IN THE SUPREME COURT
OF THE
STATE OF VERMONT

HUNTINGTON INGALLS INDUSTRIES, INC., ET AL.,
Plaintiffs/Appellants,

v.

ACE AMERICAN INSURANCE COMPANY, ET AL.,
Defendants/Appellees.

Appealed from Vermont Superior Court, Franklin Unit, Civil Division

Trial Court Docket No. 230-9-20 Frcv

Supreme Court Docket No. 2021-173

# BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFFS / APPELLANTS

ANDERSON KILL PC

Marshall Gilinsky (#5016)
1251 Avenue of the Americas
New York, NY 10020
Tel.: (212) 278-1000
Tel.: (802) 503-0997
mgilinsky@andersonkill.com

*Counsel for Amicus Curiae United Policyholders*

September 16, 2021

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Other Authorities**

## SUMMARY OF ARGUMENT

*Amicus Curiae* United Policyholders ("UP") respectfully submits this *amicus curiae* brief in support of Plaintiffs/Appellants Huntington Ingalls Industries, Inc. and Huntington Ingalls Industries Risk Management LLC ("HII"). UP has a special interest in this litigation and can offer a unique perspective to the Court as it considers the issues raised by this case.

The spread of SARS-CoV-2 throughout Vermont constitutes a natural disaster that is covered by insurance. 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 SARS-CoV-2 and the resulting COVID-19 disease. The inability to use property as intended because it became unsafe due to a physical condition outside the policyholder's control is the exact type of "physical loss or damage" to property that the "all-risk" insurance policy here was purchased and sold to address.

HII clearly alleges that it sustained significant business interruption losses due to physical loss or damage caused by SARS-CoV-2. HII alleges that over 1,000 HII employees reported contracting COVID-19, and that the virus was present at its facilities and rendered the premises unsafe and unfit for their intended use. HII alleges that the presence of SARS-CoV-2 at and around its premises forced HII to alter its operations and the use of its property to achieve social distancing, add intrusive procedures to comply with CDC guidance and government orders and reduce its workforce due to COVID-19 infections and government-ordered quarantines, among other disruptions. As a result, HII alleges it sustained significant business interruption losses.

Nevertheless, Appellees denied HII's claim, mainly on the grounds that SARS-CoV-2 and COVID-19 do not cause "physical loss or damage" as required to trigger coverage. UP makes submissions on three points to aid this Court in evaluating this important issue.

First, UP traces the how courts have treated the term "physical loss or damage" from the 1950s to the inception of the COVID-19 pandemic; namely, courts found that infusion of property with disease-causing agents – radon gas, asbestos, ammonia, smoke, bacteria, carbon monoxide, oil fumes, *etc.* – causes direct "physical loss or damage." Policyholders and insurance companies knew this, as did the entities that draft standard-form insurance policy language, which, after the insurance industry made payouts for loss from the first novel coronavirus, SARS-CoV-1, drafted a Virus or Bacteria exclusion to address loss or damage from two types of disease-causing agents. This knowledge, spanning decades, and the ease with which the insurance industry drafted language to address loss from the presence of a virus – but did not include in the insurance policies sold to HII – should be considered by this Court in resolving the questions on appeal.

Second, UP makes a comment on the nature of the arguments of the insurance companies, which is to declare victory on this issue by pointing to results in mainly Federal court cases. UP points out that those cases have been the subject of pointed criticism by legal scholars, insurance law experts and jurists alike. Moreover, a large number of those cases rely upon an erroneous formulation of the law taken from an insurance industry treatise.

Third, UP submits that this Court should not be swayed by the insurance industry's cries that paying claims for loss and damage from the presence of SARS-CoV-2 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. Nor does Vermont law recognize an exception to the rule that a party is bound by the terms of the contracts it freely enters into merely because the party now regrets those terms.

Regardless, any warnings of impending doom are entirely unfounded. Financially, insurance companies 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, and have continued to do so in 2021. They can weather losses that most policyholders cannot bear. This Court's only role in this case is to ask whether HII's interpretation of the insurance policies at issue is reasonable. If so, then the decision below must be reversed and remanded for further proceedings and a resolution based on the evidence.

## ARGUMENT

### I. THE INSURANCE INDUSTRY HAS KNOWN FOR SIXTY YEARS THAT COURTS WERE RULING THAT ITS STANDARD-FORM LANGUAGE COVERED LOSSES LIKE THOSE AT ISSUE HERE.

#### A. The Purpose of Business Income Insurance Is To Cover the Policyholder's Operations.

Businesses buy property and business interruption insurance to insure that their properties can operate as designed and be used to generate revenues. When property is impacted in a way that interrupts operations and the ability to drive revenues – whether

from a fire, flood, noxious odors or a virus – the loss or damage is the same. That is why ABM Industries, the provider of janitorial services at the World Trade Center, which owned only mops and cleaning equipment destroyed there, was entitled to business interruption coverage for the loss of the property (the World Trade Center) at which it conducted **operations**.[1] Indeed, a company teaching self-defense courses in a warehouse it leases would have a business interruption claim if the warehouse became infused with radon, because it could not conduct operations there, despite the fact that it could not make any claim for any real or personal property.

For instance, in *Schlamm Stone & Dolan, LLP v. Seneca Insurance Co.*, No. 603009/2002, 2005 WL 600021 (N.Y. Supr. Mar. 16, 2005), the policyholder operated a law firm near the World Trade Center. After the September 11, 2001 attacks, the policyholder alleged that dust and debris in its premises affected its operations for the balance of the month of September.[2] In the coverage case, the court rejected the insurance company's argument that the policyholder "should be denied business interruption coverage because [the policyholder] failed to file a claim for actual damage to its property":

> The insurance contract does not condition a business interruption claim upon the filing of property damage claim. The [insurance company] has not cited, nor has the court found, any clause in the body of the contract to the contrary. Moreover, an insured may have valid reasons for not filing a

---

[1] *Zurich American Ins. Co. v. ABM Indus., Inc.*, 397 F.3d 158, 166 (2d Cir. 2005) (finding the janitorial firm was entitled to business interruption coverage for loss from the destruction of the World Trade Center where it performed "operations").

[2] *Id.* at *1.

claim with its insurer. For instance, the transaction costs for recovering the claim may be higher than the value of the claim itself.[3]

Modern first-party property insurance policies insure a policyholder's operations, and this is why policyholders whose operations are affected by conditions that occur through natural action – such as smoke from forest fires or dust from the collapse of a nearby building – without any need to repair or replace property nonetheless are entitled to coverage for business interruption claims.[4]

### B. For More than Sixty Years, Policyholders, Courts, Insurance Policy Drafting Organizations and Insurance Companies Themselves Stated That Standard-Form Property Insurance Policies Covered Loss from Events Rendering Property Unfit for Its Intended Use.

UP submits that the long history of how the "physical loss or damage" language at issue has been construed shows that the requirement is met here. As shown below, policyholders, courts, insurance companies, and insurance industry drafting organizations have – for decades – concluded that the term "physical loss or damage" includes situations in which events render property unfit or unsafe for its intended use, regardless of whether such property has suffered "physical alteration" or "structural damage." At a

---

[3] *Id.* at *3.

[4] *See, e.g., Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, No. 2:12-cv-04418, 2014 WL 6675934, at *5-6 (D.N.J. Nov. 25, 2014) (concluding that "property can sustain physical loss or damage without experiencing structural alteration," that "the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated," and therefore that the ammonia discharge caused direct physical loss or damage to the plant); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-cv-01932-CL, 2016 WL 3267247, at *5-6 (D. Or. June 7, 2016), *vacated by joint stipulation*, 2017 WL 1034203 (Mar. 6, 2017) (smoke from wildfires).

minimum, Appellees knew that this standard policy language was at least ambiguous as to whether it applied in such situations. This is amply demonstrated by the following.

### 1. From 1957 through 2000, Courts Repeatedly Concluded that Policyholders Were Correct in Asserting that Events Rendering Property Unfit or Unsafe for Intended Use Caused Physical Loss or Damage.

For years, there have been issues as to whether unusual events – *i.e.*, events other than a fire, collapse or tornado – cause direct physical loss or damage to property. The parties will no doubt discuss these cases at length, and UP will not duplicate that discussion, but what is important for present purposes is that there were cases finding standard-form property insurance policies to have been triggered in such circumstances in the 1950s,[5] the 1960s,[6] the 1970s,[7] the 1980s,[8] and the 1990s.[9]

---

[5] *American Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957) (finding that the policyholder, which manufactured instruments used in measuring radioactivity, had suffered property damage from a release of radon dust and gas which made the building unsafe to work in, and made it impossible to calibrate the instruments prior to sale because of the background radiation).

[6] *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 655 (Cal. App. 1962) (finding that policyholder's home, which became perched on the edge of a cliff after a sudden landslide deprived it of lateral support and stability, was damaged because it became unsafe to live in and thus useless); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968) (en banc) (finding a "direct physical loss" where a church complied with the fire department's order to close because gasoline vapors made "use of the building dangerous").

[7] *Cyclops Corp. v. Home Ins. Co.*, 352 F. Supp. 931, 937 (W.D. Pa. 1973) (finding policyholder entitled to coverage for loss of Business Income where vibration of motor, without apparent damage, caused it to be shut down).

[8] *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986) (finding policyholder could claim Business Income coverage where risk of collapse necessitated abandonment of grocery store).

[9] In chronological order: *Hetrick v. Valley Mut. Ins Co.*, 15 Pa. D. & C. 4th 271, 1992

### 2. In the Early 2000s, the Insurance Industry Made Payments in Relation to Claims of Loss from SARS-CoV-1.

In the early 2000s, there were a number of other decisions finding that unusual circumstances nonetheless caused direct physical loss or damage to property.[10]

---

WL 524309, at *3 (Pa. Comm. Pl. May 28, 1992) (finding that there would be coverage for loss of use of a house if an outside oil spill made the house uninhabitable); *Largent v. State Farm Fire & Cas. Co.*, 842 P.2d 445, 446 (Or. App. 1992) (noting insurance company conceded methamphetamine fumes could cause "accidental direct physical loss"); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. App. 1993) (finding costs of methamphetamine odor covered as direct physical loss or damage); *Azalea, Ltd. v. American States Ins. Co.*, 656 So. 2d 600, 602 (Fla. Dist. Ct. App. 1995) (finding damage to sewage treatment plant from chemicals that destroyed a bacteria colony necessary for the plant to operate amounted to "direct damage to the structure"); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, No. 9400837, 1996 WL 1250616, at *2 (Mass. Super. Mar. 15, 1996) (finding oil fumes present in house after discovery of oil leak constituted physical damage to the house); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (asbestos); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) (concluding that a home rendered dangerously unlivable by the presence of falling rocks had suffered a "direct physical loss to the property"); *Shade Foods*, *Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 78 Cal. App. 4th 847, 865 (2000) (intermingling of a quarter pound of wood shavings in 80,000 pounds of almonds caused physical loss or damage to the almonds even though the almonds were structurally unchanged); *Matzner v. Seaco Ins. Co.*, 9 Mass. L. Rptr. 41, 1998 WL 566658, at *4 (Mass. Super. Aug. 12, 1998) (concluding that the phrase "direct physical loss or damage" was ambiguous and could mean either "only tangible damage to the structure of insured property" or "more than tangible damage to the structure of insured property," and that "carbon monoxide contamination constitutes 'direct physical loss of or damage to' property"); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. 98-434-HU, 1999 WL 619100, at *7-8 (D. Or. Aug. 4, 1999) (finding that policyholder could bear its burden to demonstrate that clothes impregnated with mold or mildew suffered "direct physical loss or damage" if it established "at trial a class of garments which has increased microbial counts and that will, as a result, develop either an odor or mold or mildew"); *Board of Educ. v. International Ins. Co.*, 720 N.E.2d 622, 625-26 (Ill. App. 1999) (*citing* liability insurance coverage cases finding that incorporation of asbestos into buildings caused "property damage," defined under liability policies to be "physical injury to or destruction of tangible property," and finding that policyholder had established that the asbestos fiber contamination constituted Property Damage).

[10] In chronological order: *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d

Consistent with this, and the previous cases decided in the period 1957-2000, the insurance industry paid a number of claims for loss caused by the original novel coronavirus, SARS-CoV-1, which led to a pandemic in 2002-2004. As noted in an article in the Washington Post titled "Insurers knew the damage a viral pandemic could wreak on businesses. So they excluded coverage":

> The forced closure of businesses nationwide because of the novel coronavirus would seem to be the perfect scenario for filing a "business interruption" insurance claim.
>
> But most companies will probably find it difficult to get an insurance payout because of policy changes made after the 2002-2003 SARS outbreak, according to insurance experts and regulators.
>
> SARS, which infected 8,000 people mostly in Asia and is now seen as foreshadowing the current pandemic, led to millions of dollars in business-interruption insurance claims. Among the claims was a $16 million payout to one hotel chain, Mandarin Oriental International.[11]

---

819, 825-26 (Minn. 2000) ("A principal function of any living space [is] to provide a safe environment for the occupants" and "[i]f rental property is contaminated by asbestos fibers and presents a health hazard to the tenants, its function is seriously impaired"); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *8-*9 (D. Or. June 18, 2002) (concluding that mold damage to house could constitute "distinct and demonstrable" damage and that inability to inhabit a building may constitute "direct, physical loss"); *Cooper v. Travelers Indem. Co. of Ill.*, No. 01-cv-2400, 2002 WL 32775680, at *1 (N.D. Cal. Nov. 4, 2002) (coliform bacteria and E.coli); *Graff v. Allstate Ins. Co.*, 54 P.3d 1266, 1269 (Wash. Ct. App. 2002) (methamphetamine vapors); *Yale Univ. v. CIGNA Ins. Co.*, 224 F. Supp. 2d 402, 413 (D. Conn. 2002) (finding while the presence of asbestos and lead in buildings did not constitute "physical loss of or damage to property," contamination by such materials could, citing "the substantial body of case law" "in which a variety of contaminating conditions have been held to constitute 'physical loss or damage to property'").

[11] Todd C. Frankel, "Insurers knew the damage a viral pandemic could wreak on businesses. So they excluded coverage," WASHINGTON POST (April 2, 2020) (copy attached as Exhibit 1).

Accordingly, by the mid-2000s, not only did the insurance industry, including Appellees, know that courts had found that standard-form property insurance policies covering "physical loss or damage" covered claims from the infusion of property with substances rendering its intended use dangerous, the insurance industry specifically knew that its members had paid claims alleging loss or damage from the presence of a novel coronavirus.

### 3. Insurance Industry Drafting Organizations Paid Close Attention to the Development of Case Law in this Area.

The trend in cases discussed above from 1957 onward continued in the mid-2000s after the industry paid claims from SARS-CoV-1.[12] The insurance industry, through its

[12] In chronological order: *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 824, 826–27, 824–26 (3d Cir. 2005) (E. coli); *De Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 722-23 (Tex. App. Mar. 31, 2005) (finding mold damage constituted "physical loss to property"); *Schlamm*, 2005 WL at *4 (finding that "the presence of noxious particles, both in the air and on surfaces of the plaintiff's premises, would constitute property damage under the terms of the policy"); *Cook v. Allstate Ins. Co.*, No. 48D02-0611-PL-01156, 2007 Ind. Super. LEXIS 32, at * slip op. at 9-10 (Ind. Super. Ct. Madison County Nov. 30, 2007) (finding that infestation of house with Brown Recluse Spiders constituted "sudden and accidental direct physical loss" to the house: "Case law demonstrates that a physical condition that renders property unsuitable for its intended use constitutes a 'direct physical loss' even where some utility remains and, in the case of a building, structural integrity remains"); *Brand Mgt., Inc. v. Maryland Cas. Co.*, No. 05-cv-02293, 2007 WL 1772063, at *2 (D. Colo. June 18, 2007) (noting, where a sushi manufacturer which closed for 15 days to disinfect its premises after discovery of listeria contamination, the insurance company voluntarily paid the Business Income claim during that period); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co.*, No. 05-1315, 2007 WL 464715, at *8 (D. Or. Feb. 7, 2007) (finding, where the policyholder's heat treater for medical implants was contaminated by lead when a lead hammer was mistakenly left in it, this was "physical loss or damage": "There is no question that the physical transformation of the furnace which rendered it useless for processing medical devices, the use for which it was specially certified, reduced both the value of the furnace and [the policyholder's] ability to derive business income from the furnace. This reduction of value was

ratings organizations, claims handlers, coverage counsel, and employees reading trade journals, was well aware of the decisions.

To the extent there is any doubt of this, the Insurance Services Office ("ISO") admitted that it was part of its responsibility to its member companies (including Appellees) to monitor the common law on standard-form property insurance policies, and that such review prompted them to draft changes to the standard forms to eliminate ambiguities:

> In addition, pollution exclusions are at times narrowly applied by certain courts. In recent years, ISO has filed exclusions to address specific exposures relating to contaminating or harmful substances. Examples are the mold exclusion in property and liability policies and the liability exclusion addressing silica dust. Such exclusions enable elaboration of the specific exposure and thereby can reduce the likelihood of claim disputes and litigation.[13]

It was no secret in the insurance industry that courts had found unusual events that do not visibly alter property – like SARS-CoV-1 – nonetheless cause physical loss or physical damage to that property; indeed, anyone reading one of these cases recounted above would soon learn of the rest.[14]

Accordingly, if insurance companies wanted to state that "physical alteration" or "structural damage" to property was required to trigger coverage, they have had fifty

---

caused by an incident that is fairly characterized as 'direct physical damage'").

[13] ISO Circular dated July 6, 2006 ("ISO Circular"), at 7 of 13 (copy attached as Exhibit 2).

[14] For instance, one of the first such decisions, *First Presbyterian Church* (gasoline vapors) subsequently was cited by a host of other similar decisions. *Lillard-Roberts*, 2002 WL 31495830, at *8-9 (mold); *Matzner*, 1998 WL 566658, at *4 (carbon monoxide); *Trutanich*, 858 P.2d at 1335 (methamphetamine fumes); *Hetrick*, 1992 WL 524309, at *3 (oil fumes).

years to put such language in the insurance policies they sold. They have not. Instead, they have continued to promise coverage in response to "physical loss or damage" – which consistently has been understood to include loss scenarios like those at issue here, such as those resulting from heightened ammonia levels, gasoline fumes, asbestos fibers, E. coli, unpleasant odors, smoke, carbon monoxide and "off-tasting" soda.

#### 4. After the SARS-CoV-1 Outbreak and Claim Payments, Courts Continued To Hold that Policyholders Were Correct in Asserting that Events Rendering Property Unfit or Unsafe for Intended Use Caused Physical Loss or Damage.

Since the SARS-CoV-1 outbreak in the early 2000's, courts have continued to rule for policyholders in circumstances like those here, holding that there is "physical loss or damage" that triggers business interruption coverage even if property is not physically altered or structurally damaged.[15]

---

[15] In chronological order: *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 968 A.2d 724, 734 (N.J. Super. App. Div. 2009) ("In the context of this case, the electrical grid was 'physically damaged' because, due to a physical incident or series of incidents, the grid and its component generators and transmission lines were physically incapable of performing their essential function of providing electricity."); *Manpower Inc. v. Insurance Co. of the State of Pa.*, No. 08C0085, 2009 WL 3738099, at *1 (E.D. Wis. Nov. 3, 2009) (finding "direct physical loss … or damage to" a building adjacent to a building which collapsed despite the fact that the collapse did not cause any noticeable damage to the policyholder's occupied space); *Travco Ins. Co. v. Ward*, No. 2:10cv14, 2010 WL 2222255, at *8-9 (E.D. Va. June 3, 2010) (finding that house built with Chinese drywall which emitted toxic gases, causing the policyholder to move out, had suffered direct physical loss, despite the fact that it was "physically intact, functional and ha[d] no visible damage," noting the majority of cases nationwide find that "physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces"); *In re Chinese Mfr'd Drywall Prods. Liab. Litig.*, 759 F. Supp. 2d 822, 831 (E.D. La. 2010) (finding that there "exists a covered physical loss" where "potentially injurious material" is "activated, for example by releases gases or fibers," and "that the presence of Chinese-manufactured drywall in a home constitutes a physical loss" because it "renders the

Of particular note among these cases is the 2015 decision by the New Hampshire Supreme Court holding that there can be "physical loss" without tangible alteration to property where cat urine odor rendered a condominium unit temporarily unusable. *Mellin,* 115 A.3d at 805. That precedent has been followed in the COVID-19 context, resulting in summary judgment for the policyholder based on a finding that "the Policies' use of the terms 'loss or damage' and 'direct physical loss of or damage to property' encompasses the kind of damage caused by the spread of SARS-CoV-2 to the Plaintiffs' properties." *Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Companies,* 2021 WL 4029204 at * 10 (N.H. Super. June 15, 2021) (*citing Mellin*, 167 N.H. at 550, 115 A3d. at 805).

**5. Insurance Companies Have Confirmed the Majority Rule that Events Rendering Property Unfit for Its Intended Use Cause Physical Loss or Damage.**

Prior to the run of business interruption claims by policyholders from COVID-19 and SARS-CoV-2, insurance companies confirmed the status of the law discussed above. For instance, three months before the pandemic, Factory Mutual Insurance Company – perhaps the most sophisticated property insurance company in the United States –

---

[policyholders'] homes useless and/or uninhabitable"); *Association of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1068 (D. Haw. Apr. 9, 2013) (applying Hawai'i law) (finding that intrusion of arsenic into roof caused "direct physical loss or damage" to the roof); *Gregory Packaging*, 2014 WL 6675934, at *5-6 (concluding that "property can sustain physical loss or damage without experiencing structural alteration," that "the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated," and therefore that the ammonia discharge caused direct physical loss or damage to the plant); *Mellin v. Northern Sec. Ins. Co.*, 115 A.3d 799, 803-05 (N.H. 2015) (holding that pervasive odor of cat urine was "physical loss" to condominium); *Oregon Shakespeare Festival*, 2016 WL 3267247, at *5-6 (smoke from wildfires).

admitted that "physical loss or damage" to property exists when the presence of a physical substance renders property unfit for its intended use, despite it causing **no** structural alteration to property.[16]

At issue in *Factory Mutual Insurance Co. v. Federal Insurance Co.* was a mold infestation in a "clean room" at a drug manufacturing plant.[17] Mold (and its spores), like SARS-CoV-2, can exist on the surface of property and in the air. FM argued the mold infestation constituted "physical loss or damage" under a property insurance policy sold by Federal Insurance Company because the mold "destroyed the aseptic environment and rendered [the clean room] unfit for its intended use."[18] FM asserted case law "broadly interprets the term 'physical loss or damage' in property insurance policies."[19] Citing several of the cases cited above, FM represented to the court that loss of use is physical loss or damage:

> **Numerous courts have concluded that loss of functionality or reliability under similar circumstances constitutes physical loss or damage**. *See, e.g.*, *Western Fire Insurance Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (church building sustained physical loss or damage when it was rendered uninhabitable and dangerous due to gasoline under the building); *Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America*, Civ. No. 2:12-cv-04418 2014 U.S. Dist. LEXIS 165232, 2014 WL 6675934 (D. N.J. 2014) (unsafe levels of ammonia in the air inflicted "direct physical loss of or damage to" the juice packing facility "because the ammonia physically rendered the facility unusable for a period

[16] FM's Mot. *in Limine* No. 5 re Physical Loss or Damage, filed Nov. 19, 2019 in *Factory Mut. Ins. Co. v. Fed. Ins. Co.*, No. 1:17-cv-00760-GJF-LF (D.N.M.) (copy attached as Exhibit 3).

[17] *Id.* at 3.

[18] *Id.*

[19] *Id.*

> of time."); *Port Authority of N.Y. and N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (asbestos fibers); *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (unpleasant odor in home); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 709 (E.D. Va. 2010), *aff'd*, 504 F. App'x. 251 (4th Cir. 2013) ("toxic gases" released by defective drywall).[20]

FM reiterated that what was key was whether property could be used as it was used prior to the occurrence, and, essentially, that the Period of Restoration was the period which lasted until customers viewed the policyholder's location as safe:

> The period of time as well as costs required to bring [the policyholder's] facility to the **level of cleanliness** following the mold infestation required by [the policyholder's] customers is **also** physical loss or damage covered by the Federal policy. The facility was damaged by stringent requirements of [the policyholder's] customers regarding production to the same extent it was damaged from the mold infestation itself as the facility was unusable as the result of a covered loss. . . . Without the customers' approval of the restored aseptic conditions following the mold infestation, [the] facility remained unusable.[21]

Moreover, FM conceded that, **at worst**, it had put forward a reasonable interpretation of the undefined phrase "physical loss or damage" – akin to the undefined terms "physical loss" and "physical damage" here – and even if Federal could propose a reasonable reading, this merely rendered the subject policy ambiguous.[22]

### 6. The Failure of the Insurance Industry To Draft Specific Language To Achieve the End They Seek Here Must Have Consequence.

Decisions addressing claims for loss or damage from SARS-CoV-2 and COVID-19 have noted that courts, in wrestling with the issue since 1957, had essentially begged

---

[20] *Id.* at 3-4 (emphasis added).

[21] *Id.* at 4-5 (emphasis added).

[22] *See id.* at 3 n.1.

the insurance industry to make their language more specific. For instance, in *Cherokee Nation v. Lexington Insurance Co.*, No. CV-20-150, 2021 WL 506271 (Okl. Dist. Jan. 28, 2021), the policyholder, in response to the COVID-19 pandemic, temporarily closed its business operations to implement mitigation protocols and modifications, such as acrylic barriers and sanitation stations, staggering seating and gaming machines, and replacing air filters, to allow its businesses to operate safely.[23] The policyholder sought coverage for its losses of income under a policy triggered by "all risk of direct physical loss or damage," which "important phrase" was not defined.[24] The insurance companies argued that "direct physical loss or damage" was a "phrase-of-art" which means "distinct, demonstrable, physical alteration to the property."[25] The court first noted that the interpretation of this phrase "could have been preempted if [the insurance companies] would have simply defined the phrase within the [insurance] Policy," noting that "[c]arriers have utilized the phrase *direct physical loss* for over fifty (50) years and courts have begged carriers to define the phrase to avoid the precise issue before the Court now."[26] Later in the opinion, the court noted "[i]t is also notable that since at least 1968, several courts have rejected [the insurance companies'] interpretation and instructed carriers to clearly limit *direct physical loss or damage* within their policies for it to have

[23] *Id.* at *1-2.

[24] *Id.* at *3.

[25] *Id.*

[26] *Id.*

the meaning [the insurance companies] advance here," but the insurance companies "failed to do so."[27]

"Despite these pleas and the known confusion surrounding the phrase 'direct physical loss,' Defendant Insurers made no attempt to clarify or define that phrase within the [insurance] policy to avoid the [policyholder's] that losses such as the closure of a business in response to the Pandemic would be covered – at least, not until it was too late."[28] Specifically, the insurance companies added a Communicable Disease exclusion only *after the pandemic struck*, which the court construed against them:

> The day after the [policyholders] filed this same action under this same policy, Defendant Insurers added a new Communicable Disease exclusion to the [insurance] Policy that preempted coverage due to the fear or threat of viruses. This action on the part of the Defendant Insurers can mean one of two things. Either the exclusion was added to provide clarity for [the insurance companies'] interpretation—i.e., that Pandemic-related closures like the one at issue here are not covered—which underscores the confusion surrounding the existing policy language and the conclusion that the [insurance policy] is ambiguous. Or the exclusion was added because the [policyholders'] interpretation is correct—i.e., that Pandemic-related closures like the one at issue here are covered—and Defendant Insurers needed to create a truly new exclusion in order to avoid liability for such claims. In either event—even assuming the Defendant Insurer[s'] interpretation of the existing language is reasonable—Oklahoma law would require the Court to adopt the [policyholders'] interpretation.[29]

---

[27] *Id.* at *7 n.16.

[28] *Id.* at *3.

[29] *Id.* at *4.

### 7. Since the SARS-CoV-2 Pandemic, Insurance Companies Have Drafted Additional Exclusions To Address Loss from the Infusion of Property with Virus.

As shown above in the discussion of *Cherokee*, since the inception of the COVID-19 pandemic, insurance companies have drafted a number of exclusions to bar coverage for loss arising from infusion of property with a virus or other communicable disease, such as the following:

COMMUNICABLE DISEASE EXCLUSION

> This policy, subject to all applicable terms, conditions and exclusions, covers losses attributable to direct physical loss or physical damage occurring during the period of insurance. Consequently and notwithstanding any other provision of this policy to the contrary, this policy does not insure any loss, damage, claim, cost, expense or other sum, directly or indirectly arising out of, attributable to, or occurring concurrently or in any sequence with a Communicable Disease or the fear or threat (whether actual or perceived) of a Communicable Disease.[30]

Obviously, if property insurance policies never covered losses stemming from communicable disease due to the absence of "physical loss or damage" from such things, then there would be no need to impose such an exclusion.

The National Association of Insurance Commissioners reported that 83% of property policies in effect when the current pandemic struck incorporated an exclusion for virus or pandemic.[31] Yet, despite their knowledge of the risk of loss from virus and pandemic, Appellees did not exclude any such provision in the policies they sold to HII.

---

[30] *Cherokee Nation,* 2021 WL 506271, at *6.

[31] *See* COVID-19 Property & Casualty Insurance Business Interruption Data Call Part I, June 2020, available at https://content.naic.org/sites/default/files/inline-files/COVID-19%20BI%20Nat%27l%20Aggregates_2.pdf; NAIC COVID-19 Report for 2020, at 23, available at https://content.naic.org/sites/default/files/naic-covid-19-report-update3-eoy-2020.pdf.

Their failure to use clear and distinct language to address the issue should be held against them:

> When carriers fail to use clear and distinct language to exclude a cause of loss known in the market, they "act at their own peril." *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.,* 505 F.2d 989, 1001 (2d Cir. 1974). As with the definition of *direct physical loss*, the [insurance companies] could have included language that would have clarified any ambiguity regarding pandemic coverage, but they chose not to do so. Indeed, [the insurance companies'] choice to add the "Communicable Disease Exclusion" (discussed above) underscores the conclusion that the policy at issue does not clearly and distinctly exclude pandemics.[32]

Appellees and the rest of the insurance industry knew that "physical loss or damage" was being construed to cover loss or damage from bacteria, smoke, ammonia, asbestos, radon, *etc.*, and from the first novel coronavirus, SARS-CoV-1. If Appellees disagreed with these decisions, they easily could have revised the standard terms used in their insurance policies. They did not. Appellees must live up to their obligations under the terms of the insurance policies that they sold – not the terms that they wished they had used.

## II. THE BRIEFS FILED BY APPELLEES AND INSURANCE INDUSTRY AMICI DEMONSTRATE THE INSURANCE INDUSTRY STRATEGY – CITE THE SAME QUESTIONABLE SOURCES OVER AND OVER AND DECLARE VICTORY.

The briefs filed by Appellees before the Superior Court here and by insurance industry trade organizations in other COVID-19 cases (and likely to be filed here) reflect the core strategy of the insurance industry: repeat and repeat statements that they are winning without looking too closely at the actual arguments. A close inspection of the

[32] *Cherokee Nation,* 2021 WL 506271, at *10.

arguments reveals that the insurance companies are trying to misapply policy terms and circumvent precedent. That is why legal scholars and insurance law experts have sharply criticized the courts that have accepted the insurance companies' arguments and dismissed cases early on in COVID-19 coverage disputes. *See* Prof. Erik S. Knutsen and Prof. Jeffrey W. Stempel, *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 CONN. INS. LAW J. 185 (2020) (copy attached as Exhibit 4).

An extensive analysis by Professors Knutsen and Stempel led them to the following assessment of the pro-insurance industry decisions on which Appellees so heavily rely:

- "[T]he 'early returns' point toward excessively impulsive and overbroad (in our view) embrace of an insurer-sponsored conventional wisdom that COVID claims are simply not insured." *Id.* at pp. 191-92.

- "[W]e remain disappointed in the quality of analysis applied in many of the COVID coverage cases, which has often been reductionist, simplistic, crabbed, and overconfident regarding textual analysis, as well as insufficiently sensitive to the value of trial proceedings for resolving these disputes." *Id.* at p. 192.

- "Judges granting dismissal motions without any opportunity for discovery, and denying any possibility of coverage at the metaphorical starting gate, have undermined the traditional American commitment to jury trials as well as widely accepted legal principles of insurance policy construction such as interpreting ambiguous terms against the drafter and considering policyholder reasonable expectations." *Id.*

- "A more extensive and nuanced analysis of COVID coverage issues suggests to us that policyholders should be winning most of these dismissal motion cases – at least on the loss and damage issues – and proceeding further in the adjudication process. Notwithstanding some shining exceptions, the first wave of decisions in these cases has been largely disappointing and reflects poorly on the legal and hyper-textual analysis of

> the bench. If this trend continues, the insurance industry will have obtained an undeserved victory that is inconsistent with the extent of coverage it promised to policyholders, particularly small businesses." *Id.* at pp. 193-94.

Many courts – especially state courts – are joining this criticism in their denial of insurance company motions to dismiss COVID-19 coverage actions. One spirited decision recently issued by a fellow New England court observed: "The rush to judgment on the question of physical damage in some courts – without reasoning and without evidence – has been ill advised. For now, in this court, and for this policy, it would be wrong to rush." *New Castle Hotels LLC v. Zurich American Ins. Co.*, No. X07-HHD-CV-21-6142969-S at p. 7 (Conn. Super. Ct. Sept. 7, 2021) (copy attached as Exhibit 5); *see also, e.g., MacMiles LLC v. Erie Insurance Exchange*, No. GD-20-007753 at p. 12, n. 12 (Pa. Com. Pl. May 25, 2021) (copy attached as Exhibit 6) ("merely accepting the non-binding decisions of other courts 'by the purely mechanical process of searching the nations courts for conflicting decisions' amounts to an abdication of this Court's judicial role"); *Ungarean v. CNA et al*. No.: GD-20-006544 at p. 12, n. 12 (Pa. Com. Pl. March 22, 2021) (copy attached as Exhibit 7) (same); *Brown's Gym, Inc. v. The Cincinnati Ins. Co.,* No. 20 CV 3113, 2021 WL 3036545, at *19 (Pa. Com. Pl. July 13, 2021) ("State trial courts throughout the nation have agreed with the foregoing rationale articulated in the federal case law in denying insurers' attempts to dismiss business interruption insurance claims filed by insureds who assert that COVID-19 was present on their covered property"); *Goodwill Industries of Orange County, California v. Philadelphia Indemnity Insurance Co*., No. 30-2020-01169032-CU-IC-CXC at p. 3 (Cal. Super. Ct.

Jan. 28, 2021) (copy attached as Exhibit 8) (stating that the Federal cases relied on by the insurance company "are not binding on this court and were decided under a different standard" [compared to a motion to dismiss] and that unlike the insurance company's cases, the plaintiff did allege that the coronavirus and COVID-19 caused physical loss or damage to the property at issue, which allegations must be accepted as true); *Snoqualmie Entertainment Authority v. Affiliated FM Ins. Co.,* No. 21-2-03194-0 SEA, 2021 WL 4098938, at *6 (Wash. Super. Sep. 3, 2021) ("This Court is not persuaded by [another judge's] reliance on the opinions of other federal district court opinions across the country that applied the laws of other states, nor its holding that the undefined phrase 'all-risks of physical loss or damage' cannot be reasonably interpreted by the average lay person to include the insured's inability to physically use, control, or manipulate its property as a result of the COVID-19 closure orders and Tribal resolutions"), *Boardwalk Ventures CA LLC v. Century-National Insurance Company,* 20STCV27359 (Cal. Super. Ct. Mar 18, 2021) (rejecting the "litany of unpublished federal district court cases" cited by the insurance company "in support of the proposition that courts applying California law have 'uniformly dismissed lawsuits like the instant action'" – recognizing instead that the cases cited by the insurance company were not binding authority and holding that dismissal was not proper).

The Court in *New Castle Hotels* took particular aim at the many courts siding with the insurance without carefully considering the arguments and evidence:

> Zurich claims that there is nothing "physical" about the losses or damage flowing from the COVID-19 virus. Zurich notes that some courts in other jurisdictions have addressed this issue – remarkably at the pleading stage –

> remarkably with little apparent deliberation. Yes, Zurich can cite decisions where courts agree with it. Some of them merely note that claimants haven't even alleged physical damage using the words "physical". Others go further. The virus damages lungs not property, they say.
>
> But can this merely be asserted to become true? Maybe this kind of result is the product of an expansive view of "plausibility" under the pleading standard adopted by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly.* But Connecticut's standard prefers a ruling from the evidence rather than the gut.

*New Castle Hotels*, slip. op. (Ex. 6) at p. 5.

Moreover, it should be noted that so many of the cases on which Appellees rely improperly draw support from an erroneous yet oft-cited citation from a particular insurance treatise, as discussed in detail in a thoroughly researched law review article. *See* Richard P. Lewis, Lorelie S. Masters, Scott D. Greenspan and Chris Kosak, *Couch's "Physical Alteration" Fallacy: It's Origins and Consequences* TORT, TRIAL & INS. PRAC. L.J. __ (2021) (copy attached as Exhibit 9 and available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3916391). This Court should not be misled by arguments based on such sources here.

## III. THE COURT SHOULD NOT BE SWAYED BY SELF-SERVING WARNINGS ABOUT RUINING THE INSURANCE INDUSTRY – INSURANCE COMPANIES 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. Insurance companies, on the other hand, have profited handsomely. Nevertheless, insurance industry trade associations repeatedly have filed similar amicus

briefs in COVID-19 coverage cases arguing that a decision finding that "physical loss or damage" includes loss of use would bankrupt the insurance industry.

As an initial matter, this is no basis to decide the parties' contractual obligations. Insurance policies should not be interpreted with the thumb on the scale to the benefit of either insurance company or policyholder because of the impact the result would have on the party or its industry. 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.

Moreover, the insurance companies are crying wolf. 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 the self-serving assertion that their insurance policies were "never meant to cover that." The predicted collapse, however, has never arrived. Going back thirty years, insurance companies 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.[33] Yet, they survived despite the fact that many courts found coverage for such claims under standard-form Comprehensive General Liability policies. The same can be said for the

[33] 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.

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-CoV-1. 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. As the California Supreme Court put it nearly 25 years ago when insurance companies made the same arguments that the insurance industry is making here:

> We shall assume for argument's sake that Aerojet has enjoyed great good luck over against the insurers. But the pertinent policies provide what they provide. Aerojet and the insurers were generally free to contract as they pleased. . . . They evidently did so. They thereby established what was "fair" and "just" inter se. We may not rewrite what they themselves wrote. . . . We must certainly resist the temptation to do so here simply in order to adjust for chance — for the benefits it has bestowed on one party without merit and for the burdens it has laid on others without desert. . . . As a general matter at least, we do not add to, take away from, or otherwise modify a contract for "public policy considerations."

*Aerojet Gen. Corp. v. Transport Indem. Co.,* 48 P.2d 909, 932 (Cal. 1997).

In fact, to the knowledge of UP, 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.[34] Chubb Ltd. reported net income of $1.19 billion in Q3 2020 – up 9.4%, or $100 million, from the year before.[35] CNA Insurance similarly reported a $106 million increase in net income in the same period.[36] Berkley Insurance reported a massive 161% increase in Q4 2020.[37] Rather than pay the COVID-19 claims their policies cover, the insurers have been hoarding this surplus.

Not only that, but insurance companies have significantly *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."[38] From April through June 2020, property insurance rates spiked 22%, despite the insurers' refusal to pay

---

[34] 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

[35] C. Wilkinson, *Chubb reports gains in Q3 profit, net premium written*, Business Insurance (Oct. 28, 2020), available at https://www.businessinsurance.com/article/20201028/NEWS06/912337411/Chubb-reports-gains-in-Q3-profit,-net-premium-written

[36] A. Childers, *CNA Reports Higher Net Income Despite Cat Losses*, Business Insurance (Nov. 2, 2020), available at https://www.businessinsurance.com/article/00010101/NEWS06/912337508/CNA-reports-higher-net-income-despite-cat-losses

[37] J. Greenwald, *Berkley Reports 161% Jump in Profits*, Business Insurance (Jan. 26, 2021), available at https://www.businessinsurance.com/article/00010101/NEWS06/912339367/Berkley-reports-161-jump-in-profits

[38] M. Lerner, *Most Policyholders See Rate Hikes Across Multiple Lines*, Business Insurance (Oct. 26, 2020), available at https://www.businessinsurance.com/article/20201026/NEWS06/912337341/Most-policyholders-see-rates-hikes-across-multiple-lines-Arthur-J-Gallagher-Re

COVID-19 claims and despite the historically low rate of insurance claims in general.[39] Insurers ratcheted up prices again between July and September, with a total increase of 24% for commercial property coverage.[40] From October to December 2020, property insurance premiums increased – again – by 20%.[41] 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.[42] Added together and compounded, this reflects a *doubling* of the prices that insurance companies are collecting for the insurance they sell – while they refuse to pay any COVID-related business interruption claims under the pre-pandemic property insurance policies they sold to their customers.

Amazingly, the insurance industry has taken the position that American taxpayers should be the ones to foot the bill for the COVID-related business interruption losses. *See* APCIA: Insurance Perspective on COVID-19, available at

---

[39] M. Lerner, *U.S. Commercial Property Pricing up 22% in Q2*, Business Insurance (Aug. 10, 2020), available at https://www.businessinsurance.com/article/00010101/NEWS06/912336034/US-commercial-property-pricing-up-22-in-Q2

[40] C. Wilkinson, *Insurance Prices Increased Sharply in Third Quarter*, Business Insurance (Nov. 5, 2020), available at https://www.businessinsurance.com/article/00010101/NEWS06/912337590/Insurance-prices-increased-sharply-in-third-quarter-Marsh

[41] 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-

[42] J. Greenwald, *Continued Rate Increases Expected: Willis*, BUSINESS INSURANCE (Nov. 19, 2020), available at https://www.businessinsurance.com/article/20201119/NEWS06/912337904/Continued-rate-increases-expected-Willis-Towers-Watson

https://www.apci.org/media/news-releases/release/59762 (stating that the "APCIA supports the federal assistance programs that the Administration and Congress are proposing to deliver aid directly to vulnerable business communities, particularly affected small businesses" while distancing the insurance industry from any obligation to pay COVID-related business interruption claims based on virus or communicable disease exclusions found in some but not all commercial property insurance policies – and not found in the policies sold to HII). This "pass the buck" strategy has been a cornerstone of the insurance industry playbook for decades, as it has a long history of coming out ahead following catastrophes. *See* 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 (Consumer Federation of America, Feb. 17, 2012), copy attached as Exhibit 10, at p. 1 ("industry data demonstrates that insurers have significantly and methodically decreased their financial responsibility for [catastrophic] events in recent years and shifted much of this risk to consumers and taxpayers. . . . most of these savings have been achieved by hollowing out the coverage in homeowners insurance policies and raising rates").

Ultimately, if a particular insurance company 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 that insolvent insurance company. 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. The

taxpayers are doing their share already. Appellees must do theirs by paying the amounts owed under the terms of the insurance policies that they sold to HII.

Respectfully submitted,

ANDERSON KILL PC

Dated: September 16, 2021

*/s/ Marshall Gilinsky*

Marshall Gilinsky (#5016)
1251 Avenue of the Americas
New York, NY 10020
Tel.: (212) 278-1000
Tel.: (802) 503-0997
mgilinsky@andersonkill.com

*Counsel for Amicus Curiae United Policyholders*

IN THE SUPREME COURT
OF THE
STATE OF VERMONT

| | |
|---|---|
| HUNTINGTON INGALLS INDUSTRIES, INC., ET AL.,<br>Plaintiffs/Appellants,<br><br>v.<br><br>ACE AMERICAN INSURANCE COMPANY, ET AL.,<br>Defendants/Appellees. | Appealed from Vermont Superior Court, Franklin Unit, Civil Division<br><br>Trial Court Docket No. 230-9-20 Fncv<br><br>Supreme Court Docket No. 2021-173 |

## CERTIFICATE OF COMPLIANCE

NOW COMES Amicus Curiae United Policyholders, by and through its counsel Marshall Gilinsky of Anderson Kill PC, and pursuant to V.R.A.P. 32(4)(D), to certify that the number of words in the Brief filed by Amicus Curiae United Policyholders is 8,238 as indicated by the word count of Microsoft Office Word 2016 which was used to prepare the brief.

DATED at New York, New York this 16th day of September, 2021.

ANDERSON KILL PC

*/s/ Marshall Gilinsky*

Marshall Gilinsky (#5016)
1251 Avenue of the Americas
New York, NY 10020
Tel.: (212) 278-1000
Tel.: (802) 503-0997
mgilinsky@andersonkill.com

*Counsel for Amicus Curiae United Policyholders*