No. 21-15367

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CIRCUS CIRCUS LV, LP,
Plaintiff-Appellant,

v.

AIG SPECIALTY INSURANCE CO.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
NO. 2:20-CV-01240-JAD-NJK
HON. JENNIFER A. DORSEY

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT AND REVERSAL OF THE DISTRICT COURT DECISION

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CORPORATE DISCLOSURE STATEMENT

United Policyholders ("UP") is a nonprofit, 501(c)(3) corporation and has no public ownership.

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STATEMENT ON THE AUTHORSHIP OF THIS BRIEF

UP confirms that: (1) no party's counsel authored any part of this brief; (2) no party or party's counsel contributed any money to fund preparation of submission of this brief; and (3) no person, other than UP and UP's counsel, contributed any money to prepare or submit this brief.

CONSENT TO FILE PURSUANT TO FED. R. APP. PROC. 29(a)(2)

All parties have consented to UP filing this amicus curiae brief. Fed. R. App. Proc. 29(a)(2).

SOURCE OF AUTHORITY TO FILE PURSUANT TO FED. R. APP. PROC. 29(a)(4)(D)

UP's executive management has authority to authorize filing this amicus curiae brief, and has done so. Fed. R. App. Proc. 29(a)(4)(D).

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

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

Unlike insurers, individual policyholders are not repeat players on insurance-coverage issues. UP works to provide an intellectual counterweight to the claims of the insurance industry, in order to help facilitate the evenhanded development of insurance law. During the COVID-19 pandemic, UP's commitment to advocating for policyholders' rights to coverage for their devastating losses is more vital than ever. Here, UP seeks to assist the Court on an issue of immense public importance – coverage for losses caused by SARS-CoV-2 and COVID-19 – by identifying arguments and authority that has escaped the lower courts' attention to date.

UP obtained the consent of all parties to the filing of this brief.

STATEMENT OF THE CASE

In the district court, the Nevada policyholder hotel and casino sought property damage and Business Income coverage for physical loss and property damage caused by SARS-CoV-2 at its insured premises and orders of Civil Authority issued as a result of SARS-CoV-2 and/or COVID-19, under a clause triggered by

interruptions directly resulting from "all risks of direct physical loss or damage."[1] Relevant to this brief, the district court, evaluating the insurer's motion to dismiss, noted law in Nevada and from this Court on the phrase "direct physical loss or damage," and then erroneously stated "California courts, which often guide Nevada's, have consistently interpreted 'direct physical loss' to require a 'distinct, demonstrable, physical alteration of the property' or a 'physical change in the condition of the property.'"[2] The district court's assessment, relying on the opinion in *MRI Healthcare of Glendale, Inc.* v. *State Farm General Ins. Co.*, 115 Cal. Rptr. 3d 27, 38 (Cal. App. 2010), come from 10A COUCH ON INSURANCE § 148:46. The court concluded that "pure, economic losses caused by COVID-19 closures do not trigger policy coverage predicated on 'direct physical loss or damage.'"[3]

I. INTRODUCTION

Apart from, but complimentary to, the argument of the policyholder that the presence of SARS-CoV-2 virions at the insured location caused physical loss or damage, *Amicus Curiae* UP files this brief to give this Court further context in relation to three issues: (1) the majority rule of law confirms health hazards cause "loss" or "damage" to property insurance coverage under an all risk property policy;

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1 *Circus Circus LV, LP v. AIG Specialty Insurance Company*, No. 2:20-cv-01240-JAD-NJK (D. Nev. Feb. 26, 2021) at 2-3.

2 *Id.* at 6-7.

3 *Id.* at 7.

(2) Couch on Insurance – the treatise relied upon by the district court – acknowledges that coverage exists despite lack of distinct, demonstrable physical alteration of property; and (3) whether SARS-CoV-2 actually causes "physical damage" to any insured property is a factual inquiry that cannot be determined at the pleading stage.

First, UP demonstrates that, from the 1950s until March 2020, the majority of courts found that events like infusion of dust or gases or substances potentially injurious to health causes "loss" or "damage" to property. Under this majority rule, the policyholder does not need to show a "distinct, demonstrable, physical alteration of the property" or a "physical change in the condition of the property."[4]

Second, UP treats 10A COUCH ON INSURANCE § 148:46 as the basis of the district court's ruling on the meaning of "direct physical loss or damage." What the court did not consider is COUCH's next paragraph, discussing decisions "*allowing* coverage based on physical damage *despite* the lack of physical alteration of the property." Again, by any objective measure, this is the majority rule.

Third, UP treats those cases which have found, as a matter of fact, that SARS-CoV-2 does not cause "physical damage" to property. As UP demonstrates, the bulk of these decisions trace back to a single erroneous lower court decision, *Uncork &*

[4] *Id.* at 6-7.

Create LLC v. Cincinnati Ins. Co.,[5] which made factual findings based on no record. Absent a full record including expert evidence, these factual findings are improper, and this Court should not rely upon this decision or any of its progeny.

II. ARGUMENT

A. The Status of the Law in March 2020

As of March 2020, there had been about forty-three (43) cases addressing whether unusual circumstances – *i.e.*, circumstances other than a fire or a tornado or a collapse – caused "physical loss or damage" or "physical loss of or damage to" property. Of those cases, the majority – thirty-five (35) – found coverage in favor of the policyholder. As noted in *Choctaw Nation of Okla. v. Lexington Ins. Co.*,[6] "[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." If the insurance industry sought to require a "distinct, demonstrable, physical alteration of the property" as a condition to making a Business Income claim, they should have made that requirement explicit.

1. Cases Ruling for Policyholders

As an initial matter, courts had found physical loss or damage to property which was simply too unsafe to inhabit. For instance, in *Hughes v. Potomac Ins.*

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[5] No. 2:20-cv-00401, 2020 WL 6436948 (S.D.W. Va. Nov. 2, 2020) (applying West Virginia law).

[6] No. CV-20-42, slip op. 4, 9 n.17 (Okla. Dist. Ct. Feb. 15, 2021).

Co.,[7] the court found that a policyholder's home, which became perched on the edge of a cliff after a sudden landslide deprived it of lateral support and stability, was in fact damaged because it became unsafe to live in and thus useless to the owners.[8] Similarly, in *Murray v. State Farm Fire & Cas. Co.*,[9] the court concluded that a home rendered dangerously unlivable by the presence of falling rocks had suffered a "direct physical loss to the property."[10] In *Manpower Inc. v. Ins. Co. of the State of Pa.*,[11] the court found "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.[12] None of these cases required a "distinct, demonstrable, physical alteration" of the property.

Even a temporary condition impacting a property's safety or function can cause "physical loss or damage." In *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*,[13] there was a large release of ammonia at a plant, which was evacuated as

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7 18 Cal. Rptr. 650 (Cal. App. 1962).

8 18 Cal. Rptr. at 655 (emphasis added); *see also Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986) (finding policyholder could claim Business Income coverage where mere risk of collapse necessitated abandonment of grocery store).

9 509 S.E.2d 1 (W. Va. 1998).

10 *Id.* at 17 (emphasis added).

11 No. 08C0085, 2009 WL 3738099 (E.D. Wis. Nov. 3, 2009).

12 *Id.* at *6-7.

13 No. 2:12-cv-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014).

the release was remediated over the next week, and the court concluded that "property can sustain physical loss or damage without experiencing structural alteration,"[14] that "the ammonia release physically transformed the air within [the plant] so that it contained an unsafe amount of ammonia," 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.[15] In *Western Fire Ins. Co. v. First Presbyterian Church*,[16] the court found a "direct physical loss" where a church complied with the fire department's order to close "'because of the infiltration of gasoline in the soil under and around the building, which gasoline and vapors thereof infiltrated and contaminated the foundation and halls and rooms of the church building, making the same uninhabitable and making the use of the building dangerous.'"[17]

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14 *Id.* at *5.

15 *Id.* at *6; *see also Travco Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708 (E.D. Va. 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").

16 437 P.2d 52 (Colo. 1968).

17 *Id.* at 54 (emphasis added); *see also Matzner v. Seaco Ins. Co.*, No. 96-0498-B, 1998 WL 566658, at *4 (Mass. Super. Aug. 12, 1998) (finding carbon monoxide contamination could constitute direct physical loss of or damage to property); *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

In *Oregon Shakespeare Festival Assoc. v. Great Am. Ins. Co.*,[18] the policyholder alleged "physical loss or damage" to its outdoor theater when it temporarily suspended operations because of dangerous levels of smoke and ash caused by numerous nearby fires, arguing that "the wildfire smoke caused injury or harm to the interior of the theatre, which includes the air within the theatre."[19] The rejected the insurance company's arguments that "air within a covered building cannot suffer contamination or infiltration such that 'physical loss of or damage to property' exists."[20] The court also rejected the insurance company's argument that "in order to be 'physical,' the loss or damage must be *structural* to the building itself," finding the insurance company "does not provide any evidence from within the policy to show that the plain meaning of the term 'physical' includes such a limitation."[21] None of these cases required structural damage to property.

Courts have also concluded that contamination and suspected contamination making property dangerous for humans can constitute "physical loss or damage." In

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oil leak constituted physical damage to the house); *Hetrick v. Valley Mut. Ins Co.*, 15 Pa. D. & C. 4th 271, 1992 WL 524309, at *2 (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).

18 No. 1:15-cv-01932-CL, 2016 WL 3267247 (D. Or. June 7, 2016).

19 *Id.* at *5.

20 *Id.*

21 *Id.*

Stack Metallurgical Servs., Inc. v. Travelers Indemnity Co. of Conn.,[22] the court found "physical loss or damage" where the policyholder's heat treater for medical implants was contaminated when a lead hammer was mistakenly left in it:[23]

> 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 caused by an incident that is fairly characterized as "direct physical damage."[24]

In *American Alliance Ins. Co. v. Keleket X-Ray Corp.*,[25] the court affirmed the trial court's 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.[26] Similar holdings were reached involving properties impacted by an array of conditions such

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22 No. 05-1315, 2007 WL 464715 (D. Or. Feb. 7, 2007).

23 *Id.* at *1.

24 *Id.* at *8.

25 248 F.2d 920 (6th Cir. 1957).

26 *Id.* at 925.

as E. coli bacteria,[27] brown recluse spiders,[28] arsenic,[29] mold,[30] lead and asbestos.[31] Events rendering property unfit or unsafe for its intended use cause physical loss or damage to property sufficient to trigger coverage.[32]

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[27] *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 827 (3d Cir. 2005); *Cooper v. Travelers Indem. Co.*, No. C-01-2400, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002).

[28] *Cook v. Allstate Ins. Co.*, No. 48D02-0611-PL-01156, 2007 Ind. Super. LEXIS 32, at *9 (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").

[29] *Association of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1068-69 (D. Hawai'i Apr. 9, 2013) (applying Hawai'i law).

[30] *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *8-*9 (D. Or. June 18, 2002); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. 98-434-HU, 1999 WL 619100, at *7-*8 (D. Or. Aug. 4, 1999); *de Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 722-23 (Tex. App. Mar. 31, 2005).

[31] *Yale Univ. v. CIGNA Ins. Co.*, 224 F. Supp. 2d 402, 413-14 (D. Conn. 2002); *Board of Educ. v. Inter'l Ins. Co.*, 720 N.E.2d 622, 625-26 (Ill. App. 1999); *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 825-26 (Minn. 2000).

[32] *See, e.g.*, *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); *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So. 2d 600, 602 (Fla. 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"); *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.").

Even conditions which can be easily cleaned can cause physical loss or damage, just as property that can be repaired can be damaged. Indeed, the insurance company in *Brand Mgmt., Inc. v. Maryland Cas. Co.*,[33] where a sushi manufacturer which closed for just 15 days to disinfect its premises after discovery of listeria, voluntarily paid the Business Income claim during the short period in which the premises was remediated. Similarly, in *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*,[34] the policyholder alleged that dust, soot and smoke in its law firm after the WTC attacks affected operations, and the court concluded 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."[35] Likewise, even though residue and odors from cooking methamphetamine can be cleaned, courts have still found it to be physical loss or damage triggering coverage.[36] Courts have reached the same conclusion in cases where noxious odors are involved as well.[37]

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33 No. 05-cv-02293, 2007 WL 1772063, at *2 (D. Colo. June 18, 2007).

34 No. 603009/2002, 2005 WL 600021 (N.Y. Supr. Mar. 16, 2005).

35 *Id.* at *5.

36 *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Ore. App. 1993); *Largent v. State Farm Fire & Cas. Co.*, 842 P.2d 445, 446 (Or. App. 1992); *Graff v. Allstate Ins. Co.*, 54 P.3d 1266, 1267 (Wash. App. 2002).

37 *In re Chinese Mfr'd Drywall Prods. Liab. Litig.*, 759 F. Supp. 2d 822, 831-32 (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 [policyholders'] homes useless

2. Insurance Companies Recognized the Majority Rule

Beyond this, prior to the run of claims by policyholders as a result of loss from COVID-19 and SARS-CoV-2, insurance companies understood and confirmed the status of the law discussed above. For instance, *Factory Mut. Ins. Co. v. Federal Ins. Co.*[38] considered mold loss to a clean room.[39] Two insurers litigated their obligations to pay the policyholder, and Factory Mutual brought a motion *in limine* to exclude evidence that "the mold infestation" was "not physical loss under the Federal … policy."[40] Factory Mutual asserted that those arguments would be "contrary to the facts of this loss and the case law which broadly interprets the term 'physical loss or damage' in property insurance policies":[41] "It is undisputed that the mold infestation destroyed the aseptic environment and rendered Room 152 unfit for its intended use – manufacturing injectable pharmaceutical products. Numerous courts have concluded that loss of functionality or reliability under similar

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and/or uninhabitable"); *Mellin v. Northern Sec. Ins. Co.*, 115 A.3d 799, 806 (N.H. 2015) (holding that pervasive odor of cat urine was "physical loss" to condominium); *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (holding, in a liability insurance case, that pervasive odor from installed carpet "can constitute physical injury to property").

38 No. 17-760 GJF/LF, 2019 WL 5742167 (D.N.M. Nov. 5, 2019).

39 *Id.* at *1.

40 Plaintiff Factory Mutual Insurance Company's Motion *in Limine* No. 5 Re Physical Loss or Damage, filed Nov. 19, 2019, in *Factory Mut. Ins. Co. v. Federal Ins. Co.*, No.: 1:17-cv-00760-GJF-LF (D.N.M.), at 1 ("Factory Mutual's Motion *in Limine*").

41 *Id.* at 3.

circumstances constitutes physical loss or damage."[42] Alternatively, Factory Mutual noted that, "[a]t best," the undefined term "physical loss or damage" was ambiguous and had to be construed against Federal.[43]

3. Cases Ruling for Insurance Companies

Against this weight of authority, insurers continue to cite the same handful of cases over and over. First, in *Great Northern Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Assoc.*,[44] the court rejected a claim for the costs to abate asbestos discovered to be present in a building, finding "there is no evidence here of *physical* loss, direct or otherwise," as "[t]he building has remained physically intact and undamaged."[45] There was no evidence that the asbestos was friable (not contained); had there been such evidence, the court should have followed *Yale University*, *Board of Education*, and *Sentinel Mgmt.* Further, *Great Northern*'s prediction of Oregon law was rejected by the Oregon appellate court three years later in *Trutanich*.

In *Mama Jo's, Inc. v. Sparta Ins. Co.*,[46] a restaurant was affected by dust from nearby road work, which required the policyholder to engage in daily cleaning. The

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42 *Id.* at 3-4 (*citing First Presbyterian Church*, *Gregory Packaging, Port Authority*, *Essex* and *TRAVCO*).

43 *Id.* at 3 n.1. The court agreed with Factory Mutual. *Factory Mut. Ins. Co.*, 2019 WL 5742167, at *5.

44 793 F. Supp. 259 (D. Or. 1990).

45 *Benjamin Franklin*, 793 F. Supp. at 263.

46 No. 17-cv-23362, 2018 WL 3412974 (S.D. Fla. June 11, 2018).

court first considered the issue of causation – *i.e.*, whether the dust caused damage to the premises – a question that a lay witness could not answer; as the court had excluded the policyholder's expert report on causation, and thus could not bear its burden of proof.[47] Further, the court concluded that "cleaning is not considered direct physical loss,"[48] and that, to be entitled to coverage, the policyholder had to demonstrate that its restaurant was "unusable."[49] On appeal, the court affirmed, finding "under Florida law, an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'"[50]

Insurers also frequently cite two cases concluding that, contrary to the conclusion of Factory Mutual, mold does not constitute "physical loss or damage."[51] In *Universal Image Prods., Inc. v. Chubb Corp.*,[52] the policyholder's business was

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47 *Id.* at *8-9.

48 *Id.* at *9.

49 *Id.*

50 *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 Fed. App'x 868, 879 (11th Cir. 2020). *Mama Jo's* was recently distinguished in another case involving loss from SARS-CoV-2 and consequent orders of Civil Authority. *Serendipitous, LLC v. Cincinnati Ins. Co.*, No.: 2:20-cv-00873-MHH, 2021 U.S. Dist. LEXIS 86998, at *15 (N.D. Ala. May 6, 2021).

51 The first is *Mastellone v. Lightning Rod Mutual Insurance Co.*, 884 N.E.2d 1130, 1143, 1144-45 (Ohio App. 2008) (addressing question of whether presence of mold on outdoor siding was "physical loss or damage," concluding that "physical injury" meant "harm to the property that adversely affects the structural integrity of the house," and that "mold was present on the surface of the siding and could be removed without causing harm to the wood").

52 703 F. Supp. 2d 705 (E.D. Mich. Mar. 29, 2010).

disrupted by the pervasive smell of mold, which eventually caused the policyholder to relocate, and claimed this was "direct physical loss or damage."[53] The court, recognizing the policyholder's authority in relation to the presence of mold,[54] concluded there is no evidence that this stench was so pervasive as to render the premises uninhabitable.[55] On appeal, citing COUCH, the court concluded the policyholder had not suffered "tangible, physical losses" but rather "economic losses."[56] The court recognized both that "[s]everal courts have held that 'physical loss' occurs when real property becomes 'uninhabitable' or substantially 'unusable'" (*citing Port Authority*, *Lillard-Roberts*, *Murray*, and *First Presbyterian Church*) and that "a handful of courts have held that persistent and pervasive odor may constitute 'physical loss'" (*citing Bloomsouth*, *Arbeiter*, and *Trutanich*), but found that the difficulties of working in the property did not make it "uninhabitable" or "unusable" as the odors at issue neither penetrated the upper floors of the building nor were persistent.[57] Ultimately, *Universal Image Productions* recognizes that odors can cause physical loss of or damage to property.

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53 *Id.* at 711.

54 *Lillard-Roberts*, *Columbiaknit*, and *De Laurentis*.

55 *Universal Image Prods.*, 703 F. Supp. 2d at 710.

56 *Universal Image Prods., Inc. v. Federal Ins. Co.* 475 Fed. Appx. 569, 573 (6th Cir. 2012).

57 *Id.* at 574-75.

In *Pentair, Inc. v. Am. Guar. & Liab. Ins. Co.*,[58] the policyholder sold products made especially for it by two manufacturers in Taiwan, whose operations were interrupted when the power station providing them power was damaged by an earthquake. The policyholder sought its consequent additional expenses as these Contingent Extra Expenses, and the insurance company asserted that the policyholder's claim was not covered because the supplying manufacturers did not suffer any direct physical loss or damage.[59] On appeal, in *Pentair, Inc. v. Am. Guar. & Liab. Ins. Co.*,[60] the Court of Appeals affirmed on the issue of whether the Taiwanese factory suffered "direct physical loss" in the power outages, rejecting the argument that loss of use was equivalent to "direct physical loss or damage."[61]

In *Roundabout Theatre Co. v. Cont'l Cas. Co.*,[62] operation of theatre was interrupted when an exterior elevator being used at a neighboring premises collapsed, and the policyholder sought coverage for cancellation of performances "as a direct and sole result of loss of, damage to or destruction of property or facilities (including the theatre building occupied … by the Insured … the perils insured

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58 No. Civ. 02-3696, 2003 WL 21804874 (D. Minn. July 31, 2003) (applying Minnesota law).

59 *Id.* at *2.

60 400 F.3d 613 (8th Cir. 2005).

61 *Id.* at 616.

62 751 N.Y.S.2d 4 (N.Y. App. Div. 2002).

against."[63] Reversing the trial court, the Appellate Division found that "the language in the instant policy clearly and unambiguously provides coverage only where the *insured's* property suffers direct physical damage."[64]

Insurers further cite a case that, despite adopting the minority rule expressed by COUCH, actually supports the policyholder. In *Port Authority of N.Y. & N.J. v. Affiliated FM Ins. Co.*,[65], the policyholder sought coverage for costs incurred in abating asbestos-containing materials, alleging its properties suffered "physical damage" as a result of the "presence of asbestos," and the presence of friable asbestos, but there was no evidence that any asbestos in the air and the buildings continued in normal use.[66] The district court "held that unless asbestos in a building was of such quantity and condition as to make the structure unusable," it did not constitute "physical loss or damage,"[67] which existed "only if an imminent threat of asbestos release existed, or actual release of asbestos resulted in contamination of the property so as to nearly eliminate or destroy its function, or render it uninhabitable."[68] Further, the court found that "a significant portion of the

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63 *Id.* at 5.

64 *Id.* at 8.

65 311 F.3d 226 (3d Cir 2002).

66 311 F.3d at 230.

67 *Id.*

68 *Id.* at 232.

[policyholder's] claimed losses arise from the presence of asbestos, unaccompanied by even the suggestion of actual release or imminent threat of release of asbestos fibers," and that "the continued and uninterrupted use of the buildings without any indication of elevated airborne asbestos level, coupled with the plaintiffs' own assurances of public safety, 'belie the existence of contamination to the extent required to constitute physical loss or damage.'"[69] On appeal, the court, citing COUCH, concluded that the district court did not err in concluding that the mere presence of encapsulated asbestos in the buildings did not cause them "physical loss or damage."[70] Here, the policyholder did not allege that the SARS-CoV-2 virions were encapsulated; in fact, it alleged the opposite.

Insurers also cite *MRI Healthcare*, 115 Cal. Rptr. 3d at 38, which found that an MRI machine, which had to be "ramped down" and which could not be "ramped up," causing a loss of Business Income, had not suffered physical loss because there had been no "distinct, demonstrable [or] physical alteration" to the MRI machine.

Last, in *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*,[71] the court held that loss of functionality from products which could not be imported because of "mad cow" regulations, did not constitute physical loss or damage, and thus because the

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69 *Id.*

70 *Id.* at 235-36.

71 465 F.3d 834 (8th Cir. 2006),

beef tallow was not infected, but simply had become useless, the policyholder could not recover.[72] This decision is a case about unmerchantability not physical loss or damage, and is anyway against the weight of authority; were we to add *Source Food* to the count, we would have to add six cases to the policyholder side.[73]

To conclude, insurance companies cite an asbestos case (*Great Northern*) and two mold cases (*Mastellone* and *Universal Image*), that are against the weight of authority, three cases of dubious relevance (*Newman*, *Pentair* and *MRI Healthcare*), and two other cases (*Mama Jo's* and *Roundabout*); this is eight cases as against thirty-five in favor of policyholders as of the eve of the COVID-19 pandemic.

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[72] *Id.* at *4.

[73] *See, e.g.*, *S. Wallace Edwards & Sons, Inc. v. Cincinnati Ins. Co.*, 353 F.3d 367, 374–75 (4th Cir. 2003) (affirming finding that meat exposed to ammonia and thus less valuable even though not actually affected had suffered property damage); *Blaine Richards & Co. v. Marine Indem. Ins. Co.*, 635 F.2d 1051, 1055–56 (2d Cir. 1980) (finding policyholder could recover lost value of beans exposed to chemical not accepted in the United States but not actually harmed); *Federal Ins. Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, No. 02-70236, 2007 WL 1007787, at *12 (E.D. Mich. Mar. 31, 2007) (finding that food in cardboard containers exposed to ammonia was physically injured, despite the fact the food was judged fit to eat); *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 98 N.W.2d 280, 295, 300 (Minn. 1959) (finding that egg powder in cans, which had been exposed to smoke was physically damaged because it had suffered a loss of market value); *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. App. 2001) (finding oats treated with a non-approved pesticide chemically identical to an approved pesticide nonetheless suffered physical loss or damage); *Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co.*, 806 N.Y.S.2d 709, 711 (App. Div. 2005) ("Neither the fact that the product was not rendered unfit for human consumption nor the fact that the product's unmerchantability may have gone undetected initially, mean that a physical event did not occur for which injury or damage resulted").

B. COUCH ON INSURANCE Discusses Both the Majority and the Minority Rule, and the District Court Relied Only on the Latter.

10A COUCH ON INSURANCE § 148:46, titled "Generally; 'Physical' loss or damage," drove the decision of the district court to require a "distinct, demonstrable, physical alteration of the property." More specifically, the court was convinced to apply the standard suggested in the third paragraph of that section, which reads:

> The requirement that the loss be "physical," given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.[74]

COUCH cites five[75] of the eight cases supporting the insurance industry's restrictive view, including *Port Authority*, which actually supports policyholders, and an Oregon federal district court opinion later rejected in *Trutanich*.

In the very next paragraph, however, COUCH expressly states that "[t]he opposite result has been reached":

> The opposite result has been reached, allowing coverage based on physical damage despite the lack of physical alteration of the property, on the theory that the uninhabitability of the property was due to the fact that gasoline vapors from adjacent property had infiltrated and saturated the insured building, and the theory that the threatened physical damage to the insured building from a covered peril essentially triggers the insured's obligation to mitigate the impending loss by

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74 10A COUCH ON INSURANCE § 148:46, at 2.

75 *Port Auth.*, *Universal Image*, *Newman Myers*, *Benjamin Franklin* and *MRI Healthcare*.

> undertaking some hardship and expense to safeguard the insured premises.[76]

COUCH cites two[77] of the thirty-five pro-policyholder cases. While UP believes this treatment is not representative of the actual state of the law, COUCH does recognize the majority rule, which treats coverage provisions in the appropriate manner.

The court in *James W. Fowler Co. v. QBE Ins. Corp.*,[78] shows how COUCH'S observations should be considered. There, the issue involved coverage for a "micro-tunnel boring machine" ("MTBM") which was being used to bore a tunnel deep underground when it became immobilized, with no potentially cost-effective way to recover it, although it had not been physically damaged.[79] The policyholder sought to recover the cost of the MTBM under a policy providing coverage for "direct physical loss caused by a covered peril."[80] The court noted that "[t]he primary legal question before the Court is whether the burial deep underground of covered property that remains intact and undamaged constitutes a 'direct physical loss.'"[81] In evaluating this issue, the court distinguished 10A COUCH ON INSURANCE § 148:46:

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76 10A COUCH ON INSURANCE § 148:46.

77 *First Presbyterian Church* and *Hampton Foods.*

78 474 F. Supp. 3d 1149 (D. Or. 2020) (applying Oregon law).

79 *Id*. at 1154.

80 *Id*.

81 *Id*. at 1155.

> Finally, [the insurance company] points to an insurance treatise that discusses the meaning of "physical loss:"
>
> > The requirement that the loss be "physical," given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.
>
> 10A Steven Plitt, et al., *Couch on Ins*. § 148:46 (3rd ed.) (June 2020 Update). But [the policyholder's] alleged loss is not intangible or incorporeal, nor a mere detrimental economic effect. [The policyholder] alleges that the MTBM is permanently buried underground. [The policyholder's] alleged loss is much more analogous to the loss in *Western Fire*, where the church structure remained intact and undamaged, but was rendered uninhabitable by gasoline contamination. The MTBM, while intact and undamaged, is rendered useless to [the policyholder] if it is stuck underground.[82]

The court concluded that, under canons of construction, "loss" meant something different than "damage," and that courts had not interpreted "direct physical loss" to require "physical damage or alteration," but only to require "tangible, concrete, and measurable losses" as opposed to "speculative or intangible losses."[83] That is the correct standard, and UP suggests that this Court should apply it in this case.

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82 *Id*. at 1158.

83 *Id*. at 1158-59.

C. The Majority of Decisions Finding that SARS-CoV-2 Does Not Cause Physical Damage Ultimately Are Derived from a Single Decision which Made Findings of Fact Without Consideration of Any Evidence.

The issue of whether SARS-CoV-2 virions can cause physical damage to property has been litigated in a number of cases, with some courts (correctly) accepting that the policyholder properly pleaded the virions caused physical damage.[84] Some courts have noted, expressly, the lack of evidence, including expert opinions, at the motion to dismiss stage.[85] Other courts finding for the policyholder have noted the ambiguities inherent in the undefined term "damage."[86]

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[84] *See, e.g., JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, No. A-20-816628-B, 2020 WL 7190023, at *2-3 (Nev. Dist. Ct. Nov. 30, 2020) (applying Nevada law) ("[The policyholder's] Complaint alleges the physical presence and known facts about the coronavirus, including that it spreads through infected droplets that 'are physical objects that attach to and cause harm to other objects' based on its ability to 'survive on surfaces' and then infect other people…. The Court finds that [the policyholder's] Complaint sufficiently alleges losses stemming from the direct physical loss and/or damage to property from COVID-19 to trigger [the insurance company's] obligations under the property and TIME ELEMENT coverage provisions in the Policy, including coverage for general business interruption and Interruption by Civil or Military Authority.").

[85] *See, e.g.*, *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins., Co.*, No. CV-20-932117, 2020 WL 7258114, at *3-4, *5 (Ohio Ct. Com. Pl. Cuyahoga Cnty. Nov. 17, 2020) (applying Ohio law) (noting that it did not have the benefit of "evidence, including expert opinions" at the motion to dismiss stage, and concluding the policyholder had sufficiently alleged "direct physical loss or damage" "as a result of the presence of SARS-Cov-2" at their premises).

[86] *Salon XL Color & Design Group, LLC v. West Bend Mut. Ins. Co.*, No. CV 20-11719, 2021 WL 391418, at *2 (E.D. Mich. Feb. 4, 2021) (applying Michigan law) ("[The policyholder] has plausibly alleged that the COVID-19 particles have infected their property, exposed their staff and patrons, and therefore [the

Those courts which have ruled against policyholders have done so by citing a case decided in November 2020 which inappropriately made findings of fact on a motion to dismiss without the benefit of a record. In *Uncork & Create*, the court found that the actual presence of SARS-CoV-2 did not cause "direct physical damage or loss to property," based not on record evidence, but "common sense":

> Firstly, while factual allegations drive the analysis of a motion to dismiss, courts are not required to set aside common sense, and neither *Studio 417*, which relied in part on the allegation of presence of the virus, nor the instant case, involve actual allegations of employees or patrons with infections traced to the business. There is a similar risk of exposure to the virus in any public setting, regardless of artful pleading as to the likelihood of the presence of the virus. Secondly, even when present, COVID-19 does not threaten the inanimate structures covered by property insurance policies, and its presence on surfaces can be eliminated with disinfectant. Thus, even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property. Because routine cleaning, perhaps performed with greater frequency and care, eliminates the virus on surfaces, there would be nothing for an insurer to cover, and a covered "loss" is required to invoke the additional coverage for loss of business income under the Policy.[87]

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policyholder] 'has been unable to use its property for its intended purpose.' This is enough to survive a motion to dismiss when the Policy states that it will cover 'direct physical loss or damage' that does not define 'loss' or 'damage' to exclude loss of use. The terms 'damage' and 'loss' in this contract is ambiguous, and ambiguities in an insurance contract are construed in favor of the insured.")(internal citations omitted).

[87] 2020 WL 6436948, at *5.

In *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*,[88] the court rejected the argument that SARS-CoV-2 "causes direct physical damage to property because of 'the presumed presence of this contagious, infectious disease on physical surfaces in buildings, in the air, and in human beings, transmissible by any these vehicles.'"[89] This was both because the policyholders did not allege that SARS-CoV-2 was ever at their restaurants, and even if had been at the restaurants, "it would not constitute the direct physical loss or damage required to trigger coverage under the Policy because the virus can be eliminated."[90] In support of this latter conclusion, the court did not cite any record evidence, but rather the holding in *Uncork & Create*.

Thereafter, a string of cases deciding against policyholders did the exact same thing: *i.e.,* rather than examining record evidence, they cited *Uncork & Create*.[91]

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88 No. 1:20-CV-665-RP, 2020 WL 7351246 (W.D. Tex. Dec. 14, 2020) (applying Texas law).

89 2020 WL 7351246, at *7.

90 2020 WL 7351246, at *7-8 (*citing Uncork & Create LLC*, 2020 WL 6436948, at *5).

91 *B St. Grill & Bar LLC v. Cincinnati Ins. Co.*, No. CV-20-01326-PHX-SMB, 2021 WL 857361, at *5 (D. Ariz. Mar. 8, 2021); *ILIOS Prod. Design, LLC v. Cincinnati Ins. Co.*, No. 1:20-CV-857-LY, 2021 WL 1381148, at *7 (W.D. Tex. Apr. 12, 2021); *Kamakura, LLC v. Greater N.Y. Mut. Ins. Co.*, No. 20-11350, 2021 WL 1171630, at *6 (D. Mass. Mar. 9, 2021); *Bluegrass, LLC v. State Auto. Mut. Ins. Co.*, No. 2:20-CV-00414, 2021 WL 42050, at *5 (S.D. W. Va. Jan. 5, 2021); *Tralom, Inc. v. Beazley USA Servs., Inc.*, No. 2:20-CV-08344-JFW (RAOX), 2020 WL 8620224, at *5 (C.D. Cal. Dec. 29, 2020); *Tappo of Buffalo, LLC v. Erie Ins. Co.*, No. 20-CV-754V(SR), 2020 WL 7867553, at *4 (W.D.N.Y. Dec. 29, 2020); *Mortar*

Other courts then cited decisions which cited *Uncork & Create*,[92] or decisions which cited decisions which cited *Uncork & Create*,[93] *etc.*[94] Accordingly, the bulk of the case law finding that SARS-CoV-2 does not cause physical damage derives from a single case making findings of fact on a bare record, when it should have accepted well-pleaded allegations as true. This Court should not follow *Uncork & Create*.

CONCLUSION

The decision of the district court should be reversed.

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Dated May 14, 2021

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Attorneys for Amicus Curiae
UNITED POLICYHOLDERS

& Pestle Corp. v. Atain Spec. Ins. Co., No. 20-cv-03461-MMC, 2020 WL 7495180, at *3-4 (N.D. Cal. Dec. 21, 2020).

[92] *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, No. CV 20-10850-NMG, 2021 WL 858378, at *3 (D. Mass. Mar. 5, 2021) (*citing Terry Black's* (citing *Uncork & Create*); *Select Hosp., LLC v. Strathmore Ins. Co.*, No. CV 20-11414-NMG, 2021 WL 1293407, at *3 (D. Mass. Apr. 7, 2021) (*citing Terry Black's* (citing *Uncork & Create*); 6593 *Weighlock Drive, LLC v. Springhill SMC Corp.*, No. 4799/2020, 2021 WL 1419049, at *6 (N.Y. Sup. Ct. Apr. 13, 2021) (*citing Tappo* (citing *Uncork & Create*); *Visconti Bus Servs., LLC v. Utica Nat'l Ins. Group*, No. EF005750-2020, 2021 WL 609851, at *9-10 (N.Y. Supr. Feb. 12, 2021) (citing *Tappo* (*citing Uncork & Create*)).

[93] *Sharde Harvey, DDS, PLLC v. Sentinel Ins. Co., Ltd.*, No. 20CV3350PGGRWL, 2021 WL 1034259, at *9 (S.D.N.Y. Mar. 18, 2021) (*citing Visconti* (*citing Tappo* (*citing Uncork & Create*))).

[94] *Kim-Chee LLC v. Philadelphia Indem. Ins. Co.*, No. 1:20-cv-1136, 2021 WL 1600831, at *3 (W.D.N.Y. Apr. 23, 2021) (citing *Sharde Harvey* (*citing Visconti* (*citing Tappo* (*citing Uncork & Create*)))).

UNITED STATES COURT OF APPEALS
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