No. 21-2459

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CIRCLE BLOCK PARTNERS, LLC and CIRCLE BLOCK HOTEL, LLC,

Plaintiffs-Appellants,

v.

FIREMAN'S FUND INSURANCE COMPANY,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA
HON. JAMES P. HANLON, DISTRICT JUDGE
CASE NO. 1:20-CV-02512-JPH-MJD

VERIFIED MOTION FOR LEAVE TO FILE BRIEF OF UNITED POLICYHOLDERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS' PRINCIPAL BRIEF AND IN SUPPORT OF REVERSAL

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Pursuant to Federal Rule of Appellate Procedure and Seventh Circuit Rule 29, United Policyholders ("UP") respectfully requests that the Court grant it leave to appear as amicus curiae and to file an amicus curiae brief in the above-captioned matter. In support of this Motion, UP states as follows:

1. UP is a unique non-profit, tax-exempt, charitable organization founded in 1991 that educates and assists individual and business consumers on insurance matters and works to secure the loss indemnity objective for which people buy insurance. UP monitors legal developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps preserve the integrity of the insurance system by advocating for fair sales and claims practices. Grants, donations and volunteers support the organization's work. UP does not accept funding from insurance companies.

2. UP gave three separate NAIC presentations in 2020 on the topic of coverage and claims for Business Interruption related to

COVID-19 and public safety orders.[1] UP called regulators' attention to the uniform pattern of coverage denials (even where the policy language differed and the policies contained no virus or pandemic exclusion) by insurance companies across the country, coupled with unsupported assertions that paying claims would bankrupt the entire insurance industry. UP shared evidence that insurers were not fully candid with regulators or their customers about the significance of virus and pandemic-related limitations and exclusions they added to their policies.[2] Although insurers had paid business interruption losses from hotel reservation cancellations due to SARS, when they added limitations and exclusions after that event, some told regulators they had *never* paid virus-related losses and that therefore there would be no rate decrease associated with the policy language change. Because

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[1] NAIC Special Session on COVID-19 Lessons Learned, https://content.naic.org/sites/default/files/national_meeting/speakerbios_covid-19_lessons_learned_summer_nm_2020_0.pdf
Testimony of Amy Bach on Business Interruption Policies and Claims, Summer National Meeting Property and Casualty Insurance (C) Committee August 12th, 2020, https://www.uphelp.org/sites/default/files/attachments/8-12-20_bach_c_committee_final_3.pdf
Testimony of Amy Bach on COVID-19 Related Business Interruption Claims, Coverage Issues, Disputes and Litigation, Summer National Meeting, Consumer Liaison Committee, August 14th, 2020

[2] https://www.propertycasualty360.com/2020/04/07/here-we-go-again-virus-exclusion-for-covid-19-and-insurers/?slreturn=20200927114442

there was no rate decrease and no clear notice that virus and pandemic related losses could be excluded, commercial policyholders were not aware of insurers' efforts to drastically reduce business interruption loss protection until 2020. Because policyholders (including plaintiff in this case) had no notice of a potentially very substantial hole in their insurance, they had no opportunity to cure the gap, hence the need for special judicial handling and careful scrutiny of this case.

3. In furtherance of its mission, UP cautiously chooses cases and regularly appears as amicus curiae in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. UP has been advocating for insureds' rights in the courts for decades. Since 1991 UP has filed amicus curiae briefs in federal and state appellate courts across 42 states and in over 450 cases. Amicus briefs filed by UP have been expressly cited in the opinions of state supreme courts as well as the U.S. Supreme Court. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 105 A.3d 1181, 1185-6 (Pa. 2014). UP's amicus

brief has also been referenced by the Indiana Court of Appeals in *Commonwealth Land Title Ins. Co. v. Robertson*, 5 N.E.3d 394 (Ind. Ct. App. 2014).

4. By submitting a brief in this matter, UP seeks to fulfill the classic role of amicus curiae in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration. This is an appropriate role for amicus curiae. As commentators have often stressed, an amicus is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (*quoting* Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).

5. UP works to provide an intellectual counterweight to the claims of the insurance industry, in order to help facilitate the evenhanded development of the law. During the pandemic, UP's commitment to advocating for policyholders' rights to coverage for their devastating COVID-19 losses is more vital than ever. Here, UP seeks to assist the Court on an issue of immense public importance—coverage for COVID-19 losses—by identifying arguments and authority that has

escaped the lower courts' attention to date.

6. United Policyholders is substantively aligned with Appellants, Circle Block Partners, LLC and Circle Block Hotel, LLC.

7. United Policyholders has tendered herewith its proposed Brief of Amicus Curiae.

Wherefore, United Policyholders respectfully requests that the Court grant it leave to file its brief of amicus curiae in this matter.

VERIFICATION

I affirm under the penalties for perjury that the foregoing factual representations are true.

/s/Charles P. Edwards

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2021, I electronically filed the foregoing Verified Motion for Leave to File Brief of United Policyholders as *Amicus Curiae* in Support of Appellants' Principal Brief and in Support of Reversal the with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Charles P. Edwards

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BRIEF OF UNITED POLICYHOLDERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS' PRINCIPAL BRIEF AND IN SUPPORT OF REVERSAL

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I. DISCLOSURE STATEMENT

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

II. STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

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

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

business policyholders today as a result of the losses caused by the COVID-19 pandemic.

In this brief, UP discusses the unique and broad structure of "all-risk" insurance policies like the one policyholder-Appellants (collectively, "Conrad") purchased from insurer-Appellee (Fireman's Fund Insurance Company, "FFIC"). UP details the insurance industry's pre-COVID knowledge, including a public filing where an insurer admitted there is coverage for pandemic events under standard-form policies that lack a virus exclusion and stated that some insurers have an economic interest in insuring that risk. UP addresses the unsubstantiated subtext running through the insurers' arguments in COVID-19 cases—that the industry will become insolvent if they must pay these claims, and so courts should not force them to do so. Finally, UP corrects the record on the state of the nationwide litigation over insurance coverage for COVID-19, which is still in the first inning.[1]

[1] Pursuant to Fed. R. App. P. 29(E), UP states that no party's counsel authored this brief in whole or in part, and no person, party or party's counsel contributed money intended to fund the preparation or submission of this brief.

III. SUMMARY OF THE ARGUMENT

Property insurance policies have long recognized that it is impossible to predict in advance every way in which a covered loss might occur. To accommodate this uncertainty, property insurance policies like the one FFIC sold to Conrad are written on what is termed an "all-risk" basis, meaning they cover all risks of physical loss or damage that are not specifically excluded in the policy.[2] Indiana law places the burden on insurance companies to clearly and unmistakably exclude any losses they want to exclude when issuing these "all-risk" policies. Any losses not so excluded, are covered.

The insurance industry has similarly long recognized that losses like those caused by the recent COVID-19 pandemic are within the broad scope of all-risk insurance policies. Indeed, some insurers have argued to regulators that it is *in their interest* to insure these losses because that is what their customers want. The industry developed virus and pandemic exclusions to allow insurers to exclude those losses

[2] There are, of course, more restrictive policies available, referred to as "Named Peril" or "Specified Risk" coverage. 1 New Appleman on Insurance Law Library Edition § 1.06[4]–[5] (2021). "Under the specified risk policy, for coverage to exist the loss must be caused by one of the specified perils; if the loss is caused by something not specified as a peril, no coverage exists." *Id.*

if they did not want to cover them. Under Indiana Supreme Court precedent, the existence of these exclusions shows (1) that the insurance industry understood virus and pandemic losses were covered in the absence of any of these exclusions, and (2) that it was reasonable for policyholders like Conrad to expect coverage if their policies did not contain any of these exclusions.

In ruling for FFIC on a motion to dismiss, the district court was persuaded by its view of the trend developing elsewhere; but that view is irrelevant, premature and misleading. Regardless of the current state of the law elsewhere, the Indiana Supreme Court will decide the extent to which Indiana law will continue to adhere to its historical precedent (and, as Conrad points out, historical precedent around the country) favoring coverage and disfavoring insurance companies' attempts to deny coverage to Indiana policyholders under anything less than clear and unmistakable policy language—language that is not present here. Adopting the district court's approach would not only deviate from the Indiana Supreme Court's application of Indiana law, but leave the policyholders represented by UP without critical insurance coverage for their losses caused by COVID-19.

IV. ARGUMENT

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

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

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

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

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

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

(Ind. 1985) (barring the insurer, as a matter of law, from introducing extrinsic evidence of its "intent" in drafting a term, and instead construing the ambiguity in favor of coverage).

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

At any rate, the premise is false. The insurance industry *subjectively intended* for these policies to cover virus-based losses in the absence of a virus exclusion. As fellow amicus ICI explains, one of the most sophisticated property insurers in the world affirmatively argued that standard-form policies were intended to cover risks arising from disease-causing agents. (*See* Brief of ICI as *Amicus Curiae*, pp. 20-21.) It argued that these policies cover cases where a substance "destroy[ed]

the aseptic environment and render[ed] [the pharmaceutical facility] unsafe for its intended use." (*Id.*, p. 20.)

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

Further support for this conclusion is that some insurers asked regulators if they could omit the virus exclusion (making it "optional" rather than "mandatory," as ISO proposed), in order to offer their customers broader coverage. *Id.*, ECF#36-2 (GNY[3] Explanatory Memorandum, Response to Objection 1 Dated 4-30-2012). GNY's

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

explanations for this proposal illustrate why the industry's premise lacks merit.

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

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

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

Id. (emphasis added).

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

The "all-risk" policy issued by FFIC at issue in this appeal further illustrates FFIC's understanding that it insured risks just like this one. The policy provided additional "Communicable Disease Coverage." *See Circle Block Partners, LLC v. Fireman's Fund Ins. Co.*, No. 1:20-CV-02512-JPHM-JD, 2021 WL 3187521, at *2 (S.D. Ind. July 27, 2021). Under the Communicable Disease Coverage part, FFIC agreed to "pay for *direct physical loss or damage to*" insured property "caused by or resulting from a covered communicable disease event." *Id.* FFIC's—and the lower court's—position is that bacteria or virus particles can *never* cause "direct physical loss or damage to" property because such bacteria or virus particles, when present, do not cause "alteration in the appearance, shape, color, composition, or other material dimension of the property." *Id.* at *4. But, FFIC must have understood that "physical loss or damage" could be "caused by or resulting from a…communicable disease event," or its issuance of Communicable Disease Coverage is inexplicable. And FFIC is not the only insurer that sold this coverage. *See, e.g., Paradigm Care & Enrichment Ctr., LLC v. W. Bend Mut. Ins. Co.*, No. 20-CV-720-JPS-JPS, 2021 WL 1169565, at *9 (E.D. Wis. Mar. 26, 2021) (discussing Communicable Disease Coverage issued by West

Bend Mutual Insurance Company); *Dakota Girls, LLC v. Philadelphia Indem. Ins. Co.*, No. 2:20-CV-2035, 2021 WL 858489, at *7-8 (S.D. Ohio Mar. 8, 2021) (discussing Communicable Disease Coverage issued by Philadelphia Indemnity Insurance Company).

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

C. Indiana courts give weight to the insurer's knowledge and understanding of policy provisions in policy interpretation.

The Indiana Supreme Court has acknowledged the significance of the insurance industry's knowledge in interpreting policy language. In *Kiger*, for example, the Court considered the "sudden and accidental" exception to the industry's pre-1987 pollution exclusion. In finding the exclusion ambiguous, the Court noted, "If one considers the insurance industry's own interpretation of the contractual language, it becomes clear that there exists a lack of clarity." *Kiger*, 662 N.E.2d at 947.

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

> That this interpretation [that the exclusion was a mere restatement of limitations already in the policy] was advanced simply demonstrates the presence of the ambiguity that requires this Court to construe the insurance policy in favor of the insured and against the insurer who drafted

> it. When the insurance industry itself has offered differing interpretations of the same language, we must assume that the insured understood the coverage in the more expansive way.

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

Here, the existence of virus and pandemic exclusions shows that the insurance industry understood that losses caused by viruses and pandemics were covered under all-risk insurance policies. The absence of such an exclusion in the policy FFIC issued to Conrad shows that the parties intended such losses would be covered. Indiana law requires that the policy language be construed in favor of Conrad "[i]n order to achieve the objectives in Indiana law, of giving effect to the polic[y's] dominant purpose of indemnity." *Eli Lilly*, 482 N.E.2d at 471.

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

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

The pandemic has imposed hardship and losses for a wide range of business concerns—some have gone out of business already, and others likely will before the pandemic is over. Insurers, in effect, make the same argument: if we are affected by the pandemic, as everyone else has been, then we, too, may go out of business. But where catastrophe affects multiple industries, insurance policies should not be interpreted with the thumb on the scale to benefit the insurer. Rather, insurance contracts should be interpreted according to long-standing precedent and rules of construction, and in accordance with public policy favoring the spread and transfer of risk through the purchase of insurance. *See Eli Lilly*, 482 N.E.2d at 470 (insurance policies "should be construed to further the policy's basic purpose of indemnity").

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

are massively capitalized and their risk is reinsured and hedged in multiple ways.

For example, insurers asserted that the liability from claims launched by the passage and enforcement of CERCLA would bankrupt them.[4] Yet, insurers survived. When the Indiana Supreme Court confronted the pollution exclusion in the 1990s, the industry again appeared and warned that it might go bankrupt unless the exclusions were given the sweeping construction they demanded. *See* Brief of the Insurance Institute of Indiana, Inc., as *Amicus Curiae* in Support of Appellant in *Am. States Ins. Co. v. Kiger*, No. 32C01-9206-CP-184, pp. 15-16; Brief of Alliance of Am. Insurers as *Amicus Curiae* in support of rehearing in *Kiger*, pp. 1-2, 6-9. The Indiana Supreme Court rejected these arguments, found the exclusions ambiguous, construed them in favor of coverage, and denied rehearing. *Kiger*, 662 N.E.2d at 948-50. Yet, again, the insurers survived. Decades after *Kiger*, insurers are still selling liability insurance in Indiana, sometimes without the language

[4] 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.

Kiger required. *State Auto. Mut. Ins. Co. v. Flexdar*, 964 N.E.2d 845, 852 (Ind. 2012).

To the knowledge of UP, no insurance company has entered insolvency due to the pandemic.[5] Few other industries have been so fortunate.

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.[6] Chubb Ltd.— the largest[7] property insurer in the world— reported net income of $1.19 billion in Q3 2020, up 9.4%, or $100 million, from the year before.[8] CNA Insurance similarly reported a $107

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[5] *See generally* Erik S. Knutsen & Jeffrey W. Stempel, *Infected Judgment: Problematic Rush to Conventional Wisdom & Insurance Coverage Denial in a Pandemic*, 27 Ct. Ins. L. J. 185, 201-228 (2020) (discussing the insurers' "public relations blitz" with regard to COVID-19 business interruption coverage, including the alleged massive expense to the insurance industry).

[6] 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

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

[8] C. Wilkinson, *Chubb reports gains in Q3 profit, net premium written*, Business Insurance (Oct. 8, 2020), *available at*

million increase in net income in the same period.[9] Berkley Insurance reported a massive 161% increase ($312.2 million) in Q4 2020.[10] Rather than pay the COVID-19 claims their policies cover, the insurers have been hoarding this surplus.

Allianz SE, the parent company of wholly-owned subsidiary FFIC, is no exception. In its 2020 Annual Report, published in March 2021, Allianz boasted that its net income increased by five million euros (~$5.9 million).[11] It closed out 2020—a year that was catastrophic for most businesses—by booking over 4.6 *billion* euros (~$5.3 billion) in income, after taxes and expenses.[12] Allianz is not in danger of insolvency, in any sense of the word, if the Court enforces the promise Allianz, through FFIC, made to Conrad.

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https://www.businessinsurance.com/article/20201028/NEWS06/912337411?template=printart

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

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

[11] Allianz SE, *2020 Annual Report*, at 13 (Mar. 4, 2021), *available at* https://www.allianz.com/content/dam/onemarketing/azcom/Allianz_com/investor-relations/en/results-reports/annual-report/ar-2020/en-Allianz-SE-Annual-Report-2020.pdf

[12] *Id.*

On top of all of this, virtually all insurers *increased* rates on consumers in 2020, across all lines of business. The Arthur J. Gallagher Co., a large broker in Chicago, reported that 89% of its clients saw a rate increase for their property insurance— the "highest number recorded since the early 2000s."[13] From April through June 2020, property insurance rates spiked 22%, despite the insurers' refusal to pay COVID-19 claims and despite the historically low rate of insurance claims in general.[14] Insurers ratcheted up prices again between July and September, with a total increase of 24% for commercial property coverage.[15] From October to December 2020, property insurance premiums increased—again—by 20%.[16] And in late 2020, insurers told consumers to expect increases of between 15% to 25% for property

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[13] M. Lerner, *Most Policyholders See Rate Hikes Across Multiple Lines*, Business Insurance (Oct. 26, 2020).
[14] M. Lerner, *U.S. Commercial Property Pricing up 22% in Q2*, Business Insurance (Aug. 10, 2020), *available at* https://www.businessinsurance.com/article/20200810/NEWS06/912336034/US-commercial-property-pricing-up-22-in-Q2-Global-Insurance-Market-Index-Marsh-
[15] C. Wilkinson, *Insurance Prices Increased Sharply in Third Quarter*, Business Insurance (Nov. 5, 2020), *available at* https://www.businessinsurance.com/article/20201005/NEWS06/912337014?template=printart
[16] 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-

insurance in 2021—again, despite their refusal to pay any COVID-19 claims.[17]

The sources the industry has cited to support its doomsday predictions fare no better. All of them were generated in response to legislative proposals that would have required coverage for *all* COVID-19 claims, regardless of policy language or the presence of exclusions.[18] Proposals to mandate coverage "despite any specific policy exclusions" was what prompted warnings that two months of business interruption payments could "wipe out half of insurers' capital,"[19] or that paying on their contracts would "dwarf the premiums for all relevant commercial

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

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

[19] *Best's Commentary: Two Months of Retroactive Business Interruption Coverage Could Wipe Out Half of Insurers' Capital*, Business Wire, ¶2 (May 5, 2020), *available at* https://www.businesswire.com/news/home/20200505005723/en/Best%E2%80%99s-Commentary-Two-Months-of-Retroactive-Business-Interruption-Coverage-Could-Wipe-Out-Half-of-Insurers%E2%80%99-Capital.. Insurers sometimes cite videos to establish this fact, but they are linked to this Business Wire article and stand for the same proposition—retroactive, legislatively mandated coverage despite policy language.

property risks."[20] The aim was to persuade Congress and state legislatures *not* to exercise their policymaking authority to override all policy terms, exclusions and all.

Nothing like that is happening here. Fully 83% of business-interruption policies issued to small businesses in the United States have some sort of virus, pandemic, or communicable disease exclusion.[21] Conrad is one of the 17% of policyholders that lack *any* such exclusion. Enforcing FFIC's obligations under *this* contract creates no prospect of widespread insolvency, and the Court can address the scope of policies with a virus exclusion, along with any attendant economic concerns, if they come before it. The alleged difficulty of paying what is contractually required is not a basis to override Indiana's well-settled principles of insurance law.

The prospect that losses might exceed premiums collected is inherent in the nature of insurance. Insurers charge premiums with the

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[20] E. Gilligan, *APCIA Releases Update to Business Interruption Analysis*, APCIA (Apr. 28, 2020), *available at* https://www.apci.org/media/news-releases/release/60522/

[21] *Business Interruption/Businessowners' Policies*, National Association of Insurance Commissioners (last updated Dec. 19, 2020), *available at* https://content.naic.org/cipr_topics/topic_business_interruptionbusinessowners_policies_bop.htm.

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

The industry will be fine if it must pay COVID-19 claims. It enjoyed substantial windfalls in 2020 while the rest of the economy suffered. And, it is hedging future exposure with drastic premium increases. This is becoming a pattern with property insurers: "[I]ndustry data demonstrates that insurers have significantly and methodically decreased their financial responsibility for [catastrophic] events in recent years and shifted much of this risk to consumers and taxpayers." J. ROBERT HUNTER, THE INSURANCE INDUSTRY'S INCREDIBLE DISAPPEARING WEATHER CATASTROPHE RISK: HOW INSURERS HAVE SHIFTED RISK AND COSTS ASSOCIATED WITH WEATHER CATASTROPHES TO

CONSUMERS AND TAXPAYERS, AT p. 1 (Consumer Federation of America, Feb. 17, 2012).

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

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

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

Of slightly over 2,000 cases that have been filed to date,[22] courts have rendered only around 500 merits decisions.[23] In at least 255 of those cases, appeals are pending.[24] Only six appellate courts have heard arguments, and four have rendered a decision. For the other approximately 1,500 cases, insurers have been content to proceed through discovery (rather than litigating a motion to dismiss). The Court would need a crystal ball to predict how all of this litigation will shake out.

It will be years before rulings by appellate courts can be said to have crafted a "majority rule" in connection with COVID-19 coverage. But, as discussed in Conrad's and the other amici's briefing, the pro-insurer cases are legally flawed in many aspects,[25] such as:

- Many pro-insurer cases do not meaningfully distinguish between "loss" and "damage," thus ignoring general principles of law that

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[22] *CCLT Case List*, Covid Coverage Litigation Tracker, http://cclt.law.upenn.edu/cclt-case-list/ (last visited Sept. 23, 2021).
[23] *Trial Court Rulings on the Merits in business Interruption Cases*, Covid Coverage Litigation Tracker, http://cclt.law.upenn.edu/judicial-rulings/ (last visited Sept. 23, 2021).
[24] *Appeals*, Covid Coverage Litigation Tracker, http://cclt.law.upenn.edu/appeals/ (last visited Sept. 23, 2021).
[25] These are just a few of the severe flaws with these cases. As academics point out, these early trial court cases have serious and numerous flaws. *See* Knutsen & Stempel, 27 Ct. Ins. L. J. at 251-261.

redundancies should not be read into contracts, including insurance policies. *See, e.g., Bedwell v. Sagamore Ins. Co.*, 753 N.E.2d 775, 780 (Ind. Ct. App. 2001); *Earl v. Am. States Preferred Ins. Co.*, 744 N.E.2d 1025, 1029 (Ind. Ct. App. 2001).

- Likewise, in defining "loss" and "damage" as synonymous, these cases also ignore the disjunctive "or" in the phrase "physical loss **or** damage to" property. *See Indiana Ins. Co. v. N. Vermillion Cmty. Sch. Corp.*, 665 N.E.2d 630, 635 (Ind. Ct. App. 1996) (noting that the use of the disjunctive "or" in insurance policy language suggests something different and that any ambiguity must be construed against the insurer and in favor of coverage).
- Many pro-insurer cases mistakenly extrapolate the scope of coverage from a wholly-irrelevant definition of the "period of restoration." *See In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, No. 20 C 02005, 2021 WL 679109, at *9 (N.D. Ill. Feb. 22, 2021) (rejecting this argument and noting, "There is nothing inherent in the meanings of those words ['repaired' and 'replaced'] that would be inconsistent with characterizing the

Plaintiffs' loss of their space due to the shutdown orders as a physical loss").

- These decisions often reach a mistaken conclusion about the state of the law based on a misleading summary in 10A COUCH ON INSURANCE § 148:46.[26] (*See* Brief of ICI as *Amicus Curiae*, pp. 8-12.); *see also* R. Lewis, et al., *Couch's "Physical Alteration" Fallacy: Its Origins and Consequences*, 56:2 Tort, Trial & Ins. Prac. L.J. — (Forthcoming 2021)[27] (thoroughly explaining why this section of *Couch* is misleading and should not be followed).

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

[26] For example, the Fourth Circuit's recent opinion in *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1144 (8th Cir. 2021), and the Sixth Circuit's recent decision in *Santo's Italian Café v. Acuity Ins. Co.*, 2021 U.S. App. LEXIS 28720, *9, 11-12 (6th Cir., Sept. 22, 2021) relied heavily on this flawed Couch survey.

[27] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3916391

V. CONCLUSION

The district court's dismissal of Conrad's complaint should be reversed, or the Court should certify the questions posed by Conrad to the Indiana Supreme Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for Amicus Curiae certifies as follows:

1. This brief complies with Circuit Rule 29 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), the Brief contains 5,035 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32 and Circuit Rule 32(b) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in proportionally spaced typeface using Microsoft Word XP in Century Schoolbook in 14-point font in the text and 12-point font in the footnotes.

/s/ Charles P. Edwards

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2021, I electronically filed the foregoing Brief of United Policyholders as *Amicus Curiae* in Support of Appellants' Principal Brief and in Support of Reversal the with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Charles P. Edwards