CASE NO. 21-10992-CC

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

TOWN KITCHEN, LLC,

Appellant,

vs.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON KNOWN AS SYNDICATE ENH 5151, NEO 2468, XLC 2003, TAL 1183, TRV 5000, AGR 3268, ACS 1856, NVA 2007, HDU 382, PPP 1980, AMA 1200 ASC 1414 and VSM 5678, INDIAN HARBOR INSURANCE COMPANY, and HDI GLOBAL SPECIALTY SE,

Appellees.

On Appeal from the United States District Court, Southern District of Florida
Case No. 1:20-CV-22832-FAM

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS

June 24, 2021

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1 of the United States Court of Appeals for the Eleventh Circuit, United Policyholders, *Amicus Curiae* hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

/s/ Rhonda D. Orin

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

United Policyholders ("UP") is a highly respected national non-profit 501(c)(3) organization. Founded in 1991, for nearly 30 years UP has operated as a dedicated advocate and information resource for individual and commercial insurance consumers throughout the entire United States. UP assists purchasers of insurance who are seeking a policy or pursuing a claim for loss reimbursement. UP assists Florida businesses and residents through three programs: Roadmap to Recovery™ (disaster recovery and claim help), to Preparedness (preparedness through insurance education), and Advocacy and Action (judicial, regulatory and legislative engagements to uphold the reasonable expectations of policyholders). UP hosts a library of informational publications and videos related to personal and commercial insurance products, coverage and the claims process at UNITED POLICYHOLDERS, www.uphelp.org (last visited June 24, 2021).

UP has been serving Florida residents since 1992 when it helped promote fair claim settlements in the aftermath of Hurricane Andrew. UP's activities in the Sunshine State have included long-term disaster recovery assistance; consumer advocacy related to homeowners' insurance rates and availability (i.e., depopulating

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), UP states that the undersigned has authored this entire brief *pro bono* and that no person or party or any party's counsel authored any part of the brief or contributed money that was intended to fund preparing or submitting the brief.

Citizens); promoting preparedness and mitigation; educating and assisting consumers navigating the complicated insurance claims process under wind, flood, and liability policies. State insurance regulators, including the Florida Office of Insurance Regulation, 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.

Since March 2020, UP has been engaged in the critical effort to assist business owners around the country whose operations have been impacted by COVID-19 and public safety orders. UP is conducting educational workshops for businesses and trade associations and maintaining an online help library at *COVID loss Recovery Initiative*, UNITED POLICYHOLDERS (Jan. 7, 2021), uphelp.org/COVID. In addition, UP is presenting considerations to courts and regulators on the special rules of contract construction that are uniquely imperative in the context of insurance.

The application of insurance contracts requires special judicial handling. Commerce, government and society benefit when losses are indemnified through insurance purchased by individuals and businesses. The insurance system is woven into the fabric of our economy through mandatory purchase requirements, prudent personal and business risk management and the pricing of goods and services. Each state regulates insurance contracts and transactions through its own set of laws and

regulations, yet most insurance companies operate in multiple states. Most insurance companies serve three different masters when carrying out their important purpose, and the resulting conflicts that arise often compel judicial balancing, such as the instant case. Insurance companies must meet their own revenue objectives *and* the reasonable expectations of policyholders, *and* the demands of their investors and shareholders. Judicial oversight is essential to maintain the purpose and value of insurance purchases by individuals and businesses in this complex system.

Effectuating indemnification in case of loss despite these factors remains a fundamental economic and social objective that courts can advance. UP respectfully seeks to assist this Court in fulfilling these important roles. In addition to hosting disaster-relief workshops and clinics around the country, and helping individual policyholders resolve coverage questions and claim disputes, UP routinely engages in nationwide policy work to assist and educate the public, governmental agencies, and the courts on policyholders' insurance rights.

Public officials, state insurance regulators, academics, and journalists throughout the U.S. routinely seek UP's input on insurance and legal matters. UP serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and, in turn, the U.S. Treasury Department. UP's Executive Director has been an official consumer representative to the National Association of Insurance Commissioners ("NAIC") since 2009. In that role, UP assists regulators

in monitoring policy language and claim practices through presentations and collaboration and the development of model laws and regulations.

UP gave three separate NAIC presentations in 2020 on the topic of coverage and claims for Business Interruption related to COVID-19 and public safety orders.[2] The gist of UP's presentations was that there is evidence that insurance companies were not fully candid with regulators about the significance of virus and pandemic-related limitations and exclusions they added to their policies.[3] Although insurance companies had paid business interruption losses from hotel reservation cancellations due to SARS, when they added limitations and exclusions after that event, some told regulators they had *never* paid virus-related losses and that

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[2] *See* NAIC Special Session One: COVID-19: Lessons Learned (Aug. 10, 2020), https://content.naic.org/sites/default/files/national_meeting/speakerbios_covid-19_lessons_learned_summer_nm_2020_0.pdf; NAIC News, *COVID-19: Lessons Learned | NAIC Summer National Meeting 2020*, YOUTUBE (Aug. 12, 2020), https://youtu.be/J2QmaZqd9Vk; 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://uphelp.org/wp-content/uploads/2021/01/up_business_ interruption_policies_and_claims.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.

[3] Richard P. Lewis et al., *Here We Go Again: Virus Exclusion for COVID-19 and Insurers*, NU PROP. CASUALTY360 (Apr. 7, 2020), https://www.propertycasualty360.com/2020/04/07/here-we-go-again-virus-exclusion-for-covid-19-and-insurers/?slreturn=20200927114442.

therefore there would be no rate decrease associated with the policy language change.

Since 1991 UP has filed amicus curiae briefs in federal and state appellate courts across forty-two states and in over 450 cases. Amicus briefs filed by UP have been expressly cited in the opinions of state supreme courts as well as the U.S. Supreme Court. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 105 A.3d 1181, 1185-86 (Pa. 2014).

By submitting a brief in this matter, UP seeks to fulfill the classic role of amicus curiae in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to broad implications that escaped consideration. This is an appropriate role for amicus curiae. As commentators have often 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 ET AL., SUPREME COURT PRACTICE 570-71 (1986) (*quoting* Ennis, *Effective Amicus Briefs*, 33 CATH. U.L. REV. 603, 608 (1984)).

PRELIMINARY STATEMENT

UP respectfully submits this Amicus Brief to urge this Court to reverse the District Court's dismissal of the complaint filed by Plaintiff-Appellant Town Kitchen, LLC ("Town Kitchen") and remand this action for ordinary adjudication of Town Kitchen's claims against Defendants-Appellees (the "Insurers").

Under black letter Florida law, where the policyholder presents a reasonable interpretation supporting coverage, that interpretation must be applied, even if the insurance company proffers another reasonable interpretation. The District Court acknowledged this tenet of Florida law. It also acknowledged that:

> it is reasonable to understand the 'direct physical loss or damages to the premises' language as covering COVID-19 harms. Several state and federal courts (although none in Florida) have found that way and it would be wrong to say those decisions were wholly irrational.

Appendix attached to Brief for the Appellant ("App."), at 542. That conclusion required the District Court to *deny* the motion to dismiss, not grant it. Where the terms used by the insurance company are reasonably interpreted in favor of coverage—as the Court acknowledged is the case here—Florida law mandates that those terms be applied to provide that coverage. The District Court's ruling violates that settled Florida law.

Businesses pay premiums for business interruption insurance so that if something happens to their property that drives down revenues, they will be covered.

It does not matter if that something is a giant hurricane that tears roofs off buildings or an invisible virus that renders property unsafe and unusable; to the policyholder, the "physical loss of or damage to property" is the same. Insurance companies support that understanding by failing to specify that structural alteration will be required. They have failed to do so even though courts have held for decades that structural alteration is not required for a finding of physical loss or damage and have urged insurance companies to clarify their policy language if they intend to limit coverage to structural alteration.

The District Court erred by basing its decision on the fact that "a majority" of federal trial courts have found structural alteration to be required in cases regarding COVID-19. Those decisions are not binding.[4] They involved different state laws and different policies; also, none of those courts had expressly found the interpretation of coverage to be reasonable (as the District Court did here). It remains to be seen whether those rulings are correct and will be upheld by appellate courts. Moreover, there have been pro-policyholder decisions as well and the District Court found no fault with their reasoning. If the scorecard matters, then the existence of these alternative rulings reinforces that under Florida law, the motion

[4] Notably, most of those cases involved policies with virus exclusions, which were included in approximately 82% of commercial property insurance policies sold in the United States. *See* App. at 413, 443-46.

to dismiss should have been denied. The District Court completely missed this larger point when it picked a side among these reasonable interpretations, and it violated Florida law again when it picked the side that defeats coverage. In Florida, ambiguities in insurance policies are interpreted in favor of the policyholder.

Florida law gives policyholders the benefit of the doubt in coverage disputes for a reason: to offset the undeniable fact that the insurance playing field is tipped in favor of the insurance companies. The insurance companies write the policies, without input from policyholders. The policyholders perform by paying premiums up front, knowing that the insurance companies' obligations to pay a claim may never even arise. The policies are lengthy, complex and specialized documents that no ordinary policyholder can fully understand. Such policies are more than ordinary contracts. While the ordinary contract is a means to documenting a transaction, such as the purchase of a tangible good, in the insurance context *the promises in the policy are the entire transaction*. If the insurance company fails to honor its obligations when they arise, it deprives the policyholder of the entire benefit of the bargain. This is why Florida law requires courts presiding over insurance coverage disputes to enforce with vigilance the protections afforded to policyholders and designed to level the playing field. The District Court abdicated that responsibility here.

The District Court also improperly disregarded the well-pled allegations in Town Kitchen's complaint in violation of basic principles of procedural law such as

Federal Rule of Civil Procedure 12. Such allegations must be accepted as true, and the District Court's failure to do so constitutes reversible error. Such error deprived Town Kitchen of its right to pursue the allegations in its Complaint—which the District Court itself acknowledged as being reasonable—without any discovery or the development of a meaningful factual record. This is a sacrosanct right in our nation that must be protected.

For all these reasons, it was error for the District Court to dismiss Town Kitchen's complaint. Rather, Town Kitchen should have been given the opportunity to present evidence supporting the allegations in its complaint and in favor of the insurance claim presented. The lower court's dismissal of the complaint would set a dangerous precedent contrary to basic principles of insurance and procedural law. Accordingly, UP respectfully requests that this Court remand this lawsuit for ordinary adjudication.

STATEMENT OF FACTS

As to the operative facts, UP adopts the Statement of Facts submitted by Plaintiff-Appellant Town Kitchen.

LEGAL ARGUMENT

A. THE DISTRICT COURT'S DISMISSAL IS CONTRARY TO FLORIDA LAW AND IMPROPERLY RESTS ON OTHER FEDERAL COURTS ATTEMPTING TO APPLY THE LAWS OF OTHER STATES TO OTHER POLICIES.

The District Court's decision to dismiss the complaint improperly rests on trial court decisions in COVID-related coverage litigation pending in other jurisdictions, and the District Court's observation that "[t]he weight of the federal court rulings is against the Plaintiff." *App.* at 543. Instead of focusing on the applicable Florida law—which precludes dismissal here—the District Court relied on decisions of other trial courts that had rejected Town Kitchen's two theories of coverage: (1) there was a "physical loss of property" because it was rendered unsuitable for its intended purpose; and (2) there was "damage to" property because it was physically contaminated. *App.* at 544.

The District Court rejected the first theory on grounds that a property being unsuitable for its intended purpose is not "physical loss or damage." *App.* at 545-46. The District Court did not cite any Florida law or state court rulings as support for this position. *Id.* The District Court rejected the second theory in the same fashion. It focused on the fact that while one federal judge in Missouri has deemed allegations of physical contamination to state a claim, "[o]ther federal courts have ruled the opposite way." *App.* at 548.

The District Court placed undue reliance on this Court's unreported decision in *Mama Jo's Inc. v. Sparta Ins. Co.*, No. 17-CV-23362-KMM, 2018 WL 3412974 (S.D. Fla. June 11, 2018), *aff'd*, 823 F. App'x 868 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 1737 (2021). That case involved the mere presence of construction dust—not a deadly virus that sickened millions of Americans and killed hundreds of thousands. The District Court noted that in this decision, Judge Moore held that dust from nearby construction did not constitute "physical loss" because the dust did not rise to the level of a "distinct, demonstrable, physical alteration of the property." App. at 545 (quoting *Mama Jo's*, 2018 WL 3412974, at *9 (citation omitted)). The District Court stressed that the plaintiffs in *Mama Jo's* "did not show that they suffered a direct physical loss to their property"—only "intangible losses." *Id.*

Yet there is no comparison between harmless dust and a deadly virus. When property is impacted by the coronavirus—whether by aerosolized particles suspended in the air or by "fomites" that come to rest on surfaces—that property is transformed from something that is safe and useful into something unusable and potentially deadly. Such changes plainly constitute a "distinct and demonstrable alteration" to property. *See Schleicher & Stebbins Hotels LLC v. Starr Surplus Lines Ins. Co.*, No. 217-2020-CV-00309, slip op. at 21 (N.H. Super. Ct. June 19, 2021) ("[f]irst, property contaminated with SARS-CoV-2 is 'distinct' from uncontaminated property. Coming into contact with property exposed to the virus

results in a risk of contracting a potentially deadly disease . . . . Moreover, whether the Plaintiffs' property is or has been infected is clearly 'demonstrable' through a series of means, including laboratory testing").[5]

While Judge Moore found the dust problem in *Mama Jo's* to be ordinary, no one can reasonably say the same about COVID-19, which shut down Town Kitchen's dining facilities for months so people would not get sick or die from coming into contact with a deadly virus. Even though the Insurers apparently dispute these facts, such disputes over well-pled allegations are no basis for dismissal. *See infra* at p. 26.

Mama Jo's is also inapposite because it was a ruling on summary judgment following full discovery and based upon shortcomings of the plaintiffs' expert analysis and testimony. No such evidence was presented here let alone considered and rejected.

The District Court also was wrong to conclude that construction dust is the same as the coronavirus because "they are both eliminated in the same way – with Lysol and a rag." App. at 549. First, such a factual finding has no place in deciding a motion to dismiss. Second, it is often the case that the source of a covered property

[5] The decision in Schleicher & Stebbins was based on precedent from the state's highest court: *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799 (N.H. 2015)). Tellingly, the decision in *Schleicher & Stebbins* did not cite any federal court COVID decisions or out-of-state precedent. *Id*.

insurance loss can be cleaned or remediated, yet that does not mean that there was no "physical loss of or damage to property" in the first place. This was true for the odors, smoke, fumes, asbestos fibers, etc. that triggered coverage in the appellate cases on point (*see infra* at notes 7-10), and the same is true here. That is especially significant when it comes to business interruption losses, where even modest impacts to property lead to covered losses. *See, e.g.*, *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, 800 N.Y.S.2d 356, 20005 WL 600021, at *4-5 (N.Y. Sup. Ct. 2005); *Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 15-01932, 2016 WL 3267247, at *6 (D. Or. June 7, 2016). Even if Town Kitchen's "routine disinfecting" had enabled it to continue altered and limited operations, those actions (which are admirable) merely would have reduced the losses subject to coverage. They would not have disqualified Town Kitchen from receiving any coverage at all.

The decision below reveals that the District Court's focus was on rendering the same ruling as the "majority of federal courts around the country." App. at. 544. It failed to consider that these decisions were decided under inapposite law, and interpreted insurance policies with inapposite provisions (such as "virus" exclusions). It disregarded that these decisions are non-binding, that other courts have held to the contrary, and that the only fault with those pro-policyholder decisions is that they "come from outside this jurisdiction and [are] not nearly numerous enough as to outweigh the cases Defendant cites from over fifteen federal

courts across the country." *App.* at 547[6] That is not how cases should be decided—especially cases regarding insurance disputes that are governed by state law. *See App.* at 542 ("Florida law governs interpretation of the policy").

The District Court paid mere lip service to Florida law, reciting key legal principles, but then failing to apply them to the policies at issue. *See App.* at 542-43. Among other things, the District Court disregarded the black letter law in Florida that a policy is ambiguous and must be construed liberally in favor of coverage if it "is susceptible to more than one reasonable interpretation, one providing coverage and another limiting coverage." *Auto-Owners Ins. Co. v. Anderson,* 756 So.2d 29, 34 (Fla. 2000); *Washington Nat. Ins. Corp. v. Ruderman*, 117 So. 3d 943, 949-50 (Fla. 2013); *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So.2d 161, 165 (Fla. 2003). Similarly, it disregarded that Florida law does not interpret "direct physical loss" to require structural alteration. *See Azalea, Ltd. v. Amer. States Ins. Co.*, 656 So. 2d 600 (Fla. 1st DCA 1995) (finding direct physical loss when a sewage treatment facility had to be drained and cleaned); *Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co.*, 250 F. Supp. 2d 1357, 1364 (M.D. Fla. 2003), *aff'd*, 362 F.3d

[6] In stating that there are no federal cases from Florida favoring the policyholder, the District Court overlooked *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co*., 489 F. Supp. 3d 1297 (M.D. Fla. 2020), in which the court refused to dismiss a policyholder's claim for COVID-19 losses under Florida law. The policy at issue, like the policy here, provided coverage for "direct physical loss of or physical damage." *See id.* at 1299.

1317 (11th Cir. 2004) ("*Azalea* stands for the proposition that under Florida law 'direct physical loss' includes more than losses that harm the structure of the covered property").

But the District Court was correct to acknowledge that Town Kitchen's reading of the policy was reasonable. Nearly every appellate court that has considered the meaning of "physical loss of or damage to property" or "physical loss or damage" in property policies has concluded that such terms—used in standard form policies for decades—do not require "structural" damage, and held that non-structural losses from odors, fumes and other invisible airborne matter are covered. The highest courts of five states,[7] and the intermediate appellate courts of seven other states (including in Florida),[8] have held in binding decisions that "physical

[7] *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) (cat 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).

[8] *Azalea*, 656 So. 2d 600 (death of bacteria colony in treatment plant); *Hughes*, 199 Cal. App. 2d 239 (erosion of land beneath a house); *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) (methamphetamine odor); *Graff v. Allstate Ins. Co.*, 54 P.3d 1266 (Wash. Ct. App.

loss" and its variants includes property that is rendered unsafe or unusable, even without "structural" damage. Federal appellate courts reached the same conclusion under the law of four other states.[9]

Since at least the 1960s, insurance companies have been on notice that unless they made their policy language more specific, "physical loss" and its variants are reasonably be understood to cover loss-of-use and other non-structural claims. *See, e.g.*, *Hughes* v. *Potomac Ins. Co.*, 199 Cal. App. 2d 239 (Cal. Ct. App. 1962). In case after case, appellate courts rejected a "structural damage" requirement, holding the "physical loss" language provides coverage where property becomes too dangerous for its intended use.[10] Because of the ambiguous breadth of the term "physical loss," courts "begged carriers to define the phrase to avoid the precise issue before the Court now"—closures caused by a pandemic. *See e.g., Cherokee Nation*

2002) (methamphetamine residue); *but see Roundabout Theatre Co. v. Cont'l Cas Co.*, 302 A.D.2d 1 (N.Y. App. Div. 2002) (construction accident).

[9] *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).

[10] *See U.S. Fid. & Guar. Co. v. Wilkin Insulation Co*., 578 N.E.2d 926 (Ill. 1991) and *Bd. of Educ.*, 720 N.E.2d 622 (decisions rejecting the idea that "physical loss" to property require alteration to property's physical structure).

v. *Lexington Ins. Co.*, No. CV-20-150, 2021 WL 506271, at *3 (Okla. Dist. Ct. Jan. 14, 2021). Those pleas went unheeded. The Insurers are still using the same broad language that does not require or even mention "structural damage." Courts lack power to alter the Insurers' wording, and it was error for the District Court to do so here. The Insurers, like everyone, ought to be held to the words they used—not the words they now wish they had used.[11]

Instead of focusing on the applicable Florida law—which precludes dismissal here—the District Court relied on federal trial court decisions that do not represent controlling precedent on the issues at hand. That approach fails to acknowledge that federal trial courts should not be leading the charge on interpreting insurance policies, which are governed by state law. It has been well established since 1945 that insurance policies are governed by state law. McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. Supreme Court precedent requires the interpretation of state law to be guided by state courts. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). The District Court failed to follow these basic principles.

[11] 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").

The outsized role being played by the federal courts in COVID-19 coverage disputes has not been lost on the states. One state court in California refused outright to rely on federal court interpretations of California insurance law, deeming COVID-19 decisions of California federal courts to be non-binding. *See Goodwill Indus. v. Phila. Indem. Ins. Co.*, No. 30-2020-01169032, 2021 WL 476268 (Cal. Super. Ct. Orange Cnty. Jan. 28, 2021) ("[t]he Court recognizes that California federal cases have . . . require[d] a physical change in the property to qualify as "direct physical loss". . . However, these federal California cases are not binding on this court . . . ").

It was error for the District Court to base its decision on the fact that more trial court decisions in COVID-19 cases nationwide so far have come down in favor of insurance companies. App. at. 547 (the only fault the District Court found with the pro-policyholder decisions was that they "come from outside this jurisdiction and [are] not nearly numerous enough as to outweigh the cases Defendant cites from over fifteen federal courts across the country"). There is no place for jurisprudence by scorecard. Even if federal courts in forty-five of the fifty states rule one way on a coverage issue, federal courts in the other five states must rule differently if required by applicable state law. *See Erie*, 304 U.S. 64. Moreover, a particular policyholder's rights must be determined based on the specific terms of its insurance policy under the law of its state—not based on a generalized scorecard of cases nationwide examining different policy wordings. The District Court's decision is

fatally flawed because of its failure to recognize this fact. For the protection of businesses in Florida that are entitled to the benefit of the bargain they purchased in their insurance policies, it should be reversed and remanded.

B. INSURANCE POLICIES ARE PRODUCTS AS WELL AS CONTRACTS, SO JUDICIAL RELIEF IS PARTICULARLY IMPORTANT WHEN THEY FAIL TO FUNCTION AS REASONABLY EXPECTED.

Insurance policies are as essential to the "social and economic fabric of effective risk management" as groceries to the consumer. *See* Jeffrey W. Stempel, *The Insurance Policy as Thing*, 44 TORT TRIAL & INS. PRAC. L.J. 813, 813 n.1 (2009) ("[t]he typical [insurance] applicant buys 'protection' as much as he buys groceries" (*citing* 7 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 900, at 34 (3d ed. Jaeger ed. 1963)). Thus, insurance policies are more than just contracts. In many ways, they are products or goods that play a critical role in our national economy:

> [I]nsurance policies are products or 'things' purchased by policyholders in order to obtain particular benefits and sold by insurers as goods conveying particular value to the policyholder.

See Stempel at 816.[12]

[12] Stempel notes the following at 831-32:

> Without a doubt, insurance policies have much in common with tangible goods and are not "pure" contracts like the type of party-

Standard-form insurance policies are routinely described by the insurance industry as products.[13] New policy forms are sometimes unveiled with the marketing flourish of new automobiles or technology devices.[14] The "protection" and "assurance" that they provide are marketed to the general public through massive, catchy advertising campaigns, touting the safety of being under the Travelers "umbrella" (*see* Travelers, *Chair*, YOUTUBE (June 18, 2021), https://www.youtube.com/watch?v=JrigL-iRm9w) the comfort of having State Farm as a "good neighbor" (*see* State Farm Insurance, *Drake from State Farm: 30 | State Farm® Commercial*, YOUTUBE (Feb. 7, 2021), https://www.youtube.com/watch?v=lvpq2OjmJvg) and the peace of mind from knowing that the "good hands" at Allstate will protect you from all kinds of "mayhem" (*see* Allstate, *GPS Commercial | Allstate Mayhem*, YOUTUBE (May 31, 2012), https://www.youtube.com/watch?v=4h0Qvc6_MfQ).

> crafted agreements that formed the basis of traditional and much modern contract law. . .

[13] "The insurance trade press (e.g., *Best's Review*, *National Underwriter, Business Insurance, Insurance Journal)* routinely speaks of insurance policies as 'products' to be researched, designed, unveiled, marketed, and sold in the manner of manufactured goods." Stempel at 831.

[14] "Insurers are sometimes said to 'unveil' a new policy form in the manner of a new model year of automobiles or an electronic innovation, such as Apple's iPhone . . . ." Stempel at 831-32.

Policyholders respond by regarding their policies as goods or products[15] and displaying the type of brand loyalty that is characteristic of consumer items, not legal contracts.[16] This connection is "cemented by the longstanding ISO [the Insurance Services Office] practice of copyrighting its standard insurance forms, a practice followed by many insurers as well." *See* Stempel at 834.

When a good or product fails to serve its expected purpose, it is recognized as defective and a legal remedy is available to consumers. When insurance policies fail to serve their expected purposes, the outcome should be the same:

> The "Insurance Contract as Thing" or "Insurance Policy as Product" approach has obvious similarities to the reasonable expectations approach to insurance policy construction. Under the reasonable expectations approach in its strongest form, coverage disputes are resolved by providing coverage consistent with the objectively reasonable expectations of the policyholder even though "painstaking" study of the policy text may have negated those expectations.

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[15] "According to a study released in 2007, baby boomer policyholders (those born between 1946 and 1964) regard insurance as a good of sorts . . . . According to the survey, baby boomer consumers displayed higher "brand loyalty" toward insurance than to almost all other products, with more than two-thirds expressing high brand loyalty toward their insurers." Stempel at 832.

[16] "[I]t appears that consumers place undue stock in insurer reputation created by advertising, while simultaneously not investing significant resources in evaluating the design, language, and operation of an insurance policy." Stempel at 827-28. As these surveys indicated, "policyholders appear to shop for insurance, not according to contractual analysis, but on the basis of pricing and the sales experience. For the bulk of policyholders, it appears that they—like the insurance industry—really do regard the insurance policy as a thing more than a contract." Stempel at 833 n.65.

Id. at 840. Florida law is in accord. *See Anderson*, 756 So.2d at 34; *Deni Assoc. of Fla. Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135, 1440 (Fla. 1998); *Discover Prop. & Cas. Ins. Co. v. Beach Cars of West Palm, Inc*., 929 So.2d 729, 733 (Fla. 4th DCA 2006) (holding that if an insurance company "chooses not to [restrict coverage clearly], and thereby creates an ambiguity, it cannot later deny coverage claiming it would be exposed to unreasonable risks and absurd results"); *State Farm Fire & Cas. Co. v. Steinberg*, 393 F.3d 1226, 1230 (11th Cir. 2004) (where disputed policy language is "susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage, the insurance policy is considered 'ambiguous,' and must be 'interpreted liberally in favor or the insured and strictly against the drafter who prepared the policy'").

Yet insurance companies are quick to ignore the "product" component of their policies when confronted with claims for coverage. At that point, insurance companies call for strict construction of their policies, as if they were ordinary contracts, and to deny the existence of ambiguities. This bait-and-switch gives them an unfair advantage. *See* Stempel at 841 ("the insurance industry position of purporting to favor text and regarding most other means of contract construction as illegitimate stems from historical and sociological factors affecting insurers"). Because the insurance companies draft the policies, they are well situated to make them appear to provide the broad protections promoted by their marketing

campaigns, while hiding confusing and arguable limitations deep within the forms. Such camouflage is easy amidst the lengthy and complex policy forms they create, as policyholders cannot reasonably be expected to read and understand them fully. *See* Stempel at 826 ("consumer policyholders appear systematically uninformed about standard policy terms, which presents insurers with an opportunity to exploit consumer ignorance for greater gain"). Thus, it is essential for courts deciding coverage disputes to adhere to the established rules of construction laid down under Florida law and to construe insurance protections broadly. Insurance companies should not be allowed to use ambiguous contract terms to undermine their policyholders' reasonable expectations of coverage.

Bad outcomes can result from the failure to recognize that insurance policies are not ordinary contracts:

> Fully appreciating this trait of the insurance policy and the insurance relationship can assist courts in better determining the contours of coverage in all cases, particularly difficult cases, especially those in which the policy text at issue admits of multiple reasonable readings or appears to lead to a problematic result if read literally.

Stempel at 816. Such a bad outcome happened here. The District Court's decision trampled upon the Florida laws that purposely give the benefit of the doubt to policyholders. The solution is simple and moderate—reverse the District Court's ruling and remand for ordinary adjudication on the facts and evidence.

C. THE INSURANCE INDUSTRY'S UNPRECEDENTED STONEWALL RESPONSE TO COVID REFLECTS A NON-FUNCTIONING COMPETITIVE MARKETPLACE

The insurance industry's response to COVID business interruption claims has been unprecedented—and not in a good way. The insurance business features free market competition among insurance companies in two main respects: (1) pricing, breadth of wordings and coverage on the sales side; and (2) prompt and fair payments on the claims side. Insurance companies spend billions in advertising to promote their brands as superior in both respects. *See* Jason Woleben, *Ad Spending at State Farm, Progressive Tops $1B in 2019, GEICO Nearly Hits $2B*, S&P GLOB.), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/ad-spending-at-state-farm-progressive-tops-1b-in-2019-geico-nearly-hits-2b-57549297.

Following catastrophes, the insurance industry's response has always varied across a spectrum depending on policy wordings, loss exposures, events at particular loss sites and competitive market forces. Some insurance companies, perhaps eager to maintain and grow their book of business by demonstrating their status as "good neighbors," pay claims at or near 100 cents on the dollar. Others, perhaps those that sold limited coverage with unambiguous exclusions, pay little or nothing. Still others fall somewhere in the middle, paying less than the amount claimed, but still something. Yet the industry response to COVID business interruption claims has

been a monolithic refusal to pay a circling of wagons to an unprecedented degree. Given the myriad permutations of policy wordings sold across the marketplace,[17] it is unfathomable that the result under every policy is the same, and that few if any cover any of the losses sustained. These are blaring red flags of a non-functioning market.

Policyholders are entitled to the benefit of the bargain under the specific policies they purchased. The courts have the responsibility of ensuring that they receive it. Instead of dismissal, Town Kitchen's insurance claim should be evaluated and adjudged based on the relevant evidence. The District Court's ruling should be reversed and this case remanded for a fair adjudication on the merits and the evidence.

D. THIS ACTION SHOULD BE REMANDED FOR ORDINARY ADJUDICATION, INCLUDING DISCOVERY AND RESOLUTION OF FACT ISSUES.

The draconian dismissal of lawsuits like this one, without discovery or the development of a factual record, defies basic principles of jurisprudence in Florida.

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[17] *See* RiskGenius, *RiskGenius Covid Coverage Analysis*, YOUTUBE (Apr. 22, 2020), https://www.youtube.com/watch?v=nWYpRULmM1w ("[i]nsurance companies are asking: 'What is our exposure to COVID-19 claims?' This analysis requires an in-depth analysis of insurance policies."). Special attention should be paid to the comparative policy analysis tools on display, highlighting the hundreds of different exclusions in use and how easily they can be searched to contrast those that do and do not refer to "virus." *Id*. at 1:10-2:05.

Such dismissals wrongly deny policyholders of their day in court, a sacrosanct protection within our nation. The dismissals prevent them from engaging in the ordinary process of marshalling their evidence, presenting their cases and having them decided by impartial triers of fact.[18]

In considering a motion to dismiss, Rule 12 required the District Court to accept all of Town Kitchen's allegations as true, with disputed facts to be determined later based on the evidence presented by both sides. *See Speaker v. U.S. Dep't of Health*, 623 F.3d 1371, 1379-80 (11th Cir. 2010). Here, that evidence would have included the reasons why Town Kitchen reasonably expected to be covered for this disaster under the policies at issue. It would have included that the Insurers have known for decades that courts have not interpreted the phrase "direct physical loss" to require structural alterations of property, yet failed to make clear that structural alterations were required. It would have enabled Town Kitchen to show that Insurers failed to exclude coverage for loss or damage arising from viruses here. Further, Town Kitchen would have been able to cross examine the Insurers about why both

[18] *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1342 (11th Cir. 2014) ("[t]his circuit expresses 'a strong preference that cases be heard on the merits' … and 'strive[s] to afford a litigant his or her day in court, if possible'" (quoting *Wahl v. McIver*, 773 F.2d 1169, 1174 (11th Cir. 1985) (per curiam)); *Renfroe v. Nationstar Mortg., LLC*, 822 F.3d 1241, 1245 (11th Cir. 2016) (overruling the dismissal of a case at the pleading stage because doing so elevated the defendant's conclusions over the plaintiff's allegation, stating "[t]his dangerous argument turns the standard for considering a Federal Rule of Civil Procedure 12(b)(6) motion on its head").

"loss" and "damage" are covered, and separated by a disjunctive, if they supposedly mean the same thing.

For this case to be resolved fairly, Town Kitchen should be given the right and opportunity that Florida law and the Federal Rules protect—to present its evidence and have the disputed facts at issue here resolved on their merits.

CONCLUSION

For the foregoing reasons, UP respectfully requests that this Court reverse the ruling of the Southern District of Florida and remand this action.

Dated: June 24, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because it contains 6,414 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

/s/ Rhonda D. Orin

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 24, 2021, the undersigned electronically filed and served the foregoing document through this Court's ECF system to all counsel of record in this action.

/s/ Rhonda D. Orin