No. 21-1362

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUMMIT HOSPITALITY GROUP, LTD.,

Plaintiff-Appellant,

v.

THE CINCINNATI INSURANCE COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of North Carolina (Case No. 5:20-CV-254-BO)

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Signature: Jad Khazem Date: 09/20/2021

Counsel for: United Policyholders

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INTEREST OF *AMICUS CURIAE*

United Policyholders[1] is a respected national non-profit section 501(c)(3) organization and policyholder advocate. Founded in 1991, for nearly three decades UP has operated as a dedicated information resource and voice for individual and commercial insurance consumers throughout the entire United States and has helped secure important trial and appellate victories for insurance policyholders. During this historic pandemic, UP's commitment to defending and arguing for policyholders' rights to insurance coverage for losses associated with COVID-19 is critically important.

UP assists purchasers of insurance when seeking a policy or pursuing a claim for loss. UP is routinely called upon to help individual policyholders in the wake of large-scale natural disasters such as floods, wildfires, hurricanes, and, now, a pandemic that has caused substantial economic losses to businesses across the nation. Since March 2020, UP has been engaged in the critical effort to assist business owners around the country whose operations have been affected by COVID-19 and COVID-19-related public safety orders. UP is conducting educational workshops for businesses and trade associations and it maintains an online help library at uphelp.org/COVID.

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[1] UP affirms that no counsel for a party authored this brief in whole or in part and that no person other than UP or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

In addition, UP engages on an ongoing basis with insurance regulators through the proceedings of the National Association of Insurance Commissioners, where UP has served as a consumer representative since 2009. UP gave three NAIC presentations in 2020 concerning coverage for business interruption losses related to COVID-19 and public safety orders.

Since 1991, UP has filed *amicus* briefs in federal and state appellate courts across 42 states and in more than 500 cases. UP's amicus briefs have been cited in the opinions of many state supreme courts, as well as the U.S. Supreme Court. *See, e.g.*, *Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Pitzer Coll. v. Indian Harbor Ins. Co.*, 8 Cal. 5th 93, 104 (2019); *Julian v. Hartford Underwriters Ins. Co.*, 35 Cal. 4th 747, 760 (2005); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 105 A.3d 1181, 1185-86 (Pa. 2014).[2] Since the pandemic began in March 2020, UP has filed dozens of *amicus* briefs in insurance coverage cases involving losses associated with COVID-19.

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[2] A complete listing of all cases in which UP has appeared as *amicus curiae* can be found in UP's online Amicus Project library at https://www.uphelp.org./resources/amicus-briefs.

SUMMARY OF ARGUMENT

Summit Hospitality Group, Ltd. purchased a property insurance policy from Cincinnati Insurance Company to protect its hotels and restaurants against, among other things, a loss of business income caused by civil authority orders denying access to Summit's facilities because of "loss or damage" at third-party properties.

The coverage that Cincinnati agreed to provide to Summit was very broad. After the SARS pandemic put insurers on notice of the risk of business interruption claims based on viral pandemics, most insurers attempted to exclude *all* virus-related losses from their policies. But Cincinnati did not. Indeed, in the very policy it sold to Summit, Cincinnati included a virus exclusion—but explicitly limited the scope of that exclusion to only one portion of its policy, choosing not to even try to exclude virus-related losses for the rest of the policy, including the Civil Authority coverage that is the focus of this *amicus* brief.[3] Under North Carolina law, when a policyholder like Summit purchases a policy that does not attempt to carve out the risk of virus-related losses, it has a reasonable expectation of insurance coverage for such losses if and when they materialize.

[3] This brief does not address Summit's argument that it is entitled to coverage under the Business Income provision of the policy.

This exact scenario occurred in March 2020, when COVID-19 and the causative coronavirus caused North Carolina government officials to issue orders preventing many businesses from accessing their properties as intended. Those orders stated that they were issued because of the "serious *physical* injury" posed by COVID-19 in order to "protect lives and *property*." ER34 ¶¶ 30; 33 (emphasis added). That is because the virus that causes COVID-19 damages the air and surfaces in property. *See* ER33-34 ¶¶ 26, 28, 33, 34.

Despite this, the district court held that Summit had not pleaded a claim for relief, holding that Summit did not plausibly allege that access to its property was "specifically denied." Citing no authority, the district court summarily held that access to Summit's properties had to be completely barred for all people in order for the Civil Authority coverage to be triggered. But courts have rejected that argument, and for good reason: If Cincinnati intended to bar coverage unless an order prohibited access to all people, it was Cincinnati's responsibility to say so. The purpose of business interruption coverage is to protect a policyholder from the loss of income that occurs when it cannot operate its business normally. Therefore, the more reasonable reading of the policy is that a government order that denies access such that a business cannot operate as usual triggers the Civil Authority coverage. The decision below should be reversed and remanded.

BACKGROUND

Cincinnati sold Summit a broadly worded property insurance policy. The Income Endorsement of the policy provides coverage for business income lost when an insured business "is necessarily totally or partially interrupted" because of "direct physical loss or damage from a covered peril" to insured property. ER155. "Covered peril" is not defined in the policy.

Most relevant to this *amicus* brief, the Summit policy also contains an extension of coverage for business income losses occasioned by "Interruption by Civil Authority." Unlike the Income Endorsement, which is triggered by "direct physical loss or damage" to Summit's *own* property, the Civil Authority coverage is triggered by "loss or damage to property *other than*" Summit's property. ER156 (emphasis added). The Civil Authority coverage extension does *not* require that the "loss or damage" be "physical," in further contrast to the Income Endorsement. Instead, the Civil Authority coverage applies if (1) "access to 'covered locations' is specifically denied by an order of civil authority" and (2) that order is a "result of loss or damage to property other than 'covered locations.'" ER156.[4]

Most civil authority provisions in commercial property policies require the loss or damage to other property to be within a certain radius to the insured

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[4] Provisions in quotation marks are defined in the policy. Summit's covered locations are identified in an endorsement to the policy.

property (for example, within five or ten miles of the insured property). However, the policy Cincinnati sold to Summit is unusually broad: It has no requirement that loss or damage to other property occur within a certain distance of Summit's insured locations (ER94); the only requirements to trigger the Civil Authority coverage are those set forth in the final sentence of the preceding paragraph.

As pleaded in the complaint, the government orders issued in North Carolina that prevented Summit's customers from accessing restaurants for in-person dining stated on their face that they were issued as result of property damage. For example, Executive Order No. 118, issued on March 17, 2020, denied access to in-person dining and was issued due to "an immediate threat of serious physical injury" due to COVID-19. ER33–34 ¶¶ 29–30. Executive Order No. 121, issued on March 27, 2020, required individuals to stay at home "to assure adequate protection of lives *and property* of North Carolinians." ER34 ¶¶ 32–33 (emphasis added). The orders also stated that they were issued because COVID-19 was confirmed to be physically present in 60 of North Carolina's 100 counties as of March 27, 2020. ER33 ¶ 33.

ARGUMENT

I. The District Court Erred in Holding That Summit's Policy Unambiguously Required a Total Denial Of Access

The district court erred in holding that Summit did not plausibly allege that access to its property was "specifically denied." Citing no authority, the district

court summarily held that access to Summit's properties had to be completely barred in order for the Civil Authority coverage to be triggered. The district court stated that while access to Summit's properties was "restricted," it was not "denied," and "restricted access is not the same as denied access." ER522–23.

The district court failed to apply North Carolina's rules of insurance policy interpretation when it attempted to construe the policy language. To be entitled to dismissal, Cincinnati would need to show that its interpretation of the policy it sold to Summit unambiguously forecloses coverage. That is because the North Carolina Supreme Court has instructed that any "ambiguity in the meaning of a particular provision will be resolved in favor of the insured and against the insurance company." *Maddox v. Colonial Life & Accident Ins. Co.*, 303 N.C. 648, 650 (1981). "An ambiguity exists where, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions asserted by the parties." *Id.* Furthermore, the "fact that a dispute has arisen as to the parties' interpretation of the contract is some indication that the language of the contract is, at best, ambiguous." *St. Paul Fire & Marine Ins. Co. v. Freeman–White Assocs., Inc.*, 322 N.C. 77, 83 (1988).

Had the district court correctly applied this standard, it would have had no choice but to deny Cincinnati's motion to dismiss. Summit alleged that, as a result of the civil authority orders, access to its properties was "closed" and "restricted,"

that individuals in North Carolina were prohibited from engaging in non-essential travel. *See, e.g.*, ER33-34, 36 ¶¶ 28, 29, 35, 36, 46. These allegations must be accepted as true in a motion to dismiss. *E.g., Doe v. Meron*, 929 F.3d 153, 162 n.3 (4th Cir. 2019).

One of the relevant orders, Executive Order No. 118, denied access to "facilities that sell food and beverage" to offer in-person dining. Likewise, Executive Order No. 121 denied access to restaurants for in-person dining and denied access to hotels for all purposes except lodging and food delivery or carry-out services. Ultimately, this order barred hotel patrons from accessing on-site restaurants, bars, and retail stores or from attending conferences or other events at hotels. The district court order did not explain exactly why it believed that such orders did not constitute a denial of access, much less unambiguously so.

The relevant orders denied Summit the ability to make use of its restaurants and hotels as intended. Customers were not permitted to access the restaurants or hotels for indoor dining. Cincinnati could have easily provided in its policy that access must be "completely" or "totally denied," and it did not. If Cincinnati meant that all access to the property must be barred, it was Cincinnati's responsibility to say so. Furthermore, the policy language must be construed in light of the purpose of business interruption coverage, which is "designed to do for the insured in the event of business interruption caused by [an insured peril], just

what the business itself would have done if no interruption had occurred." *Prudential LMI Com. v. Colleton Enters., Inc.*, 976 F.2d 727, at *2 (4th Cir. 1992) (unpub.) (internal quotations omitted); *see also Pac. Coast Eng'g Co. v. St. Paul Fire & Marine Ins. Co.*, 9 Cal. App. 3d 270, 275 (1970) ("the purpose and nature of 'business interruption' . . . insurance is to indemnify the insured against losses arising from his inability to continue the normal operation and functions of his business, industry, or other commercial establishment" (internal quotations omitted)). Therefore, Summit's interpretation of "specifically denied access" is reasonable, and that term must be construed in Summit's favor. *See Maddox*, 303 N.C. at 650.

Indeed, courts considering other COVID-19 related claims have rejected such a sweeping construction of civil authority coverage grants with language similar to that in the policy at issue here and, for instance, held that "the phrase 'prohibits access'" should be interpreted to focus on "the extent to which the action of civil authority prevented the insured from accessing its premises in a manner that would normally produce actual and regular business income." *Ungarean, DMD v. CNA*, No. GD-20-006544, 2021 WL 1164836, at *10 (Pa. Com. Pl. Mar. 25, 2021); *see also id.* (holding that the policy "does not clearly and unambiguously state that any such prohibition must completely and totally bar *all* persons from *any* form of access to Plaintiff's property whatsoever") (emphasis in

original); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 803-04 (W.D. Mo. 2020) ("the Policies require that the 'civil authority prohibits access,' but does not specify 'all access' or 'any access' to the premises").

Notably, the Supreme Court of the United Kingdom recently rejected an insurer argument that policy language covering loss resulting from "[p]revention of access to the Premises due to the actions or advice of a government or local authority" applied only to "complete closure" of the premises in the context of COVID-19-related claims. *The Financial Conduct Authority v Arch Insurance (UK) Ltd & others* [2021] UKSC 1, ¶¶ 147–148. Instead, that Court held that the correct construction of such provisions is to cover "prevention of access to a discrete part of the premises and/or for the purpose of carrying on a discrete part of the policyholder's business activities," providing the example of a restaurant that was prohibited from offering in-person dining but could permit takeaway or delivery. *Id.* ¶¶ 148, 151. The UK Supreme Court specifically rejected the insurers' argument that total prevention was required for coverage, holding that a "more realistic view is that there is prevention of access to (and inability to use) a discrete part of the premises, namely the dining area of the restaurant, and prevention of access to (and inability to use) the premises for the discrete business activity of providing a dining in service." *Id.* ¶ 152.

Here, the government orders broadly prohibited normal access to Summit's insured premises even if those orders did not absolutely bar access as to all persons. For this reason alone, the Court should reverse the decision below and remand.

II. Summit Pleaded Allegations Establishing That the Coronavirus Causes 'Loss Or Damage' to Property

Because the district court dismissed Summit's Civil Authority claim based on the erroneous conclusion that Summit did not plead that access was specifically denied, it did not consider the second requirement that the qualifying order be a "result of loss or damage to property other than 'covered locations.'" ER156. Indeed, the district court recognized that Summit had pleaded factual allegations establishing that the virus was "physically affecting and damaging" property. ER523. Nonetheless, the district court expressly declined to determine "whether the presence of the coronavirus" would constitute "physical damage or loss" under the policy. *Id.*[5]

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[5] This part of the district court's decision referred to Summit's claim under the Income Endorsement coverage. The court held that it "need not decide whether the presence of the coronavirus would satisfy the policy's requirement for direct physical damage or loss because plaintiff has not alleged that COVID-19 was discovered in any of its covered properties." ER523. But that reasoning does not apply to the civil authority coverage, which is triggered by loss or damage to property *other than* Summit's insured locations. *Id.* As noted, Summit pleaded the requisite loss or damage to third-party property.

This Court should reverse the decision below on the Civil Authority coverage because Summit sufficiently pleaded a "denial of access" and should permit the district court to address this issue in the first instance, should Cincinnati attempt to move to dismiss on that ground, notwithstanding the allegations on the issue in the complaint. However, if this Court reaches this issue, it should hold that Summit sufficiently pleaded that the relevant civil authority orders are a "result of loss or damage to property other than" at Summit's insured locations.

A. The Civil Authority Orders on Their Face Establish That They Were Issued Due to 'Loss or Damage to Property'

Summit has pleaded that the orders that denied access to its properties were issued as a result of physical loss or damage to property other than the insured property. *See, e.g.*, ER33-34 ¶¶ 28, 29, 30, 31, 32, 33, 34. Specifically, Summit pleaded that "[v]arious civil authorities have recognized the presence and loss or damage to property and people by COVID-19 and the life-threatening dangers it has caused and have issued orders that have interrupted access to Summit Hospitality business locations, which include its restaurants and hotels." ER33 ¶ 28. *See also* ER33 ¶ 26 ("COVID-19 has quickly spread around the country causing loss or damage to property and people, including areas in which Summit Hospitality's business locations are located in North Carolina."); ER34 ¶ 31 (noting the presence of COVID-19 at the University of North Carolina properties and the resulting shutdown of campus buildings and residence halls); ER34 ¶ 33

(citing Executive Order No. 121's finding that COVID-19 was physically present in 60 of North Carolina's 100 counties as of March 27, 2020).

These orders include Executive Order No. 118, which closed in-person dining restaurants and stated on its face that it was issued in part due to the rising cases of COVID-19 in North Carolina and the corresponding "immediate threat of *serious physical injury*" posed by COVID-19. N.C. Exec. Order No. 118 (March 17, 2020) (emphasis added). Similarly, Executive Order No. 121 noted that the North Carolina Department of Health and Human Services had documented 763 cases of COVID-19 across 60 counties and stated it was issued in part because the governor of North Carolina has "determined that local control of the emergency is insufficient to assure adequate protection for lives and *property* of North Carolinians." N.C. Exec. Order No. 121 (March 21, 2020) (emphasis added).

These well-pleaded allegations by themselves (supported by the text of the government orders) are sufficient to defeat dismissal and permit Summit to proceed to discovery.

B. The Coronavirus Causes 'Loss or Damage' to Property

Despite the factual allegations that the civil authority orders were issued because of loss or damage to property—which must be accepted at true on a motion to dismiss—Cincinnati argued below that the coronavirus and COVID-19 do not constitute "direct physical loss" to property.

But as discussed in Summit's opening brief, Cincinnati seeks to rewrite its Civil Authority coverage, which by its plain text does not require *physical* loss or damage to property. The word "physical" does not appear in the Civil Authority provision, though it is included elsewhere in the policy before "loss or damage." That Cincinnati omitted such language from the Civil Authority provision shows that Summit would reasonably expect that coverage to be triggered by an order issued due to "loss or damage" to property, regardless of whether it was physical or not. Cincinnati cannot rewrite its policy now that a claim has arisen. At minimum, the omission of "physical" renders this provision ambiguous, and ambiguous provisions must be construed against the insurer and in favor of coverage. *See Maddox*, 303 N.C. at 650.

Even if one were to accept Cincinnati's argument that the Civil Authority coverage unambiguously requires "physical loss or damage" despite Cincinnati's decision to omit the word "physical" from the provision, Summit has pleaded that the virus causes physical loss or damage to property. Summit alleged "a person can get COVID-19 by touching a surface or object that has the virus on it and, as such, COVID-19 physically affects and damages all with which it comes in contact." ER33 ¶ 25; *see also id.* ¶ 26. These factual allegations must be accepted as true at the pleading stage. *See Doe v. Meron*, 929 F.3d at 162 n.3. And for the

reasons discussed below, these allegations would be borne out in discovery and in expert testimony.

First, the World Health Organization and researchers funded by the National Institutes of Health have advised that people can become infected with the coronavirus by touching virus-laden objects and surfaces, and then touching their eyes, nose, or mouth.[6] This mode of transmission—indirect transmission via objects and surfaces—is known as "fomite transmission." A study of a COVID-19 outbreak identified indirect transmission via objects such as elevator buttons and restroom taps as an important possible cause of a "rapid spread" of the coronavirus in a shopping mall in China.[7] Additional research has shown that the coronavirus remained viable for up to 28 days on a range of common surfaces—such as glass, stainless steel, and money—left at room temperature.[8] Further, cleaning of

[6] WHO, *Transmission of Sars-CoV-2: Implications for Infection Prevention Precautions* (July 9, 2020), https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions; Alicia N.M. Kraay et al., *Risk for Fomite-Mediated Transmission of SARS-CoV-2 in Child Daycares, Schools, Nursing Homes, and Offices*, CDC, 27(4) Emerging Infectious Diseases 1229 (Apr. 2021), https://wwwnc.cdc.gov/eid/article/27/4/20-3631_article.

[7] Jing Cai et al., *Indirect Virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China*, 2020, CDC, 26 (6) Emerging Infectious Diseases 1343 (June 2020), https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article.

[8] Shane Riddell et al., *The effect of temperature on persistence of SARS-CoV-2 on common surfaces*, 17 Virology J. 145 (Oct. 7, 2020), https://virologyj.biomedcentral.com/articles/10.1186/s12985-020-01418-7.

surfaces normally does not fully remove the virus, and thus, even after cleaning, some physical residue of the virus, and some alteration of the surface caused by the virus, remains.[9] In fact, Cincinnati *itself* has acknowledged as much, noting in its "tips for sanitation in the age of coronavirus," that, while cleaning may lower the number of germs on a surface, it will not eliminate them.[10] A recent study by the largest hospital network in New York State found that even after trained hospital personnel had used disinfection procedures in COVID-19 patient treatment areas and antechambers, much of the virus survived, indicating that even intense, non-routine cleaning cannot remove the virus from surfaces.[11]

Second, as the Centers for Disease Control has recognized, an infected person can generate virus-laden aerosols that linger in the air well after the person

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[9] Nicolas Castaño et al., *Fomite transmission and disinfection strategies for SARS-CoV-2 and related viruses*, arXiv:2005.11443 (May 23, 2020), https://arxiv.org/ftp/arxiv/papers/2005/2005.11443.pdf.

[10] John Fisher and Steve Heiden, *Tips for Sanitation in the Age of Coronavirus*, The Cincinnati Insurance Companies, https://blog.cinfin.com/2020/03/23/pandemic-coronavirus-tips-sanitation-disinfecting/ (noting that evidence "suggests the virus may remain viable for hours to days on surfaces).

[11] Zarina Brune et al., *Effectiveness of SARS-CoV-2 Decontamination and Containment in a COVID-19 ICU*, 18 Int'l J. Env't Rsch. & Pub. Health 5, 2479 (Mar. 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7967612/.

leaves the area.[12] Moreover, the virus can migrate substantial distances through a building's ventilation systems. One study found the presence of the coronavirus within the HVAC system servicing hospital ward rooms of COVID-19 patients. This study detected SARS-CoV-2 RNA in ceiling vent openings, exhaust filters, and central ducts that were located more than 50 meters from the patients' rooms.[13] Another study concluded that the spread of the coronavirus "was prompted by air-conditioned ventilation," with persons who sat downstream of the HVAC system's air flow becoming infected.[14] Further, based on "epidemiological evidence suggestive of [coronavirus] transmission through aerosol,"[15] federal agencies have recommended that facilities improve their ventilation and HVAC systems by, for example, increasing ventilation with outdoor air and air filtration.[16] Although

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[12] CDC, *Scientific Brief: SARS-CoV-2 Transmission* (last updated May 7, 2021), https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html.

[13] Karolina Nissen et al., *Long-distance airborne dispersal of SARS-CoV-2 in Covid-19 wards*, 10 Sci. Rep. 19589 (Nov. 11, 2020), https://www.nature.com/articles/s41598-020-76442-2.

[14] Jianyun Lu et al., *COVID-19 Outbreak Associated with Air Conditioning in Restaurant, Guangzhou, China*, CDC, 26(7) Emerging Infectious Diseases 1628, 1629 (July 2020), https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article.

[15] EPA, *Indoor Air and COVID-19 Key References and Publications*, https://www.epa.gov/coronavirus/indoor-air-and-covid-19-key-references-and-publications (last visited May 15, 2021).

[16] EPA, *Indoor Air and Coronavirus (COVID-19)*, https://www.epa.gov/coronavirus/indoor-air-and-coronavirus-covid-19 (last visited May 15, 2021); CDC, *COVID-19 Employer Information for Office Buildings* (last

Summit's complaint did not specifically address the coronavirus's impact on the air, Summit could explore through discovery the growing scientific evidence, some of which is described above, highlighting the coronavirus's capacity to dangerously transform property.

Third, Summit pleaded that the actual or imminent threat of viral intrusion onto the surfaces and air of its business properties has materially impaired the safe use and function of those properties. *See, e.g.*, ER33 ¶¶ 26, 28; ER34 ¶¶ 30, 33, 34, 35.

Finally, the physical impact of the coronavirus on property is further confirmed by the many physical remedial and mitigation measures that businesses have undertaken to make their unsafe premises safe and fit for some operations (and which could be developed in discovery or in an amended complaint). Those measures include (a) spatial reconfigurations of premises to avoid crowding and promote outdoor use, (b) repairs or modifications of heating and air conditioning systems to improve ventilation, (c) installation of physical barriers to limit viral spread, (d) intensive cleaning and disinfecting, (e) the modification of physical

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updated Apr. 7, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html; OSHA, *Guidance on Preparing Workplaces for COVID-19* (2020), https://www.osha.gov/Publications/OSHA3990.pdf.

behaviors by requiring social distancing, and various other steps set forth in government guidance.

In sum, whether COVID-19 and the coronavirus cause physical loss or damage to property is an issue of fact to be determined by the factfinder after the benefit of evidence developed by discovery. There is a wealth of scientific studies demonstrating exactly what Summit has alleged—that the coronavirus causes loss or damage to property. Summit should be permitted to explore this evidence through discovery.

C. *Harry's Cadillac* Is Inapposite

In the district court, Cincinnati argued that the decision *Harry's Cadillac-Pontiac-GMC Truck Company v. Motors Insurance Corporation*, 126 N.C. App. 698 (1997) required dismissal. But *Harry's Cadillac* concerned a business interruption provision that differs materially from the Civil Authority provision in Summit's policy in two ways: (1) it required "physical" loss or damage to (2) the *insured's* property. In contrast, Summit's Civil Authority provision (1) does not require "physical" loss or damage and (2) is triggered by loss or damage to *non-*insured property. Because Summit does not need to show that it suffered "physical loss or damage" to its own property to recover under the Civil Authority coverage, *Harry's Cadillac* does not support dismissal of Summit's complaint. *See Kruger v. State Farm Mut. Auto. Ins. Co.*, 102 N.C. App. 788, 789 (1991) ("[I]nterpretation

or construction of the [insurance] contract" must be "derived from the language employed.").

Furthermore, *Harry's Cadillac* does not stand for the proposition that "loss of use of a property where it was not structurally altered is not direct physical loss," as Cincinnati argued in the district court. *See* ER60.

In *Harry's Cadillac*, a car dealership made a claim for business interruption coverage after a snowstorm. 126 N.C. App. at 699. The only "physical loss of or damage to property" claimed by the policyholder was damage to its roof. *Id.* at 700. However, the policyholder did not lose business income due to the roof damage but because of the "inability to gain access to the dealership due to the snowstorm." *Id.*[17]

Harry's Cadillac does not hold that "structural alteration" is needed to constitute physical loss or damage; those words appear nowhere in the opinion. Rather, the court held that as a matter of causation, the insured's loss in business income did not result from the snowstorm. Because the decision concerned causation, it does not support Cincinnati's argument that the coronavirus and

[17] Such losses are often covered under "Ingress/Egress" additional coverage provisions that typically pay for the loss of income triggered by physical loss or damage caused by a covered peril to third-party property that prevents or hinders ingress to or egress from the insured's business. *See, e.g.*, *Fountain Powerboat Indus., Inc. v. Reliance Ins. Co.*, 119 F. Supp. 2d 552, 557 (E.D.N.C. 2000). But there was no such coverage in the policy at issue in *Harry's Cadillac*.

COVID-19 are not perils that cause insured loss or damage. Indeed, it was undisputed that the snowstorm at issue in *Harry's Cadillac* was a covered peril.[18]

Therefore, neither *Harry's Cadillac* nor any other North Carolina state appellate decision supports the dismissal of Summit's complaint.

D. Cincinnati's Civil Authority Coverage Contains No Exclusion For Virus-Related Losses

Finally, a fundamental flaw in Cincinnati's argument that the coronavirus cannot cause "loss or damage" is that Cincinnati promised to insure against "risks" not otherwise excluded or limited by the policy provisions, *Avis v. Hartford Fire Ins. Co.*, 283 N.C. 142, 146 (1973), but the risks that Cincinnati excluded or limited do not extend to virus-related risks.

The very policy at issue demonstrates that Cincinnati knew how to attempt to exclude virus-related losses but chose not to do so with respect to the Civil Authority coverage. The policy that Cincinnati sold to Summit includes an

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[18] Any argument that the "Restoration Period" in the policy limits the Civil Authority recovery is similarly misplaced. The Restoration Period does not appear in the Civil Authority coverage and therefore cannot act as an exclusion or limitation to that coverage. In any case, the Restoration Period does not purport to affect the *trigger* of coverage. Instead, it merely spells out the *duration* of coverage for a covered loss. The Restoration Period description also is entirely consistent with the measures a business must take to respond to the coronavirus. If a policyholder restores unsafe physical spaces to a safe and usable condition by, *e.g.*, installing new partitions or ventilation systems, reconfiguring physical space to permit social distancing, or engaging in deep cleaning and sanitizing, it naturally effects a repair, replacement, or rebuild of its property.

exclusion that applies *only* to the Crisis Event Coverage Endorsement for "loss directly or indirectly caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." ER124-26. Cincinnati chose not to include such exclusionary language in the Civil Authority coverage or in any other portion of its policy.

Furthermore, Cincinnati chose not to include an industry-standard virus exclusion in the policy it sold Summit. In the wake of the SARS pandemic, the Insurance Services Office—an industry trade group that drafts widely used form policies—drafted an "Exclusion of Loss Due to Virus or Bacteria," which it has published and made available for use by insurers in 2006 as a standard-form exclusion.[19] But despite its wide availability and common use in the industry,[20]

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[19] The exclusion states in part: "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." ISO Circular, *New Endorsements Filed To Address Exclusion Of Loss Due To Virus Or Bacteria*, LI-CF-2006-175 (July 6, 2006), https://www.propertyinsurancecoveragelaw.com/wp-includes/ms-files.php?file=2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf. While its omission is noteworthy, UP in this brief takes no position regarding the enforceability of the standard form virus exclusion or whether its presence in a property insurance policy in fact precludes coverage for all virus-related losses.

[20] *See* National Association of Insurance Commissioners, COVID-19 Property & Casualty Insurance Business Interruption Data Call: Part 1, Premiums and Policy Information, at 3 (June 2020), https://content.naic.org/industry_property_casualty_data_call.htm (noting that 83% of business interruption policies contain a virus exclusion).

Cincinnati chose not to include the Insurance Services Office exclusion in the policy it sold to Summit.

The Supreme Court of North Carolina "place[s] great emphasis" on the fact that an insurer chooses not to exclude a known risk. *Mazza v. Med. Mut. Ins. Co. of N. Carolina*, 311 N.C. 621, 630 (1984) (holding that if insurer "intended to eliminate coverage for punitive damages it could and should have inserted a single provision stating 'this policy does not include recovery for punitive damages'"). A policyholder would reasonably expect that because Cincinnati excluded losses due to viruses only with respect to the Crisis Event Coverage Endorsement, other losses caused directly or indirectly by viruses were covered. *See Johnson v. Am. Utd. Life Ins. Co.*, 716 F.3d 813, 822 (4th Cir. 2013) ("The purpose of an exclusion is to take something out of the coverage that would otherwise have been included in it.") (alteration and citation omitted).

If Cincinnati did not want to cover the risk of virus-induced loss of use, it needed to say so specifically, with an on-point virus exclusion that expressly applied to the Civil Authority coverage—not with an after-the-fact judicial re-write of the policy.

CONCLUSION

For the foregoing reasons, the Court should reverse and remand the decision below.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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