverage in the more expansive way.

Id. at 948 (citing *Eli Lilly*, *supra*).

Here, the existence of virus and pandemic exclusions shows that the insurance industry understood that losses caused by viruses and pandemics were covered under all-risk insurance policies. The absence of such an exclusion in the policy Cincinnati issued to IRT shows that the parties intended such losses would be covered. Indiana law requires that the policy language be construed in favor of IRT "[i]n order to achieve the objectives in Indiana law, of giving effect to the polic[y's] dominant purpose of indemnity." *Id*. at 471.

D. The insurers' warnings of insolvency are overblown and misplaced in a contract-interpretation case.

Around the country, insurers and their trade organizations have filed *amicus* briefs warning that, if the courts force them to cover COVID-19 losses, it could drive the entire industry into insolvency. Quite aside from the evidence, cited above, showing that some insurers *did* intend to cover these losses, this concern is both overblown and inappropriate under the governing legal standard.

The 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, in effect, make the same argument: if we are affected by the pandemic, as everyone else has been, then we, too, may go out of business. But where catastrophe affects multiple industries, insurance policies should not be interpreted with the thumb on the scale to benefit the insurer. 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. *See Eli Lilly*, 482 N.E.2d at 470 (insurance policies "should be construed to further the policy's basic purpose of indemnity").

When insurers face loss on a massive scale, or when laws change that could lead to a proverbial avalanche of claims, insurance companies can be counted on to sound the alarm of industry-wide insolvency. Typically, this is paired with a claim that their insurance policies "never meant to cover that." The oft-predicted collapse, however, has never arrived, and for good reason—insurance companies are massively capitalized and their risk is reinsured and hedged in multiple ways.

For example, insurers asserted that the liability from claims launched by the passage and enforcement of CERCLA would bankrupt them.[2] Yet, insurers survived. When the Indiana Supreme Court confronted the pollution exclusion in the 1990s, the industry again appeared and warned that it might go bankrupt unless the exclusions were given the sweeping construction they demanded. *See* Brief of the Insurance Institute of Indiana, Inc., as *Amicus Curiae* in Support of Appellant in *Am. States Ins. Co. v. Kiger*, No. 32C01-9206-CP-184, pp. 15-16; Brief of Alliance of Am. Insurers as *Amicus Curiae* in support of rehearing in *Kiger*, pp. 1-2, 6-9. The Indiana Supreme Court rejected these arguments, found the exclusions ambiguous, construed them in favor of coverage, and denied rehearing. *Kiger*, 662 N.E.2d at 948-50. Yet, again, the insurers survived. Decades after *Kiger*, insurers are still selling liability insurance in Indiana, sometimes without the language *Kiger* required. *State Auto. Mut. Ins. Co. v. Flexdar*, 964 N.E.2d 845, 852 (Ind. 2012).

To the knowledge of United Policyholders, no insurance company has entered insolvency due to the pandemic. Few other industries have been so fortunate.

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[2] 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.

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.[3] Chubb Ltd.— the largest[4] property insurer in the world—reported net income of $1.19 billion in Q3 2020, up 9.4%, or $100 million, from the year before.[5] CNA Insurance similarly reported a $107 million increase in net income in the same period.[6] Berkley Insurance reported a massive 161% increase ($312.2 million) in Q4 2020.[7] Rather than pay the COVID-19 claims their policies cover, the insurers have been hoarding this surplus.

Cincinnati is no exception. In a March 2021 letter to shareholders, Cincinnati boasted that its shareholders' equity "rose to more than $10 billion at year-end

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[3] 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

[4] L. Lazarony, *50 Largest Business Insurance Companies*, Forbes (Apr. 28, 2021), *available* at https://www.forbes.com/advisor/business-insurance/largest-business-insurance-companies/

[5] 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

[6] 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

[7] 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

2020."[8] It increased shareholder dividends by 5%, net premiums written by 6%, and earned premiums by 7% in that year.[9] It closed out 2020—a year that was catastrophic for most businesses—by booking over $1.2 *billion* in income, after taxes and expenses.[10] This included $119 million in net underwriting profit from its Property & Casualty segment.[11] In the last 5 years, Cincinnati made more money in 2020 than it did in every year except 2019.[12] It maintains A-range financial strength ratings from all four major ratings organizations.[13] Cincinnati is not in danger of insolvency, in any sense of the word, if the Court enforces the promise it made to IRT.[14]

On top of all of this, 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."[15] 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

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[8] The Cincinnati Financial Corporation, *2021 Annual Letter to Shareholders*, at 1, 9 (Mar. 24, 2021), *available at* https://cincinnatifinancialcorporation.gcs-web.com/annual-reports
[9] *Id.* at 1, 3.
[10] *Id.* at 9.
[11] *Id.* at 10.
[12] *Id.* at 10.
[13] The Cincinnati Financial Corporation, *2020 Annual Report on Form 10-K*, at 11 (Feb. 25, 2021), *available at* https://cincinnatifinancialcorporation.gcs-web.com/annual-reports
[14] These arguments moreover affect only one of the many types of insurance policies issued by these insurers: all-risk property insurance policies.
[15] M. Lerner, *Most Policyholders See Rate Hikes Across Multiple Lines*, Business Insurance (Oct. 26, 2020).

claims in general.[16] Insurers ratcheted up prices again between July and September, with a total increase of 24% for commercial property coverage.[17] From October to December 2020, property insurance premiums increased—again—by 20%.[18] And in late 2020, insurers told consumers to expect increases of between 15% to 25% for property insurance in 2021—again, despite their refusal to pay any COVID-19 claims.[19]

The sources the industry has cited to support its doomsday predictions fare no better. All of them were generated in response to legislative proposals that would have required coverage for *all* COVID-19 claims, regardless of policy language or the presence of exclusions.[20] Proposals to mandate coverage "despite any specific policy exclusions" was what prompted warnings that two months of business

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[16] M. Lerner, *U.S. Commercial Property Pricing up 22% in Q2*, Business Insurance (Aug. 10, 2020), *available at* https://www.businessinsurance.com/article/20200810/NEWS06/912336034/US-commercial-property-pricing-up-22-in-Q2-Global-Insurance-Market-Index-Marsh-

[17] 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=printart

[18] 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-

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

[20] *NAIC Statement on Congressional Action Relating to Covid-19*, Nat'l Ass'n of Ins. Comm'rs (Mar. 25, 2020), *available at* https://content.naic.org/article/statement_naic_statement_congressional_action_relating_covid19.htm

interruption payments could "wipe out half of insurers' capital,"[21] or that paying on their contracts would "dwarf the premiums for all relevant commercial property risks."[22] The aim was to persuade Congress and state legislatures *not* to exercise their policymaking authority to override all policy terms, exclusions and all.

Nothing like that is happening here. Fully 83% of business-interruption policies issued to small businesses in the United States have some sort of virus, pandemic, or communicable disease exclusion.[23] IRT is one of the 17% of policyholders that lack *any* such exclusion. Enforcing Cincinnati's obligations under *this* contract creates no prospect of widespread insolvency,[24] and the Court can

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[21] *Best's Commentary: Two Months of Retroactive Business Interruption Coverage Could Wipe Out Half of Insurers' Capital*, Business Wire, ¶2 (May 5, 2020), *available at* https://www.businesswire.com/news/home/20200505005723/en/Best%E2%80%99s-Commentary-Two-Months-of-Retroactive-Business-Interruption-Coverage-Could-Wipe-Out-Half-of-Insurers%E2%80%99-Capital.. Insurers sometimes cite videos to establish this fact, but they are linked to this Business Wire article and stand for the same proposition—retroactive, legislatively mandated coverage despite policy language.
[22] E. Gilligan, *APCIA Releases Update to Business Interruption Analysis*, APCIA (Apr. 28, 2020), *available at* https://www.apci.org/media/news-releases/release/60522/
[23] *Business Interruption/Businessowners' Policies*, National Association of Insurance Commissioners (last updated Dec. 19, 2020), *available at* https://content.naic.org/cipr_topics/topic_business_interruptionbusinessowners_policies_bop.htm.
[24] Some quick, back-of-the-napkin math—using the industry's own numbers—illustrates why this is correct. APCIA (an association of property & casualty insurers) estimated in April 2020 that "closure losses for small businesses . . . are between $225 billion and $431 billion per month." *Gilligan*, supra note 22. It also estimated that insurers collect approximately $4.5 billion per month in premiums on the relevant policy lines. *Id.* But cut out the 83% of policies with a virus exclusion, for example, and those numbers become much smaller: $38 billion to $73 billion. Add to that point that business-income coverages virtually always impose fixed, monetary "limits of liability," (IRT's limit, for example, is $1.4 million), the numbers get smaller because the insurer's obligations will not continue indefinitely. (Appellant's App., Vol. III, p.24.) And add further that the industry is arguing that government relief through the CARES and HEROES Act should be offset against insurance recovery, and their contributions become smaller still.

The same is true in Cincinnati's specific context. Cincinnati has $10 billion in shareholders' equity (i.e., equity after all operating expenses). *2021 Annual Letter*, *supra* address the scope of policies with a virus exclusion, along with any attendant economic concerns, if they come before it. The alleged difficulty of paying what is contractually required is not a basis to override Indiana's well-settled principles of insurance law.

The prospect that losses might exceed premiums collected is inherent in the nature of insurance. Insurers charge premiums with the hope, backed by actuaries, that loss payments will be *less* than premiums collected. Policyholders pay those premiums for security that if their losses exceed those premium payments, their insurer will cover the excess. Insurers issue a lot of policies to spread the risk and offset those areas where their claim payments exceed their premiums collected. If insurers could avoid paying losses anytime losses exceed the premiums collected on any particular risk, insurance would cease to be a valuable product.

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. And, it is hedging future exposure with drastic premium increases. This is becoming a pattern with property insurers: "[I]ndustry data demonstrates that insurers have significantly and methodically decreased their financial responsibility for

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note 8, at 1, 9. It comprises 1.22% of the total insurance market. Lazarony, *supra* note 4. Its share of the payments can be estimated at $463 million per month on the low end ($38 billion *x* 0.0122) and $890 million on the high end ($72 billion *x* 0.0122). On these numbers, it would take between 11 and 21 months of continuous payments to *all* policyholders to exhaust Cincinnati's *shareholders equity alone* and actually eat into its non-equity assets—and that assumes Cincinnati loses on every other issue: it cannot get an offset, it cannot get reinsurance, it refuses to settle claims, and it has no fixed limits of insurance. In short, Cincinnati is in no danger of going broke.

[catastrophic] events in recent years and shifted much of this risk to consumers and taxpayers." J. ROBERT HUNTER, THE INSURANCE INDUSTRY'S INCREDIBLE DISAPPEARING WEATHER CATASTROPHE RISK: HOW INSURERS HAVE SHIFTED RISK AND COSTS ASSOCIATED WITH WEATHER CATASTROPHES TO CONSUMERS AND TAXPAYERS, AT p. 1(Consumer Federation of America, Feb. 17, 2012).

In sum, despite insurers' ominous warnings, there is no financial crisis awaiting insurers if they must provide coverage for COVID-19 business interruption claims. All large insurance companies have reinsurance, and so spread the risk they face over a wide range of pools of assets. And, if any particular insurance company lacks the resources to pay claims and is liquidated, industry-funded state insurance guaranty associations exist to protect policyholders and the public. Both Congress and the General Assembly have acted, repeatedly, to relieve industries pummeled with losses from COVID-19. Those bodies—not this one—are tasked with making policy choices in that regard, and that is where those decisions should rightfully remain.

E. Finding a "majority rule" based on the first round of litigation is unwise and premature.

The trial court found it persuasive that most of the COVID-19 decisions decided at that time favored insurers. That is not persuasive in the context of COVID-19 insurance litigation, which is still in the first inning.

Of nearly 2,000 cases that have been filed to date,[25] courts have rendered only 500 merits decisions.[26] In 196 of those cases, appeals are pending.[27] Only five appellate courts have heard arguments, and only one has rendered a decision. For the other 1,500 cases, insurers have been content to proceed through discovery (rather than litigating a motion to dismiss). The Court would need a crystal ball to predict how all of this litigation will shake out.

It will be years before rulings by appellate courts can be said to have crafted a "majority rule" in connection with COVID-19 coverage. But, as discussed in IRT's briefing, the pro-insurer cases are legally flawed in many aspects, such as:

- Many pro-insurer cases do not meaningfully distinguish between "loss" and "damage," thus ignoring general principles of law that redundancies should not be read into contracts, including insurance policies. *See, e.g., Bedwell v. Sagamore Ins. Co.*, 753 N.E.2d 775, 780 (Ind. Ct. App. 2001); *Earl v. Am. States Preferred Ins. Co.*, 744 N.E.2d 1025, 1029 (Ind. Ct. App. 2001).
- Likewise, in defining "loss" and "damage" as synonymous, these cases also ignore the disjunctive "or" in the phrase "physical loss **or** damage to" property. *See Indiana Ins. Co. v. N. Vermillion Cmty. Sch. Corp.*, 665 N.E.2d 630, 635 (Ind. Ct. App. 1996) (noting that the use of the disjunctive "or" in insurance policy language suggests something different and that any ambiguity must be construed against the insurer and in favor of coverage).

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[25] https://cclt.law.upenn.edu/cclt-case-list/
[26] https://cclt.law.upenn.edu/judicial-rulings/
[27] https://cclt.law.upenn.edu/appeals/

- Many pro-insurer cases mistakenly extrapolate the scope of coverage from a wholly-irrelevant definition of the "period of restoration." *See In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, No. 20 C 02005, 2021 WL 679109, at *9 (N.D. Ill. Feb. 22, 2021) (rejecting this argument and noting, "There is nothing inherent in the meanings of those words ['repaired' and 'replaced'] that would be inconsistent with characterizing the Plaintiffs' loss of their space due to the shutdown orders as a physical loss").
- These decisions often reach a mistaken conclusion about the state of the law based on a misleading summary in 10A COUCH ON INSURANCE § 148:46.[28] (*See* Brief of ICI as *Amicus Curiae*, pp. 14-17.)

Guessing how the score will turn out based on the first inning, however, is not the proper task. Rather, the trial court should have applied Indiana's settled rules of construction which, as discussed above, support coverage for IRT's losses.

IV. CONCLUSION

The trial court's summary judgment for Cincinnati should be reversed.

Respectfully submitted,

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[28] For example, the Fourth Circuit's recent opinion in *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, No. 20-3211, 2021 WL 2753874, at *2 (8th Cir. July 2, 2021), relied on this flawed Couch survey.

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WORD COUNT CERTIFICATE

Pursuant to Indiana Appellate Rule 44, I verify that this Brief of Amicus Curiae contains 4,981 words, excluding the items specified in Appellate Rule 44(C), as calculated by the word processing program used to create this brief, which is Microsoft Word 2016.

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CERTIFICATE OF SERVICE

Pursuant to Indiana Appellate Rule 24(D), I certify that on July 16, 2021, the foregoing Brief of United Policyholders as *Amicus Curiae* in Support of Appellant and Reversal was electronically filed through the Indiana E-filing System ("IEFS") and was served electronically to counsel of record in accordance with Rule 68(F)(I) as follows:

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