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SUPREME COURT

No. 2021AP000463

Colectivo Coffee Roasters, Inc.; Tandem Restaurant, LLC; Wrecking Crew, Inc.; Iron Grate BBQ Company, Inc.; East Troy Brewery Company; Logan & Potter, Inc.; Buckley's Kiskeam Inn, LLC; Other Ones MKE, LLC; BCT 5, LLC; Company Brewing, LLC; Bryhopper's Bar & Grill, LLC; The River's Bar, LLC; Etcetera by BLH, LLC; REMBS, LLC; KRO Bar, Inc.; Rivermill, Inc.; Pork's Place of Kaukana, LLC,

Plaintiffs-Respondents,

v.

SOCIETY INSURANCE, A MUTUAL COMPANY,

Defendant-Appellant.

On Appeal from the Circuit Court of Milwaukee County,
Civil Division, No. 2020CV002597
The Honorable Laura Gramling Perez, Presiding

UNITED POLICYHOLDERS' *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS-RESPONDENTS

November 18, 2021

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The uncontrolled spread of SARS-CoV-2 throughout Wisconsin, like a spreading wildfire, constitutes a natural disaster that insurance should cover. One of the hardest-hit industries undoubtedly is the tavern and restaurant industry, which includes Plaintiffs-Respondents Colectivo Coffee Roasters, Inc. and all other named plaintiffs here ("Plaintiffs"). Their inability to use their properties, due to a physical condition outside their control rendering their properties unsafe for intended uses, is precisely the type of "physical loss" of property that Defendant-Appellant Society Insurance, Inc.'s ("Society") "all-risk" insurance policies are meant to insure. Yet, Society denied Plaintiffs' claims, asserting that the actual or alleged presence of coronavirus on or around their properties did not constitute "direct physical loss of or damage to" their properties. Society's position is contrary to Wisconsin law.

I. Under Wisconsin law, the airspace within the boundaries of a property is considered part of the real property.

Plaintiffs allege that the coronavirus permeated the airspace of their properties and that aerosolization is a primary means of transmitting SARS-Cov-2, making such property physically dangerous. (App. 263 – 265).[1]

This Court has recognized that real property includes a "three-dimensional property interest in airspace . . . bounded by the length and width of the person's land holdings . . . and rises up to approximately the height of the government-defined minimum safe altitude of flight," and that such airspace is susceptible to physical intrusions. *Brenner v. New Richmond Reg'l Airport Comm'n*, 2012 WI 98, ¶62, 343 Wis. 2d 320, 344, 816 N.W.2d 291, 303. Thus, airspace within a property's boundaries is a part of real property that is susceptible to physical damage. Indeed, insurers know how to, and do, exclude air from coverage when they want to. *First & Stewart Hotel Owner, Ltd. Liab. Co. v. Fireman's Fund Ins. Co.*, No. 2:21-cv-

[1] Society admits that Plaintiffs allege the presence of SAR-Cov-2 on their properties is "likely." Def.s' Br. at 59. The burden of proof in a civil case is "more likely than not." Plaintiffs' allegations must be taken as true.

00344-BJR, 2021 U.S. Dist. LEXIS 137146, at *7 (W.D. Wash. July 22, 2021) (exclusion of air as covered property).

The Society policies do not exclude air. Hence, Plaintiffs have shown "direct physical loss of or damage to" their properties by alleging the presence of SARS-CoV-2 at their properties. *See Cinemark Holdings v. Factory Mut. Ins.*, 500 F. Supp. 3d 565, 569 (E.D. Tex. 2021) (denying motion to dismiss where the insured alleged COVID-19 was present and damaged the property "by changing the content of the air"); *Blue Springs Dental Care v. Owners Ins. Co.*, 488 F. Supp. 3d 867, 876 (W.D. Mo. 2020) ("Plaintiffs also explain how COVID-19 is physically transmitted by air and surfaces through droplets, aerosols, and fomites that remain infectious for extended periods of time. Taking Plaintiffs' fact allegations as true, as the Court must at this stage, and after drawing reasonable inferences from those facts in their favor, Plaintiffs plausibly allege that COVID-19 physically attached itself to their dental clinics . . . .").

For decades before the pandemic, courts held that noxious fumes, odors and particles cause physical loss or damage when they render property unfit for its intended use. *See* Pls.' Br. at 25-26; *Am. Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957) (property damage found where a release of radon dust and gas made the building unsafe); *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986) (finding the insured could claim business income coverage where risk of collapse necessitated abandonment of grocery store); *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, 800 N.Y.S.2d 356 (N.Y. Sup. Ct. 2005) (noxious particles present in insured property constituted property damage under the policy); *Ore. Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 15-cv-01932, 2016 U.S. Dist. LEXIS 74450, at *17 (D. Or. June 7, 2016) (wildfire smoke rendered a theater unusable for its intended purpose) (vacated due to settlement). Similarly, SARS-CoV-2 physically impacts properties as its particles are noxious, adhere to surfaces, and remain in ambient air so as to render property unfit for its intended use. This property damage is acute in bars and restaurants,

where air is recirculated, space is limited, and surfaces are touched by multiple people.[2] An incorrect decision here could negatively impact long-standing coverage rights for Plaintiffs and other businesses for any kind of loss involving noxious fumes, odors or particles.

II. Wisconsin law does not require a showing of "physical alteration" to find "physical loss" or "physical damage" to property.

The Society policies do not define "physical loss of or "damage to" covered property. Wisconsin courts must look at the policy terms in the "context of the policy as a whole," and interpret each provision so as not to render other provisions "meaningless, inexplicable or mere surplusage." *Day v. Allstate Indem. Co.*, 2011 WI 24, ¶27 (Wis. 2011). As the circuit court correctly noted, "loss" and "damage" are separately protected. Notably absent from the phrase "physical loss of or damage to" is any mention of a "physical alteration" requirement.

Wisconsin law recognizes that "physical alteration" is not required, as physical loss may occur even if the structure of covered property remains unchanged. *See Manpower Inc. v. Ins. Co. of the State of Pennsylvania*, No. 08C0085, 2009 U.S. Dist. LEXIS 108626, at *21 (E.D. Wis. Nov. 3, 2009). ("I reject [the insurer's] argument that a peril must physically damage property in order to cause a covered loss. As noted, the policy covered physical losses in addition to physical damage, and if a physical loss could not occur without physical damage, then the policy would contain surplus language."). Any attempt by Society to now add the "physical alteration" requirement should be rejected.

Many COVID-19 rulings have wrongly applied the "physical alteration" requirement, as they generally relied on a problematic section of the *Couch on Insurance* treatise in doing so. *See* 10A Couch on Ins. 3d §148:46; Richard P. Lewis et al., Couch's *"Physical Alteration" Fallacy: Its Origins and Consequences*, 56:3 Tort, Trial & Ins. Prac. L.J. 621 (Fall 2021) (available at SSRN:

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

https://ssrn.com/abstract=3916391). The "physical alteration" requirement was a minority rule when it was included in §148:46. Lewis at 622. Subsequent updates continued to add support for the minority rule, while ignoring the significantly larger number of opinions rejecting it. *Id.* at 627-30 (collecting and examining decades of case law weighing against the "physical alteration" requirement).

The editor of §148:46 acknowledged this error nearly a decade ago, yet §148:46 was never corrected. *See* Steven Plitt, *Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alteration*, Claims J. (Apr. 15, 2013) (admitting that the modern trend focuses on "loss of use as opposed to direct physical loss involving physical alteration."). Other major treatises get it right. *See, e.g.,* 3 Allan D. Windt, *Ins. Claims & Disputes* § 11:41 (6th ed. 2021); 5 John Alan Appleman & Jean Appleman, *Insurance Law & Practice 2d* § 3092 (1970 & 2012 Supp.), *reprinted in* 5f-142f Appleman on Insurance Law & Practice Archive § 3092 (LEXIS 2011).

In accord with pre-pandemic case law, many state courts especially have analyzed complaints that allege the presence of SARS-CoV-2 and properly denied insurer motions to dismiss. *See JDS Construction Group, LLC, and 9 Dekalb Fee Owner LLC v. Continental Casualty Co.*, No. 2020 CH 5678, at 4 (Ill. Cir. Ct. Oct. 25, 2021) (observing that too many courts are blindly following inapposite decisions from other courts on COVID-19 coverage disputes instead of focusing on the allegations before them); *New Castle Hotels LLC v. Zurich Am. Ins. Co.*, No. X07-HHD-CV-21-6142969-S, 2021 Conn. Super. LEXIS 1501, at *9 (Conn. Super. Ct. Sept. 7, 2021) ("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.").

If insurers truly wanted to require "physical alteration" to trigger coverage, they easily could have revised their policies to make that clear. But they did not. Instead, insurers continued to promise coverage where there is "physical loss or damage," and courts continued to find coverage for business interruption losses in

the absence of "physical alteration." The failure to correct the erroneous statement in §148:46 has led many courts addressing COVID-related business interruption disputes to the flawed conclusion that "physical alteration" is necessary to show physical loss or damage. That is not the law and those recent decisions should not be followed by this Court.

III. "Property" is more than just a thing—it comes as a "bundle of sticks," one of which is the right to physically use the property.

In construing the phrase "direct physical loss of or damage to" property, it is critical not to forget the word "property." A thing is not "property" unless and until legal rights attach to it. The U.S. Supreme Court has described the nature of "property" as a "'bundle of sticks,' a collection of individual rights which, in certain combinations, constitute property." *United States v. Craft*, 535 U.S. 274, 278 (2002). "State law determines only which sticks are in a person's bundle." *Id*.

Under Wisconsin law, that "bundle" includes the right to possess, use, dispose of, and manage the property, amongst other rights. *Rock-Koshkonong Lake Dist. v. State Dep't of Nat. Res.*, 2013 WI 74, ¶12. Importantly, the "bundle" includes "the owner's interest in being able to put property to its most valuable use." *Manpower Inc.*, 2009 U.S. Dist. LEXIS 108626, at *21. For businesses that lease their properties, the right to "put property to its most valuable use" is of utmost importance. This "use" right is not intangible, but physical. Plaintiffs use their properties for bar and restaurant operations, and this use has been physically restricted.

Accordingly, "direct physical loss" encompasses the loss of an important property right (the right to physical use) when property is impacted by some physical harm resulting from a physical cause (the presence of a potentially deadly virus). SARS-CoV-2 has caused direct physical loss here.

IV. Because the coronavirus, a covered cause of loss, caused Plaintiffs' losses, there is coverage under Wisconsin's proximate cause rule regardless of any contributing excluded cause.

As demonstrated above, the coronavirus causes "physical loss" and "physical damage." It is precisely because of the ubiquitous presence of SARS-CoV-2 in and around the Plaintiffs' properties that civil orders were issued[3] and Plaintiffs suffered physical loss and physical damage to their properties. The coronavirus is not excluded by Society's policies and is therefore a covered cause of loss. Hence, civil authority coverage would apply. Moreover, under Wisconsin's proximate cause rule, any attempt by Society to bar coverage under potentially applicable exclusions (of which there are none), such as the Acts or Decisions exclusion (Pls.' Br. at 38), would still not succeed under Wisconsin's proximate cause rule.

This rule holds that coverage is triggered where the loss was caused by a covered risk even if an excluded risk contributed to the loss. *Kraemer Bros. v. U.S. Fire Ins. Co.*, 89 Wis. 2d 555, 570, 278 N.W.2d 857, 863-64 (1979). In *Kraemer*, the insured sought coverage for a collapsed retaining wall, and the parties disputed whether the collapse was caused by (1) negligence in digging a trench and piling dirt in proximity to the wall (a covered cause); or (2) faulty materials, improper workmanship, and errors in design (an excluded cause). The Court found that coverage exists "[i]f it is proved that an excluded peril is not the sole cause of the collapse." *Id.* at 570. *See also Benke v. Mukwonago-Vernon Mut. Ins. Co.*, 110 Wis. 2d 356, 361, 329 N.W.2d 243, 246 (Ct. App. 1982) ("[I]f there is any evidence that any included peril is a cause of damage, then, it is assumed that the insured paid to be protected from that loss, and it would be unfair to the insured to deny the benefits as paid for.") (emphasis in original); *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Wausau Paper Mills Co.*, 818 F.2d 591, 595 (7th Cir. 1987) ("recovery may be allowed . . . where the insured risk itself set into operation a chain of causation in

[3] Wis. Emergency Order 28; "COVID-19 is present throughout Wisconsin, with people testing positive for COVID-19 in 65 of 72 counties as of April 15, 2020."

which the last step may have been an excepted risk"); *In re Society Insurance Co. Business Interruption Protection Insurance Litigation*, MDL No. 2964, 2021 U.S. Dist. LEXIS 32351, at *33-34 (N.D. Ill. Feb. 22, 2021) (holding that Wisconsin's proximate cause rule applied and refusing to dismiss case where the pandemic, a covered cause of loss, and government shutdown orders, a non-covered cause of loss, combined to cause the insureds' losses).

In sum, Plaintiffs' losses are covered because they were caused by the coronavirus, a covered cause of loss, and any contributing excluded cause of loss (and there are none) would not bar coverage.

V. The Court should not be swayed by self-serving warnings about ruining the insurance industry—insurers make these claims after every market shock, and they are always overstated.

The insurance industry also claims that COVID-19 insurance claims would bankrupt the industry. This is a threadbare cry. Too often, when insurers are faced with a proverbial avalanche of claims from some circumstance, insurers sound false alarms of industry-wide insolvency (and typically with a claim that their insurance policies "never meant to cover that"). That predicted collapse, however, has never arrived. Going back forty years, insurers attempted to color the coverage discussion by asserting dire predictions about massive losses facing insurers from events such as asbestos litigation, CERCLA liability, Hurricane Katrina, the World Trade Center attacks on 9/11, and SARS. And yet, the insurance industry has survived and continue to thrive. *See* Prof. Tom Baker, *Uncertainty > Risk: Lessons for Legal Thought from the Insurance Runoff Market*, 62 B.C. L. Rev. 59, 105 (2021) ("The right lesson to draw from this experience is not that insurance markets need legal certainty, but rather that insurance markets are resilient and innovative enough to handle even extreme legal uncertainties.").

False alarms of market insolvency are no basis to decide coverage: insurance policies should not be interpreted with the thumb on the scale to the benefit of either insurer or the insured business because of the impact the result would have to party's

industry. Rather, insurance contracts should be interpreted according to long-standing precedent and rules of construction. Bending long-standing rules to favor insurers here would result in skewed precedent that could be applied to eliminate coverage for all kinds of businesses in all sorts of circumstances where noxious fumes, odors, or particles render property unsafe or unusable.[4]

As it turns out, Society and other insurers have remained profitable during the pandemic while businesses, their insureds, have suffered. A precipitous drop in claims (and claim payments) in the last year have led to windfalls for insurers. Rather than pay COVID-19 claims their policies cover, insurers have held onto this surplus. In its 2020 Annual Report, Society reported that its own surplus increased from $169 million in 2019 to $175.2 million in 2020.[5]

Moreover, virtually all insurers *increased* rates on consumers in 2020, across all lines of business. 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.[6] Insurers raised prices again between July and September, with a total increase of 24% for commercial property coverage.[7] From October to December 2020, property insurance premiums increased—again—by 20%.[8] Finally, in late 2020, insurers told consumers to expect

[4] An equally pernicious trend seen in COVID-19 coverage cases is a tendency of courts to make factual findings on a motion to dismiss (*e.g.*, accepting insurers' assertions that SARS-CoV-2 can be easily cleaned from surfaces). In most cases, courts honor the principle that complaint allegations must be taken as true. Empty cries that the sky is falling for insurers is not a reason to abandon applicable rules of law.

[5] Society Insurance, *2020 Annual Report* (2021), https://societyinsurance.com/wp-content/uploads/2021/04/2020-Annual-Report-1.pdf.

[6] M. Lerner, *U.S. Commercial Property Pricing up 22% in Q2*, Business Insurance (Aug. 10, 2020), https://www.businessinsurance.com/article/20201102/NEWS06/912337508?template=printart.

[7] C. Wilkinson, *Insurance Prices Increased Sharply in Third Quarter*, Business Insurance (Nov. 5, 2020),https://www.businessinsurance.com/article/20201005/NEWS06/912337014?template=printart.

[8] M. Lerner, *Global Prices Rise 22% in Q4: Marsh*, Business Insurance (Feb. 4, 2021), https://www.businessinsurance.com/article/20210204/NEWS06/912339588/Global-pricesrise-22-in-Q4-Marsh-Global-Insurance-Market-Index-.

15% to 25% increases for property insurance in 2021.[9] All told, the market realized a "record surplus increase to $914 billion" at the end of 2020.[10] Clearly, the pandemic has been profitable for insurers, yet insurers continue to refuse to pay COVID-19 claims for businesses teetering on the edge of collapse.

It is the province of elected legislatures to help industries that are failing due to catastrophic losses. With the pandemic, federal and state legislatures have taken steps, and are considering additional steps, to relieve industries pummeled with COVID-19 losses. It is those bodies, not the judiciary, that are tasked with making policy choices in that regard, and that is where those decisions should rightfully remain. The judiciary should simply call balls and strikes here, interpreting insurance contracts in accordance with time-honored rules.

VI. Conclusion

The circuit court correctly denied Society's motion to dismiss, finding that Plaintiffs adequately pled "physical loss of or damage to" to their covered properties. UP respectfully requests that this Court affirm the circuit court.

Dated: November 18, 2021

Respectfully submitted,

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[9] J. Greenwald, *Continued Rate Increases Expected: Willis*, Business Insurance (Nov. 19, 2020), https://www.businessinsurance.com/article/20201119/NEWS06/912337904?template =printart.
[10] J. Auden, *U.S. P/C Insurers See Profits in 2020 Despite COVID-19 Fallout*, Fitch Ratings (Apr. 12, 2021), https://www.fitchratings.com/research/insurance/us-p-c-insurers-see-profits-in-2020-despite-covid-19-fallout-12-04-2021.

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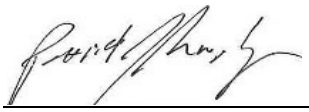
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm), and (c) for an amicus brief. The length of this brief is 2721 words.

Dated: November 18, 2021



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CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat.§ 809.19(12). I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief filed as of this date.

Dated: November 18, 2021

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