APPEAL CASE NO.: 21-1061

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BOULEVARD CARROLL ENTERTAINMENT GROUP, INC.,
PLAINTIFF-APPELLANT
V.
FIREMAN'S FUND INSURANCE COMPANY.,
DEFENDANT-APPELLEE.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY
(CASE NO.: 2:20-CV-11771-SDW-LDW)

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF UNITED POLICYHOLDERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S OPENING BRIEF AND IN SUPPORT OF REVERSAL

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In accordance with Rule 29 of the Federal Rules of Appellate Procedure, 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 action. In support of its Motion, UP states as follows:

1. UP is a unique non-profit, tax exempt, charitable organization founded in 1991 that educates and assists individuals 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's Executive Director has been appointed to twelve consecutive terms as an official consumer representative to the National Association of Insurance Commissioners. In that role, UP works with regulators on matters related to policy sales, claims, and consumer

rights. UP also serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and the Treasury Department.

3. On the topic of business interruption related to COVID-19, UP gave three separate NAIC presentations in 2020. 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 nationwide, coupled with unsupported assertions that paying claims would bankrupt the insurance industry. UP also presented evidence that insurance companies were not candid with regulators about the significance of virus and pandemic-related limitations and exclusions they added to their policies. Although insurance companies had paid business interruption claims stemming from the SARS CoV-1 outbreak, some told regulators they had never paid virus-related losses to justify not reducing rates when they added virus exclusions after the outbreak.

4. In furtherance of its mission, UP chooses cases cautiously and appears as amicus curiae in courts nationwide. UP amicus briefs help provide an intellectual counterweight to the claims of the insurance

industry and facilitate an evenhanded development of the law. UP has filed amicus 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 multiple state supreme courts as well as the U.S. Supreme Court. UP has weighed in on important insurance issues in matters adjudicated before New Jersey courts.

5. 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 might otherwise escape consideration. During the COVID-19 pandemic, UP's commitment to advocating for policyholders' rights is more vital than ever. 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)).

6. UP is substantively aligned with Appellant Boulevard Carroll Entertainment Group, Inc.

7. UP's proposed amicus brief is submitted herewith.

8. In accordance with Rule 29(a)(4)(E), UP avers that Anderson Kill is the sole author of UP's proposed amicus brief; and no party or other person contributed money that was intended to fund preparing or submitting UP's amicus brief;

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

This first day of November 2021.

s/ Nicholas M. Insua
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CERTIFICATE OF SERVICE

I hereby certify that on this first day of November 2021, I electronically filed the foregoing Motion for Leave to Appear as Amicus Curiae on behalf of United Policyholders using the Court's CM/ECF System, which will automatically send-email notifications of such filing to all counsel of record in this case.

Date: November 1, 2021

s/ Nicholas M. Insua
Nicholas M. Insua, Esq.
N.J. State Bar No.: 008552000

Counsel for Amicus Curiae
United Policyholders

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DISCLOSURE STATEMENT

United Policyholders is a non-profit, 501(c)(3) corporation, and does not have a parent corporation. In addition, United Policyholders has no public ownership; thus, no publicly held corporation owns 10% or more of its stock.

STATEMENT OF INTEREST OF AMICUS CURIAE

United Policyholders ("UP") is a highly respected non-profit 501(c)(3) organization. Since its founding in 1991, UP has been a dedicated advocate and information resource for individual and commercial insurance consumers. UP assists consumers purchasing a policy or pursuing a claim. UP hosts a library of publications and videos related to personal and commercial insurance products, coverage, and the claims process at www.uphelp.org.

Grants, donations, and volunteers support UP's work, which is divided into three program areas: Roadmap to Recovery (disaster recovery and claim help), Roadmap to Preparedness (insurance and financial literacy and disaster preparedness), and Advocacy and Action (advancing pro-consumer laws and public policy). Public officials, state insurance regulators, academics and journalists routinely seek UP's input on insurance and legal matters. UP's Executive Director has been

appointed to twelve consecutive terms as an official consumer representative to the National Association of Insurance Commissioners. In that role, UP works with regulators on matters related to policy sales, claims, and consumer rights. UP also serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and the Treasury Department.

On the topic of business interruption related to COVID-19, UP gave three separate NAIC presentations in 2020.[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 nationwide, coupled with

[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:// 3inbm04c0p4j2h1w132uyb5e-wpengine.netdna-ssl.com/wp-content/uploads/ 2020/10/8-12-20_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, https://content.naic.org/sites/default/files/national_meeting/Version%202%20-%20Slideshow%20-%20Consumer%20Liaison%20Cmte% 20-%2008.14.20.pdf.

unsupported assertions that paying claims would bankrupt the insurance industry. UP also presented evidence that insurance companies were not candid with regulators about the significance of virus and pandemic-related limitations and exclusions they added to their policies.[2] Although insurance companies had paid business interruption claims stemming from the SARS CoV-1 outbreak, some told regulators they had never paid virus-related losses to justify not reducing rates when they added virus exclusions after the outbreak.

In furtherance of its mission, UP chooses cases cautiously and appears as amicus curiae in courts nationwide. UP amicus briefs help provide an intellectual counterweight to the claims of the insurance industry and facilitate an evenhanded development of the law. UP has filed amicus 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 multiple state supreme courts as well as the U.S.

[2] Richard P. Lewis *et al.*, Here We Go Again: Virus Exclusion for COVID-19 and Insurers, NU PROP. CASUALTY 360 (Apr. 7, 2020), https://www.propertycasualty360.com/2020/04/07/here-we-go-again-virus exclusion-for-covid-19-and-insurers/?slreturn=20200927114442.

Supreme Court.[3] UP has weighed in on important insurance issues in matters adjudicated before New Jersey courts.

By submitting a brief in this matter, UP[4] 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 might otherwise escape consideration. During the COVID-19 pandemic, UP's commitment to advocating for policyholders' rights is more vital than ever. 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)).

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[3] *See Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Sproull v. State Farm Fire & Cas. Co.*, 126446 (Ill. Sep. 23, 2021); *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).

[4] 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.

LEGAL ARGUMENT

I. STANDARD POLICY LANGUAGE AND DECADES OF CASE LAW CONFIRM THAT WHEN PROPERTY IS RENDERED UNFIT FOR ITS INTENDED PURPOSE, SUCH CIRCUMSTANCES CONSTITUTE "DIRECT PHYSICAL LOSS OR DAMAGE."

Businesses like Boulevard pay substantial premiums for property insurance policies that provide coverage for business interruption. The purpose of business interruption insurance is "to return to the [policyholder] that amount of profit that would have been earned during the period of interruption." *Pennbarr Corp. v. Ins. Co. of N. Am.*, 976 F.2d 145, 154 (3d Cir. 1992).

Boulevard's entitlement to business interruption coverage turns on whether its losses were the result of "direct physical loss or damage" to its property. By holding that "direct physical loss or damage" requires a showing of actual physical damage, the trial court overlooked the plain language in Boulevard's policy, which utilizes the disjunctive "or" to separate the phrases "direct physical loss" and "direct physical damage." As a result, the trial court erred because both phrases cannot mean the same thing.

When property is physically unable to operate as intended – whether from smoke from forest fires, toxic dust from nearby building

collapses, or other microscopic disease-causing agents that could kill inhabitants – the loss and damage are the same and policyholders are entitled to coverage.[5] That is why Boulevard, one of the largest production companies in the United States, is entitled to business interruption coverage. Here, Boulevard's property was deprived of the ordinary use of its property because of the coronavirus and resulting orders of civil authority. In turn, Boulevard's property was rendered unable to generate revenues. Under well-established pre-pandemic precedent, such circumstances constitute "direct physical loss or damage," regardless of whether Boulevard's property was materially altered.

A. For Over 50 Years, Courts Across The Country Have Held That "Direct Physical Loss or Damage" Does Not Require A

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

Showing Of Actual Physical Damage To Trigger Coverage Under Standard-Form Property Insurance Policies.

For over 50 years, courts across the country have held that when a property loses its ability to function as intended, such losses constitute "direct physical loss or damage," regardless of whether the property itself is materially altered. In the 1950s,[6] the 1960s,[7] the 1970s,[8] the 1980s,[9]

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

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

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

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

and the 1990s,[10] respectively, courts consistently held that such losses constitute "physical loss or damage." This trend continued into the

[10] *Hetrick v. Valley Mut. Ins Co.*, 15 Pa. D. & C. 4th 271, 1992 WL 524309, at *3 (Pa. Comm. Pl. May 28, 1992) (finding there would be coverage for loss of use of a house if an outside oil spill made the house uninhabitable); *Largent v. State Farm Fire & Cas. Co.*, 842 P.2d 445, 446 (Or. App. 1992) (noting that insurance company conceded methamphetamine fumes could cause "accidental direct physical loss"); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. App. 1993) (finding costs of methamphetamine odor covered as direct physical loss or damage); *Azalea, Ltd. v. American States Ins. Co.*, 656 So. 2d 600, 602 (Fla. Dist. Ct. App. 1995) (finding damage to sewage treatment plant from chemicals that destroyed a bacteria colony necessary for the plant to operate amounted to "direct damage to the structure"); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, No. 9400837, 1996 WL 1250616, at *2 (Mass. Super. Mar. 15, 1996) (finding oil fumes present in house after discovery of oil leak constituted physical damage); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (finding the presence of asbestos could constitute physical loss or damage); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) (finding a home rendered unlivable by falling rocks had suffered a "direct physical loss to the property"); *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 78 Cal. App. 4th 847, 865 (2000) (holding that the intermingling of a quarter pound of wood shavings in 80,000 pounds of almonds caused physical loss or damage to the almonds even though the almonds were structurally unchanged); *Matzner v. Seaco Ins. Co.*, 9 Mass. L. Rptr. 41, 1998 WL 566658, at *4 (Mass. Super. Aug. 12, 1998) (concluding that "direct physical loss or damage" was ambiguous and could mean either "only tangible damage to the structure of insured property" or "more than tangible damage to the structure of insured property," and that "carbon monoxide contamination constitutes 'direct physical loss of or damage to' property"); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. 98-434-HU, 1999 WL 619100, at *7-8 (D. Or. Aug. 4, 1999) (finding that policyholder could bear its burden to demonstrate that clothes containing mold or mildew suffered "direct physical loss or

2000s,[11] resulting in the insurance industry paying claims for losses caused by a novel coronavirus, SARS-CoV-1.[12] Thereafter, insurance companies continued using the "physical loss or damage" formulation in their standard-form policies, and courts continued finding in favor of

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damage" if it established "at trial a class of garments which has increased microbial counts and that will, as a result, develop either an odor or mold or mildew"); *Board of Educ. v. International Ins. Co.*, 720 N.E.2d 622, 625-26 (Ill. App. 1999) (citing liability insurance coverage cases finding that incorporation of asbestos into buildings caused "property damage," defined under liability policies to be "physical injury to or destruction of tangible property").

[11] *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 825-26 (Minn. 2000) (holding that "[a] principal function of any living space [is] to provide a safe environment for the occupants" and "[i]f rental property is contaminated by asbestos fibers and presents a health hazard to the tenants, its function is seriously impaired"); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. 01-1362, 2002 WL 31495830, at *8-*9 (D. Or. June 18, 2002) (concluding that mold damage to house could constitute "distinct and demonstrable" damage and that inability to inhabit a building may constitute "direct, physical loss"); *Cooper v. Travelers Indem. Co. of Ill.*, No. 01-cv-2400, 2002 WL 32775680, at *1 (N.D. Cal. Nov. 4, 2002) (holding that the presence of coliform bacteria and E.coli could constitute physical loss or damage); *Graff v. Allstate Ins. Co.*, 54 P.3d 1266, 1269 (Wash. Ct. App. 2002) (holding that the presence of methamphetamine vapors could constitute physical loss or damage).

[12] The coverage included a $16 million payout to one hotel chain, Mandarin Oriental International. Gavin Souter, Hotel Chain to get Payout for SARS-Related Losses, Nov. 02, 2003, https://www.businessinsurance.com/article/%2020031102/story/100013638/hotel-chain-to-get-payout-for-sars-related-losses (last visited October 29, 2021).

coverage, even in the absence of actual physical damage.[13] Courts nationwide followed this precedent for the next decade, right up until the COVID-19 pandemic.[14]

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[13] *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 824–27 (3d Cir. 2005) (holding that the presence of E. coli could constitute physical loss or damage); *De Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 722-23 (Tex. App. Mar. 31, 2005) (finding mold damage constituted "physical loss to property"); *Schlamm Stone & Dolan, LLP v. Seneca Insurance Co.*, No. 603009/ 2002, 2005 WL 600021, at *4 (N.Y. County Mar. 16, 2005) (finding "the presence of noxious particles, both in the air and on surfaces of the plaintiff's premises, would constitute property damage under the terms of the policy"); *Cook v. Allstate Ins. Co.*, No. 48D02-0611-PL-01156, 2007 Ind. Super. LEXIS 32, at * slip op. at 9-10 (Ind. Super. Ct. Madison County Nov. 30, 2007) (finding infestation of house with brown recluse spiders constituted "sudden and accidental direct physical loss" to the house, and "[c]ase law demonstrates that a physical condition that renders property unsuitable for its intended use constitutes a 'direct physical loss' even where some utility remains and, in the case of a building, structural integrity remains"); *Brand Mgt., Inc. v. Maryland Cas. Co.*, No. 05-cv-02293, 2007 WL 1772063, at *2 (D. Colo. June 18, 2007) (noting that where a sushi manufacturer which closed for 15 days to disinfect its premises after discovery of listeria contamination, the insurance company voluntarily paid the business income claim); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co.*, No. 05-1315, 2007 WL 464715, at *8 (D. Or. Feb. 7, 2007) (finding "physical loss or damage" to a policyholder's heat treater for medical implants when a lead hammer was mistakenly left in the treater; noting that "[t]here 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'").

[14] *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 968 A.2d 724, 734 (N.J. Super. App. Div. 2009) ("In the context of this case, the electrical grid was 'physically damaged' because, due to a physical incident or series of incidents, the grid and its component generators and transmission lines were physically incapable of performing their essential function of providing electricity."); *Manpower Inc. v. Insurance Co. of the State of Pa.*, No. 08C0085, 2009 WL 3738099, at *1 (E.D. Wis. Nov. 3, 2009) (finding "direct physical loss … or damage to" a building adjacent to a building which collapsed despite the fact that the collapse did not cause any noticeable damage to the policyholder's occupied space); *Travco Ins. Co. v. Ward*, No. 2:10cv14, 2010 WL 2222255, at *8-9 (E.D. Va. June 3, 2010) (finding a house built with drywall manufactured in China, that emitted toxic gases, causing the policyholder to move out, had suffered direct physical loss, although it was "physically intact, functional and ha[d] no visible damage;" noting that the majority of cases nationwide find that "physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces"); *In re Chinese Mfr'd Drywall Prods. Liab. Litig.*, 759 F. Supp. 2d 822, 831 (E.D. La. 2010) (finding 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 and/or uninhabitable"); *Association of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1068 (D. Haw. Apr. 9, 2013) (applying Hawai'i law) (finding intrusion of arsenic into roof caused "direct physical loss or damage" to the roof); *Gregory Packaging*, 2014 WL 6675934, at *5–6 (*see* n.7 *supra*); *Mellin v. Northern Sec. Ins. Co.*, 115 A.3d 799, 803-05 (N.H. 2015) (holding that pervasive odor of cat urine was "physical loss" to condominium); *Oregon Shakespeare Festival*, 2016 WL 3267247, at *5-6 (*see* n.7 *supra*).

B. On Two Prior Occasions, This Court Rejected The Notion That "Direct Physical Loss or Damage" Requires A Showing Of Actual Physical Damage.

On two prior occasions, this Court analyzed, and rejected, the notion that "direct physical loss or damage" requires a showing of actual physical damage to trigger coverage under a commercial property insurance policy. *See e.g.*, *Port Auth. of New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002); *Hardinger*, 131 Fed. Appx. at 825-26. Both decisions are instructive, given both cases involved incorporeal substances, much like the coronavirus. In *Port Authority*, for example, this Court considered an insurance policy that insured against "physical loss or damage" as applied to the existence of asbestos in the policyholder's property. Although the Court ruled against the policyholder, the Court set forth a standard which it applied in determining whether the presence of asbestos in a building constitutes "physical loss or damage" to property. Specifically, the Court explained that "physical loss or damage" to a structure can occur when:

> [a]n actual release of asbestos fibers from asbestos containing materials has resulted in contamination of the property such that its *function is nearly eliminated or destroyed*, or *the structure is made useless or uninhabitable*, or if there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such loss of utility.

Id. at 236 (emphasis added).

Even more significant is the holding in *Hardinger* where this Court considered an insurance policy that insured against "direct physical loss" as applied to the existence of E. coli in the policyholder's property. *Hardinger*, 131 Fed. Appx. at 825. It was undisputed the property was contaminated with E. coli. Yet, the insurance company maintained the loss did not constitute "physical loss." This Court rejected the insurance company's argument. In so doing, this Court adopted the standard set forth in *Port Authority*, and held that "where sources unnoticeable to the naked eye have allegedly reduced the use of property to a substantial degree," such losses could constitute "direct physical loss." *Id.* Ultimately, this Court held there were genuine issues of fact regarding whether the functionality of the property was nearly eliminated or destroyed, or whether the property was made useless or uninhabitable. *Id.* at 826.

The insurance industry is well aware of these decisions, and has been for years. In 2006, a leading trade organization called the Insurance Services Office ("ISO"), which drafts standard policy forms and endorsements, admitted that its responsibilities include monitoring such

decisions and updating its forms and endorsements accordingly.[15] Thus, if only actual property damage was meant to be a prerequisite for coverage, the insurance industry had over 50 years to make that requirement clear, but failed to do so. Instead, the insurance industry continued selling policies, promising coverage when there is "physical loss or damage," and was fully aware that this phrase does not require actual physical damage to property in order to trigger coverage. Based on this precedent, the trial court erred in dismissing Boulevard's complaint, and holding that the phrase "direct physical loss or damage" requires a showing of actual physical damage.

II. NEW JERSEY LAW IS IN ACCORD WITH WELL-ESTABLISHED PRE-PANDEMIC PRECEDENT IN HOLDING THAT "DIRECT PHYSICAL LOSS OR DAMAGE" DOES NOT REQUIRE A SHOWING OF ACTUAL PHYSICAL DAMAGE.

Boulevard's insurance policy provides coverage for losses as a result of "direct physical loss or damage" to property. In holding that "direct physical loss or damage" is limited to actual physical damage, the trial court erred because its holding is in direct conflict with New Jersey law.

[15] ISO Circular dated July 6, 2006 ("ISO Circular"), at 7 of 13.

A. Under New Jersey Law, Insurance Policies Are Interpreted Broadly, And In Favor Of Coverage.

New Jersey courts have long given special scrutiny to insurance policies because of the stark imbalance between insurance companies and policyholders in their respective understanding of the terms and conditions of insurance policies. *Gibson v. Callaghan*, 730 A.2d 1278, 1282 (N.J. 1999). Indeed, insurance policies are contracts of adhesion and, as such, are subject to special rules of interpretation. *Longobardi v. Chubb Ins. Co.*, 582 A.2d 1257, 1260 (N.J. 1990) (citing *Meier v. N.J. Life Ins. Co.*, 503 A.2d 862, 869 (N.J. 1986)). Thus, New Jersey courts apply different rules to the interpretation of insurance policies and "assume a particularly vigilant role in ensuring their conformity to public policy and principles of fairness." *Voorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255, 1260 (N.J. 1992).

One such rule of insurance policy interpretation is the doctrine of *contra proferentem*, which provides that "[i]f the controlling language will support two meanings, one favorable to the insurer, and the other favorable to the insured, the interpretation sustaining coverage must be applied." *Mazzilli v. Acc. & Cas. Ins. Co.*, 170 A.2d 800, 803 (N.J. 1961); *see also Doto v. Russo*, 659 A.2d 1371, 1376 (N.J. 1995) ("New Jersey

courts often have construed ambiguous language in insurance policies in favor of the insured and against the insurer"); *Salem Grp. v. Oliver*, 607 A.2d 138, 139 (N.J. 1992) ("[w]hen a policy fairly supports an interpretation favorable both to the insured and the insurer, the policy should be interpreted in favor of the insured"). Under the rule of *contra proferentem*, courts construe ambiguities in favor of coverage; thus, "if an insurance policy's terms are capable of supporting two distinct outcomes as to whether there is coverage, the subject language must be interpreted in favor of the insured." *Customized Distrib. Services v. Zurich Ins. Co.*, 862 A.2d 560, 564 (N.J. App. Div. 2004).

In determining whether an insurance policy is ambiguous, New Jersey courts will consider whether an average policyholder could reasonably understand the scope of coverage, and whether better, crisper drafting could put the issue beyond debate. *Gibson*, 730 A.2d at 1282 (citing *Doto*, 659 A.2d at 1377); *see also Kook v. Am. Sur. Co. of N.Y.*, 210 A.2d 633, 638 (N.J. App. Div. 1965) ("[C]onsideration should be given [to] whether alternative or more precise language, if used, would have put the matter beyond reasonable question."). Where an ambiguity is caused by the language selected by the insurance company, *contra proferentem*

applies. *CPS Chem. Co., Inc. v. Cont'l Ins. Co.*, 536 A.2d 311, 318 (N.J. App. Div. 1988).

Further, "[w]hen there is ambiguity in an insurance contract, courts interpret the contract to comport with the reasonable expectations of the insured, even if a close reading of the written text reveals a contrary meaning." *Zacarias v. Allstate Ins. Co.*, 775 A.2d 1262, 1264 (N.J. 2001). In fact, if the insurance policy's language is "insufficiently clear to justify depriving the insured of her reasonable expectation that coverage would be provided," the policy must be interpreted in favor of the policyholder. *Sparks v. St. Paul Ins. Co.*, 495 A.2d 406, 408 (N.J. 1985); *see also Royal Ins. Co. of Am. v. KSI Trading Corp.*, 563 F.3d 68, 74 (3d Cir. 2009).

B. New Jersey Law Compels A Finding That Boulevard's Claim For Relief Is Based On "Physical Loss" Of Its Property

Courts applying New Jersey law have univocally held that loss of use of property and inability of property to function as intended constitutes a "physical loss" covered under "all-risk" insurance policies like the one at issue here. Under New Jersey law, "physical loss" does not require "that there be any actual physical damage to or alteration of the material composition of the property." *Customized Distribution Services*, 862 A.2d at 565.

That case involved a warehouseman's liability policy that covered "direct physical loss." The warehouse faced liability for shipping a manufacturer's drink product out of rotation with the drink's expiration date – forcing the manufacturer to sell the product at a discount because of its impending expiration at the time it reached the retail market. The insurance company denied coverage arguing the misrotation of the product did not cause "direct physical loss" because the product had not expired or "gone bad." Rather, because of the shortened expiration period, the product merely could not be sold at full market value. The insurance company argued the reduction in value did not constitute a "direct physical loss." The Appellate Division disagreed, holding the term "direct physical loss" was ambiguous and, therefore, had to be construed against the insurance company and in favor of coverage. *Id.* Specifically, "[s]ince 'physical' can mean more than material alteration or damage, it was incumbent on the insurer to clearly and specifically rule out coverage in the circumstances where it was not to be provided, something that did not occur here." *Id.* at 566. Accordingly, the court held the term included coverage for the drink product even though there was no physical material alteration to the product's composition. *Id.* at 565.

Subsequently, in *Phibro Animal Health Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 446 N.J. Super. 419, 437 (App. Div. 2016), the New Jersey Appellate Division reaffirmed that property damage can exist even in the absence of a material alteration in property. The court in *Phibro* found that broiler chickens with a diminished size and weight, caused by the unintended effects of their feed, constituted property damage under a commercial general liability policy. *Id.* The damage did not need to be physiological to constitute a covered loss. *Id.*

Wakefern was the first New Jersey case to address the requirement of "direct physical loss or damage" in property policies as a coverage trigger. 406 N.J. Super. 524. In *Wakefern*, the Appellate Division found the term "physical damage" to be ambiguous and held that summary judgment should have been granted to the policyholders – not the insurance company. In so holding, the Appellate Division concluded that "physical damage" included loss of "functionality" even if the insured property remained intact and even if the loss of functionality was temporary. 406 N.J. Super. at 543, 544.

The claim in *Wakefern* arose out of the 2003 electrical blackout across the Northeast United States. Wakefern, a collective of

supermarkets, suffered food spoilage and business interruption as a result of the blackout. Wakefern's property insurance policy provided coverage for off-site power failure if caused by "physical damage." Wakefern's insurance company, Liberty Mutual, denied coverage claiming that no "physical damage" had occurred to trigger its policy. Rather, Liberty Mutual argued that the electrical grid had properly shut itself down in order to prevent physical damage, and the shutdown had been effective. The trial court agreed and granted Liberty Mutual summary judgment.

The Appellate Division reversed. It held the term "physical damage," which was undefined in the policy, was ambiguous, and under general principles of contract interpretation had to be interpreted in favor of coverage and in accordance with the policyholder's reasonable expectations. *Id.* at 538-39. The Appellate Division found the trial court had erred in defining "physical damage" "too narrowly, in a manner favoring the insurer and inconsistent with the reasonable expectations of the insured." *Id.* at 540. The Appellate Division concluded the electrical grid, indeed, had been physically damaged because it was rendered "physically incapable of performing [its] essential function of providing

electricity." *Id.* Significant to the Appellate Division's holding was its observation that the supermarkets "paid for what they believed was protection against…the loss of electrical power to refrigerate their food," and "the average policyholder in plaintiffs' position would not be expected to understand … the narrowly parsed definition of 'physical damage' which the insurer urges us to adopt." *Id.* at 541. Accordingly, the Appellate Division stated "if Liberty intended that its policy would provide no coverage for an electrical blackout, it was obligated to define its policy exclusion more clearly." *Id.*

The *Wakefern* court concluded "one could certainly argue that the system was not physically damaged;" however, "from the perspective of the millions of customers deprived of electric power for several days, the system certainly suffered physical damage, because it was incapable of providing electricity." *Id.* The court held that "the loss of function of the system as a whole" constituted physical damage. *Id.*

In *Gregory Packaging, Inc.,* the New Jersey District Court held the inability to use property as intended constituted physical loss or damage even in the absence of any material alteration to the property. In that case, ammonia was inadvertently released in a building. 2014 WL

6675934, *6. There was no allegation that the ammonia physically damaged or altered the property. Because of the health threat raised by the presence of ammonia, however, the government authorities ordered the building evacuated, and it remained unoccupied for approximately one week. Although there was "no genuine dispute" that the ammonia release rendered the building unfit for human use until after the ammonia dissipated, *id.* at *4, the insurance company, nevertheless, argued that the release did not cause "direct physical loss or damage," because there was no "physical change or alteration to insured property requiring its repair or replacement," *id.* at *2. The insurance company further argued the policyholder's inability to use the building as intended did not constitute "physical loss or damage." *Id.*

The court rejected the insurance company's argument. It held that "the ammonia discharge inflicted 'direct physical loss or damage to' Gregory Packaging's facility, as that phrase would be construed under New Jersey law by the New Jersey Supreme Court, because the ammonia physically rendered the facility unusable for a period of time." *Id.* at *6. Thus, in *Gregory Packaging*, the loss of the building's essential

functionality – similar to the loss of the functionality of the electric grid in *Wakefern* – constituted a "physical loss or damage."

In so holding, the *Gregory Packaging* court noted the Third Circuit Court of Appeals, in *Port Authority*, 311 F.3d at 236, also held under New Jersey law that "property can be physically damaged, without undergoing structural alteration, when it loses its essential functionality." *Gregory Packaging*, 2014 WL 6675934 at *5. Specifically, in *Port Authority*, the Third Circuit stated that the presence of free-floating asbestos in the air of an insured building, which made the building uninhabitable and unusable, could constitute a distinct physical loss covered under an all-risk policy. *Port Authority*, 311 F.3d at 236.

Recently, in *Optical Services USA/JC1 v. Franklin Mutual Insurance Co.*, the court applied these principles of New Jersey law to a coronavirus case. Case No. 20-cv-08069 (N.J. Law Div. (Bergen Co.) Aug. 13, 2020). The insurance company in *Optical Services* brought a motion to dismiss the plaintiff's coronavirus-related business interruption insurance claim on the basis that no "direct physical loss or damage" had occurred. The policyholder relied on *Wakefern*, and asserted the New Jersey Governor's executive order "deemed all non-essential business

unsafe given the risk of transmission of Covid-19 thus the closure order had a specific relationship to a specific condition within the plaintiff's business." The court denied the insurance company's motion. It found *Wakefern* "compelling" in the context of a motion to dismiss.

Similarly, in *Westfield Area YMCA v. The North River Insurance Company*, the court denied the insurance companies' motion to dismiss a COVID-19-business interruption claim for losses incurred as a result of the YMCA's shutdown of its facilities due to the coronavirus, tendered under a policy with a virus exclusion. Case No. UNN-L-002584-20, (N.J. Law Div. (Union Co.) Jan. 8, 2021). The court held that under New Jersey's liberal pleading standards for judging the sufficiency of pleadings on a motion to dismiss, the YMCA complaint was "certainly sufficient." The court, referring to *Wakefern*, acknowledged the existence of "case law in New Jersey that suggests that the physical damage doesn't have to be physical on the premises." The court expressly found that *Wakefern* "stand[s] for the proposition that...coverage for physical loss or damage to plaintiff's property does not necessarily have to be direct physical loss or damage." The YMCA court stated that in *Wakefern*, for example, "there was an electrical issue that was off the premises that

shut down the Wakefern facility." Thus, *YMCA's* holding also supports the conclusion that coverage for physical loss of property does not require a tangible physical alteration of the insured property.

These decisions establish that loss of functionality of property caused by a dangerous condition constitutes "direct physical loss or damage" under a property insurance policy, and that physical alteration or actual physical damage of the property is not required. At a minimum, "direct physical loss" is ambiguous as a matter of law and must be construed in favor of coverage.

Accordingly, the trial court erred in holding that "direct physical loss or damage" is limited to actual physical damage; thus, this Court should reverse.

III. THE TRIAL COURT RAN AFOUL OF THE *ERIE* DOCTRINE BY RELYING TOO HEAVILY ON OTHER FEDERAL COURT CASES, AND NOT THE DECISIONAL LAW OF THE NEW JERSEY APPELLATE DIVISION.

The trial court failed to apply *Erie*, and in doing so relied too heavily on other federal court cases, rather than the decisional law of the New Jersey Appellate Division. *Erie* is premised on the notion that a federal court sitting in diversity should reach the same result as that of the state's highest court. *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 111

(1945); *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). *Erie* requires federal courts to look to a final decision of a state's highest court and, if none, then to predict how the state's highest court would decide the issue. *Canal Ins. Co. v. Underwriters at Lloyd's London*, 435 F.3d 431, 436 (3d Cir.2006).

Indeed, in predicting how the New Jersey Supreme would resolve whether Boulevard's losses constitute "direct physical loss or damage," the trial court was required to take into consideration: (1) what that court has said in related areas; (2) the decisional law of the state intermediate courts; (3) federal cases interpreting state law; and (4) decisions from other jurisdictions that have discussed the issue. *Id.* Yet, the trial court's opinion is devoid of any analysis regarding these considerations. In fact, there is no analysis regarding any of the New Jersey Appellate Division cases cited above. As explained in *Covington*, intermediate state court decisions are relevant and should not be disregarded unless the court is "convinced by other persuasive date that the highest court of the state would decide otherwise." *Covington*, 381 F.3d at 218 (quotations and citations omitted). Because the New Jersey Appellate Division has unequivocally held that "direct physical loss or damage" does not require

a showing of material alteration to property, and because there is no data to suggest the New Jersey Supreme Court would hold otherwise, the trial court erred by disregarding *Wakefern*, *Phibro*, and *Customized Distribution*. Accordingly, this Court should reverse on that basis, given the trial court decision runs afoul of *Erie*.

IV. THE TRIAL COURT VIOLATED THE APPLICABLE STANDARD ON A 12(B)(6) MOTION BECAUSE THE INSURING AGREEMENT IN BOULEVARD'S POLICY DOES NOT COMPLETELY REFUTE THE POSSIBILITY OF COVERAGE.

In dismissing Boulevard's complaint, the trial court acknowledged, but failed to follow, the applicable standard in evaluating a 12(b)(6) Motion:

> In considering a Motion to Dismiss under Rule 12(b)(6), the Court must accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." Phillips, 515 F.3d at 231 (external citation omitted). However, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

Op. at *1. Dismissal is improper under 12(b)(6) unless the policy provision at issue is clear, unambiguous, and capable of no other reasonable interpretation. Here, because Boulevard's policy is

ambiguous, that standard could not be met. Indeed, the trial court's dismissal disregarded, and certainly failed to interpret the policy in favor of Boulevard as required under New Jersey law, the extensive allegations in the complaint concerning the direct physical loss or damage to Boulevard's property as a result of SARS-CoV-2.

Legal scholars and insurance law experts have criticized courts for dismissing COVID-19 business interruption cases before the facts have been developed. See Prof. Erik S. Knutsen and Prof. Jeffrey W. Stempel, Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic, 27 CONN. INS. LAW J. 185, 192 (2020) ("Judges granting dismissal motions without any opportunity for discovery, and denying any possibility of coverage at the metaphorical starting gate, have undermined the traditional American commitment to jury trials as well as widely accepted legal principles of insurance policy construction such as interpreting ambiguous terms against the drafter and considering policyholder reasonable expectations."). Most of these premature dismissals improperly rely upon factual presumptions that judges are not qualified to make. *See id.* at 193–94 ("Notwithstanding some shining exceptions, the first wave of decisions in these cases has

been largely disappointing and reflects poorly on the legal and hyper-textual analysis of the bench.").

Many courts, in particular state courts, are appropriately denying motions to dismiss. One example is a recent state court in Illinois, which observed that too many courts are rushing to judgment on COVID-19 coverage disputes, blindly following decisions from other courts instead of focusing on the allegations before them:

> Economists refer to this as an appeal to "herding behavior"—a process by which group-think replaces individual decision-making. . . . Judges are not sheep, and I do not decide a case by counting noses. Further, the "herd" can be wrong. *See, e.g.,* A. Daughety et al., "Stampede to Judgment: Persuasive Influence and Herding Behavior by Courts," 1 American Law and Economics Review 158 (Fall 1999).

See JDS Construction Group, LLC, and 9 Dekalb Fee Owner LLC v. Continental Casualty Co., Case No. 2020 CH 5678, at 4 (Ill. Cir. Ct. Oct. 25, 2021). A state court in Connecticut similarly observed: "The rush to judgment on the question of physical damage in some courts—without reasoning and without evidence—has been ill advised. For now, in this court, and for this policy, it would be wrong to rush." *New Castle Hotels LLC v. Zurich American Ins. Co.*, No. X07-HHD-CV-21-6142969-S at p. 7

(Conn. Super. Ct. Sept. 7, 2021).[16] Indeed, that court sharply criticized other decisions that adopt insurance company views without carefully considering the arguments and evidence on a case-by-case basis:

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[16] *See also, e.g.*, *MacMiles LLC v. Erie Insurance Exchange*, No. GD-20-007753 at p. 12, n. 12 (Pa. Com. Pl. May 25, 2021) ("merely accepting the non-binding decisions of other courts 'by the purely mechanical process of searching the nations courts for conflicting decisions' amounts to an abdication of this Court's judicial role"); *Ungarean v. CNA et al.* No.: GD-20-006544 at p. 12, n. 12 (Pa. Com. Pl. March 22, 2021) (same); *Brown's Gym, Inc. v. The Cincinnati Ins. Co.*, No. 20 CV 3113, 2021 WL 3036545, at *19 (Pa. Com. Pl. July 13, 2021) ("State trial courts throughout the nation have agreed with the foregoing rationale articulated in the federal case law in denying insurers' attempts to dismiss business interruption insurance claims filed by insureds who assert that COVID-19 was present on their covered property"); *Goodwill Industries of Orange County, California v. Philadelphia Indemnity Insurance Co.*, No. 30-2020-01169032-CU-IC-CXC at p. 3 (Cal. Super. Ct. Jan. 28, 2021) (stating that the Federal cases relied on by the insurance company "are not binding on this court and were decided under a different standard" [compared to a motion to dismiss] and that unlike the insurance company's cases, the plaintiff did allege that the coronavirus and COVID-19 caused physical loss or damage to the property at issue, which allegations must be accepted as true); *Snoqualmie Entertainment Authority v. Affiliated FM Ins. Co.*, No. 21-2-03194-0 SEA, 2021 WL 4098938, at *6 (Wash. Super. Sep. 3, 2021) ("This Court is not persuaded by [another judge's] reliance on the opinions of other federal district court opinions across the country that applied the laws of other states, nor its holding that the undefined phrase 'all-risks of physical loss or damage' cannot be reasonably interpreted by the average lay person to include the insured's inability to physically use, control, or manipulate its property as a result of the COVID-19 closure orders and Tribal resolutions"), *Boardwalk Ventures CA LLC v. Century-National Insurance Company*, 20STCV27359 (Cal. Super. Ct. Mar 18, 2021) (rejecting the "litany of unpublished federal district court cases" cited by the insurance company

> Zurich claims that there is nothing "physical" about the losses or damage flowing from the COVID-19 virus. Zurich notes that some courts in other jurisdictions have addressed this issue – remarkably at the pleading stage – remarkably with little apparent deliberation. Yes, Zurich can cite decisions where courts agree with it. Some of them merely note that claimants haven't even alleged physical damage using the words "physical". Others go further. The virus damages lungs not property, they say.
>
> But can this merely be asserted to become true? Maybe this kind of result is the product of an expansive view of "plausibility" under the pleading standard adopted by the United States Supreme Court in Bell Atlantic Corp. v. Twombly. But Connecticut's standard prefers a ruling from the evidence rather than the gut.

New Castle Hotels, slip. op. at 5.

In addition, most cases cited by the insurance companies improperly rely on an overstated and erroneous conclusion in a frequently cited insurance treatise. *See* Richard P. Lewis, Lorelie S. Masters, Scott D. Greenspan and Chris Kosak, *Couch's "Physical*

"in support of the proposition that courts applying California law have 'uniformly dismissed lawsuits like the instant action'" – recognizing that these cases are not binding and the dismissal was not proper); *Risinger Holdings, LLC v. Sentinel Ins. Co., Ltd.*, No. 1:20-CV-00176, 2021 WL 4520968, at *12 (E.D. Tex. Sept. 30, 2021) (holding that the policy's use of "physical loss" is ambiguous and concluding that the policyholder "may have suffered direct physical loss due to Governor Abbott's lockdown order by being deprived of the use or full use of the physical space of its covered property, or alternately, because of the severe material losses it endured when it was forcibly excluded from its businesses").

Alteration" Fallacy: Its Origins and Consequences 56:3 TORT, TRIAL & INS. PRAC. L.J. 621 (Fall 2021). This Court, however, was not misled by that entry. *See Hardinger*, 131 Fed. Appx. at 825-26 (rejecting insurance company's argument that the presence of E. coli, which renders a property unable to function as intended, does not constitute direct physical loss). Notably, the editor responsible for the entry published an article acknowledging the mistake. The article contradicted the Couch treatise's conclusion that structural alteration was required to trigger coverage under a commercial property policy, stating instead: "[t]he modern interpretive trend is liberalizing the meaning of direct physical loss to focus upon loss of use as opposed to direct physical loss involving physical alteration." Stephen Plitt, "Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alteration" CLAIMS JOURNAL (Apr. 15, 2013), available at https://amp.claimsjournal.com/magazines/idea-exchange/2013/04/15/226666.htm (emphasis added).

Because the right to a jury trial is fundamental to our system of justice, this Court should reverse the trial court and allow Boulevard to have its day in court. The dismissal centered on factual assumptions the

court was in no position to make in the context of a 12(b)(6) motion. The dismissal stands to threaten the rights of all policyholders and therefore should be reversed.

CONCLUSION

On the basis of all of the foregoing, this Court should reverse the decision of the District Court.

This first day of November 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(G)(1) because it contains 6,493 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century.

Date: November 1, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on this first day of November 2021, I electronically filed the foregoing Brief on behalf of *Amicus Curiae* United Policyholders using the Court's CM/ECF System, which will automatically send-email notifications of such filing to all counsel of record in this case.

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