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Appellate Division–First Dep't Case Nos. 2021-02971, 2021-04034

Court of Appeals

of the

State of New York

CONSOLIDATED RESTAURANT OPERATIONS, INC.,

Plaintiff-Appellant,

– against –

WESTPORT INSURANCE CORPORATION,

Defendant-Respondent.

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS

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United Policyholders is a nonprofit section 501(c)(3) organization. It has no parent corporation, subsidiaries, or affiliates, and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST OF AMICUS CURIAE

United Policyholders is a non-profit 501(c)(3) organization that advocates for insurance policyholders. For over thirty years, United Policyholders has served as a voice and a trusted source of information for insurance consumers across the country, acting as a counterbalance to well-funded insurance companies and lobbying groups.

United Policyholders helps consumers when they must pursue insurance claims in the wake of natural disasters such as floods, wildfires, hurricanes, and, now, the pandemic. Since March 2020, United Policyholders has assisted businesses around the country that were disrupted by COVID-19 and related public safety orders. It frequently engages with insurance regulators through the National Association of Insurance Commissioners, where it has served as a consumer representative since 2009, and given multiple presentations to that group about pandemic-related insurance coverage issues.

Since its founding in 1991, United Policyholders also has regularly appeared as amicus curiae in the nation's most important insurance

cases, including as amicus curiae before this Court.[1] In this proposed brief, United Policyholders provides unique insight into all-risk property insurance and the industry custom and practice related to it—all of which inform policyholders' reasonable expectations. *See J.P. Morgan Secs. Inc. v. Vigilant Ins. Co.*, 37 N.Y.3d 552, 561-62 (2021) (interpretation of policy language must consider "the reasonable expectation of the average insured at the time of contracting").

In cases around the country, the insurance industry has routinely argued that courts should dismiss policyholders' cases before hearing their evidence about the relevant factual issues regarding coverage for pandemic-related losses. New York courts that are unfamiliar with industry custom and practice, and the history of all-risk insurance, have too often accepted (unsworn) insurer assurances about these key issues.

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[1] *See, e.g.*, *Keyspan Gas E. Corp. v. Munich Reinsurance Am., Inc.*, 31 N.Y.3d 51 (2018); *Universal American Corp. v. Nat'l Union Fire Ins. Co.*, 25 N.Y.3d 675 (2015); *Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 10 N.Y.3d 187 (2008); *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592 (2004); *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377 (2003); *Consol. Edison Co. v. Allstate Ins. Co.*, 98 N.Y.2d 208 (2002*); Travelers Cas. and Sur. Co. v. Certain Underwriters at Lloyd's of London*, 96 N.Y.2d 583 (2001).

In doing so, New York courts have narrowed the historically broad coverage promised by all-risk policies without the benefit of guidance from this Court. And perhaps more importantly, those courts have effectively adopted a new pleading standard for pandemic-related losses untethered to the legislature's directives, which threatens to erode the established notice-pleading standard in cases where scientifically-demonstrated facts might, for whatever reason, strike a judge as contrary to "common sense."

United Policyholders respectfully asks the Court to accept this brief, and grant review of these significant errors of procedural and insurance law.

QUESTION PRESENTED

Consolidated Restaurant presents the following question in its motion for permission to appeal:

Whether allegations that SARS-CoV-2, the virus that causes COVID-19, infiltrated insured property, attached to and transformed insured property into vectors for disease, persisted for extended periods of time, and impaired the use of such property for its intended purpose, are sufficient under New York law to plead a claim for "direct physical loss or damage" under an all-risk property and business interruption insurance policy?

PRELIMINARY STATEMENT

New York's businesses found themselves confronting a new and novel calamity in March 2020. In those early days—when people hoarded Clorox wipes, stopped shaking hands, washed their groceries, and drastically altered their daily activities—businesses like Consolidated Restaurant were forced to contend with the all-too-real physical impacts of the virus on their properties.

As Consolidated Restaurant alleged, SARS-CoV-2 viral particles physically infiltrated its property.[2] R.1941. There, like an invisible smoke, some particles remained suspended in the air and others attached to surfaces such as countertops, doors, tables, and chairs. *Id.* Scientists have shown that viral particles do not just "land" on surfaces, waiting to be wiped away with the flick of a rag. Instead, they "adsorb" to those surfaces, chemically bonding to and becoming a part of them, and changing them in scientifically-measurable ways. Those changes include alterations to the chemical composition and structure of the surface material, and convert something that was once safe to touch into a "fomite," something quite dangerous.

Once in and on business property, viral particles can persist for days, during which time the property remains unsafe until restored through intensive cleaning or ventilation efforts—steps that were neither necessary nor common for businesses before COVID-19. R.1934, R.1937. And unlike a residential household, these efforts could never realistically be completed while the business operated as

[2] Unless otherwise noted, the citations to the pleadings in this brief are to Consolidated Restaurant's proposed Amended Complaint, for which the trial court denied leave to amend as "futile." R.48.

originally intended. Every time that the business opened its doors, it had to start the sanitization process anew. R.1938, R.1942.

As a result, New York businesses had to spend substantial sums in labor and supplies for enhanced sanitization efforts, physically reconfigure their properties (*e.g.*, adding or upgrading ventilation systems), and shut down major parts of their operations (*e.g.*, indoor dining). R.1941-42.

Yet when policyholders like Consolidated Restaurant turned to their insurers for coverage under their all-risk policies, insurers denied those claims *en masse*. They did so notwithstanding their promise to protect policyholders against "*all risks* of direct physical loss or damage to insured property," R.84 (emphasis added), except for those risks that are *expressly excluded*. And they did so even under policies that, like the one here, omit the industry-standard exclusion for loss or damage by viruses. Insurers then asked the courts to approve this unprecedented narrowing of the coverage grant, claiming that SARS-CoV-2 cannot "damage" property, and that the words "or loss" have no real meaning.

Too many New York courts, including the Appellate Division, have accepted insurers' factual contentions based on nothing more than the industry's unsworn and untested assurances.[3] In denying Consolidated Restaurant the chance to present its evidence, the Appellate Division committed two principal errors, both with wide-reaching consequences:

First, the Appellate Division refused to accept as true the policyholder's allegations that SARS-CoV-2 physically "damaged" its property, which the court interpreted to require an "actual, discernable, quantifiable change constituting 'physical' difference to the property from what it was before"—or a "tangible difference." Slip Op. at 1, 9.

The Appellate Division eschewed New York's liberal notice-pleading standard and found, contrary to the complaint's express allegations, that the presence of SARS-CoV-2 could not "plausibly" cause a "tangible, ascertainable damage, change or alteration" to the insured property. Slip Op. at 14. But the purpose of a complaint under New York's *notice*-pleading regime is to give the court and other parties

[3] This troubling rush to judgment—before any evidence has been presented—is well documented. *See Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 Conn. Ins. Law J. 185 (2021).

notice of the issues in dispute. Here, the insurer (Westport) surely understood from the complaint that the policyholder intended to prove the virus could and did damage insured property.

Requiring anything more, as the Appellate Division effectively did, would mark a fundamental change in New York's procedural law. Either the Appellate Division's holding means that policyholders such as Consolidated Restaurant and the many other businesses seeking coverage must satisfy a significantly higher procedural bar than all other litigants; or it means that the Appellate Division has restructured New York's pleading standard in a way that permits courts to reject allegations as "conclusory" even where (as here) they are based on peer-reviewed scientific literature.

Second, the Appellate Division's interpretation of the undefined phrase "physical loss or damage" erroneously narrows the scope of the all-risk coverage promise. By requiring an "actual, discernable, quantifiable," or "tangible," change to property, the Appellate Division gave an inappropriately narrow gloss to the word "damage." More importantly, the court entirely read the word "loss" out of the phrase "loss or damage." These readings contravene settled principles of policy

interpretation, which require that every word be given effect, and contradict several decades of case law.

The undefined words "physical" and "damage," as understood by an ordinary person, reasonably encompass any detrimental alteration to insured property, *whether visible or microscopic*. And the undefined words "physical" and "loss," likewise so understood, further extend coverage to circumstances where property cannot function as intended due to some physical impairment, even absent such detrimental alteration.

The Appellate Division, however, held that the policyholder here could not recover because "[n]othing stopped working." Slip Op. at 14. But nothing in the policy conditions coverage on whether property remains mechanically operable, nor is that understanding consistent with industry custom and practice. Indeed, no reasonable insurer would dare deny coverage where vandals spray paint a store, on the theory that it does not matter because the aisles remain clear and the cash registers still work.

The trend by New York lower courts in failing to adhere to the notice-pleading standard set forth in CPLR 3013, and failing to give

effect to the ordinary meaning of the all-risk coverage promise, presents a serious problem. Policyholders in pandemic-related cases should not be held to a pleading standard that other litigants are not, and policyholders in any number of insurance claims should not be forced to contend with the artificially narrow interpretation of the all-risk coverage promise that the Appellate Division has now adopted.

REASONS FOR GRANTING REVIEW

For decades, insurers have sold all-risk property insurance to "cover[] *all risks* of physical loss, except for those perils specifically excluded." *TAG 380, LLC v. ComMet 380, Inc.*, 10 N.Y.3d 507, 513 (2008) (emphasis added). Policyholders buy this insurance to protect against known risks (*e.g.*, fire and flood), and novel, unknown, or unforeseen risks. *See* 70 N.Y. Jur. 2d Ins. § 1712 (2d ed. West). Many such policies also cover "business interruption" losses, that is, the policyholder's earnings stream should the loss or damage limit revenue-generating work. *Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 10 N.Y.3d 187, 194 (2008).

The Appellate Division's decision substantially limits policyholders' ability to seek and obtain recoveries under these policies.

I. The Court Should Grant Review to Correct the Misapplication of the Notice-Pleading Standard.

New York follows a notice-pleading standard. CPLR 3013. That standard requires a complaint to provide the court and other litigants with notice of the disputed issues, causes of action, and relief sought. Notice means just that: making sure the opposing party is aware of the facts in dispute, not proving them.

The California Court of Appeals said it best two weeks ago: "[W]hen a pleading alleges facts sufficient to constitute a cause of action, what [courts] think [they] know—beliefs not yet appropriately subject to judicial notice—has never been a proper basis for concluding, as a matter of law, those alleged facts cannot be true." *Marina Pacific Hotel and Suites, LLC v. Fireman's Fund Ins. Co.*, — Cal. Rptr. 3d —, 2022 WL 2711886, at *1 (Cal. Ct. App. July 13, 2022). So, too, in New York.

A. Pleadings in New York Need Only Give Notice of What the Plaintiff Intends to Prove.

It has long been the law of our state that a complaint need only make statements that are "sufficiently particular to give the court and the parties notice of the . . . occurrences . . . intended to be proved and the material elements of each cause of action." CPLR 3013.

This notice-pleading standard recognizes that "the primary function of pleadings" is "adequately advising the adverse party of the pleader's claim or defense." *Foley v. D'Agostino*, 21 A.D.2d 60, 62-63 (1st Dep't 1964), *cited with approval by Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). A plaintiff need only say what it *intends* to prove, not actually do so. "[T]he primary purpose of the pleadings" is "notice." *Rapoport v. Schneider*, 29 N.Y.2d 396, 403 (1972).

Likewise, the CPLR's mandate that pleadings "be liberally construed," CPLR 3026, "requires more than mere . . . lip service." *Foley*, 21 A.D.2d at 66. Although a complaint cannot totally omit statements of fact, a "preponderance of conclusory allegations . . . is no longer fatal." *Holzer v. Feinstein*, 23 A.D.2d 771, 772 (2d Dep't 1965). Indeed, statements of legal conclusions are permissible. *See* Patrick M. Connors, N.Y. Practice Commentaries, C3013:13.

The "sole criterion" in resolving a motion to dismiss under CPLR 3211(a)(7) is "whether the pleading states a cause of action."[4]

[4] The Appellate Division also dismissed Consolidated Restaurant's complaint under CPLR 3211(a)(1). Because the insurance policy was the sole documentary evidence that the Appellate Division relied upon, the dismissal necessarily rests on a determination that Consolidated Restaurant cannot state a cause of action under that contract.

Guggenheimer, 43 N.Y.2d at 275. A pleading does so "if from its four corners" a court can discern "factual allegations . . . which taken together manifest any cause of action cognizable at law." *Id.* "[T]he factual allegations" must be "deemed to be true." *Dolphin Holdings, Ltd. v. Gander & White Shipping, Inc.*, 122 A.D.3d 901, 901-02 (2d Dep't 2014). "[A]nd the nonmoving party must be given the benefit of all favorable inferences." *Id.* "Whether a plaintiff can ultimately establish its allegations is not part of the calculus . . . . " *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005).

B. The Appellate Division Substituted Its Views About Viral Chemistry for the Complaint's Allegations.

The Appellate Division held that the legal standard for "damage" is an "actual, discernable, quantifiable change constituting 'physical' difference to the property from what it was before"—or a "tangible difference." Slip Op. at 1, 9. Although this standard is inappropriately narrow, *see* Part II, *infra*, Consolidated Restaurant's complaint more than satisfied it. As the policyholder alleged: "[T]he virus . . . is a *tangible substance*, which *attaches to* and causes harm to property. Surfaces, once *physically altered* by the coronavirus, are referred to as fomites." R.1935 (emphasis added).

These allegations alone should have been sufficient to "adequately advis[e] the [insurer] of the . . . claim." *Foley*, 21 A.D.2d at 62-63. Yet Consolidated Restaurant went well beyond the CPLR's pleading requirements. It offered numerous additional details in its complaint, and cited more than half a dozen peer-reviewed scientific articles to support its factual allegations. R.1932-43. Not only did the complaint put the insurer on notice of the issues in dispute and the facts intended to be proved, but also of the scientific bases for Consolidated Restaurant's claim.

Rather than accept these factual allegations as true, the Appellate Division relied on its own views about viral chemistry and found the allegations to be *unpersuasive*. Yet whether a judge finds allegations persuasive is not the standard for a motion to dismiss. The Appellate Division's errors are not unique. Similarly-situated lower courts have repeated them in COVID-19 coverage cases across the state. *See, e.g.*, Slip Op. at 9-12 & 10 n.1. But it is precisely in the context of something like COVID-19—where people have "common sense" (and sometimes strongly held) views about the virus and its impacts—that adherence to the CPLR's process becomes paramount.

As the CPLR's notice-pleading standard reflects, "science itself may be highly uncertain and controversial with respect to many of the matters that come before the courts," and should be approached by all participants with procedural care. Stephen G. Breyer, *Science in the Courtroom*, Issues in Sci. & Tech. 16, no. 4, at 53-54 (Summer 2000).[5] As Learned Hand taught, courts should not "blunder[] along without the aid of unpartisan and authoritative scientific assistance in the administration of justice." *Parke-Davis & Co. v. H.K. Mulford Co.*, 189 F. 95, 115 (S.D.N.Y. 1911).

Common sense often is incomplete or wrong. Looking up at the sky, the sun appears to circle the Earth, and so judges of the Inquisition unanimously enjoined Galileo from teaching a sun-centered model of the cosmos, finding it "foolish and absurd."[6] In the now infamous "Scopes Monkey Trial," the courts refused to accept expert opinion about the field of biology, and the jury convicted the defendant for teaching evolution. *See Scopes v. State*, 289 S.W. 363, 366-67, 369 (Tenn. 1927).

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[5] Available at https://perma.cc/9V58-8ABH.

[6] *The Galileo Affair: A Documentary History* (ed. Maurice A. Finocchiaro, 1989), excerpted at https://perma.cc/9XG3-GWUW.

More recently, courts assumed that the "reliability of eyewitness identification is within the knowledge of jurors," and thus "expert testimony generally would not assist them in determining" whether such testimony is reliable. *State v. Kemp*, 507 A.2d 1387, 1389 (Conn. 1986). But today there is a "broad based judicial recognition" of "near perfect scientific consensus" that "eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror," making expert testimony a "highly effective safeguard." *State v. Guilbert*, 49 A.3d 705, 720-32 (Conn. 2012).

Common sense may help us save time in day-to-day decision-making, but it cannot supplant evidence-based litigation. That is why this Court has emphasized that courts must let plaintiffs to go forward with claims of which a judge might be skeptical, ruling only *after* the court hears the evidence. *See Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 636 (1976) (vacating dismissal even though "defendants' affidavits present a seemingly strong defense").

When evaluating COVID-19 coverage cases, the Appellate Division (and many other lower courts) have resolved contested facts as a matter of law, prematurely denying policyholders the opportunity to

present their case-specific evidence. Indeed, *all* of the COVID-19 cases the Appellate Division relied upon were decided without any scientific or expert testimony. Slip Op. at 9-13. And *all* were resolved either on a motion to dismiss or on a motion for judgment on the pleadings, without substantive evidence about the impact of viral particles on property. *Id.*

Moreover, the Appellate Division principally relied upon and adopted a series of federal cases that were decided under the materially different pleading standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Slip Op. at 9-10. In doing so, the Appellate Division failed to recognize the important differences between New York and federal procedural law.[7]

The Appellate Division's ruling likewise cannot be justified as contract interpretation. The only suitable interpretation that would justify the court's holding would be to interpret "damage" as an "actual, discernable, quantifiable change" to property—except when that change

[7] The federal standard is the product of a decades-long transformation of federal procedural rules that dramatically restrict access to discovery and resolution of cases by a trier of fact. *See* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. Law Rev. 286, 309-310, 331-47 (2013). Our legislature has directed that New York courts take a different approach.

is caused by viral particles, in which case it is excluded. It was fact-finding, not contract interpretation, for the Appellate Division to dismiss the complaint despite its allegations that satisfy the Court's own interpretation of "damage," such as "the presence of the virus in the air physically alters the air and makes it dangerous," R.1934, and "the presence of the virus tangibly changes property into a transmission vehicle for disease," R.1935.

Nor are these pleadings "conclusory." Slip Op. at 9, 13. This Court has explained that conclusory allegations are "claims consisting of bare legal conclusions *with no factual specificity*." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009) (emphasis added). Allegations that viral particles "physically alter[]" or "tangibly change" insured property are not "bare legal conclusions," but rather are specific factual assertions testable through evidence.

If New York's notice-pleading standard is to operate as the legislature intended, the label "conclusory" cannot be used to reject factual allegations that a court might, "without the aid of unpartisan . . . scientific assistance," view as unpersuasive. *See Parke-Davis & Co.*, 189 F. at 115.

C. The Appellate Division Made Scientific Judgments Without Considering the Science.

Critically, the Appellate Division (and other lower courts) have announced factual conclusions despite significant contrary scientific evidence. In an era when Google searches replace subject matter expertise, this is a deeply troubling step to take at the pleadings stage.

The emerging evidence shows that viral particles cause detrimental physical alterations by bonding or chemical "adsorption" to surfaces.[8]

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[8] *See, e.g.*:

Edris Joonaki, et al., *Surface Chemistry Can Unlock Drivers of Surface Stability of SARS-CoV-2 in a Variety of Environmental Conditions*, 6 Chem. 2135-2146 (2020) (documenting adsorption of SARS-CoV-2 onto solid surfaces through various chemical mechanisms and role thereof in viral transmission);

Yi-Nan Liu, et al., *Optical Tracking of the Interfacial Dynamics of Single SARS-CoV-2 Pseudoviruses*, 55 Env't. Sci. & Tech. 4115-4122 (2021) (documenting impairment of surfaces by adsorption of coronavirus);

Nicolas Castaño, et al., *Fomite Transmission, Physicochemical Origin of Virus-Surface Interactions, and Disinfection Strategies for Enveloped Viruses with Applications to SARS-CoV-2*, 6 ACS Omega. 6509-6527 (2021) (documenting adsorption, transfer, and persistence of coronavirus on surfaces through van der Waals interactions and electrostatic forces);

The same is true of "cleaning." The science further shows—contrary to insurers' contentions—that the virus persists even after disinfection by trained medical professionals using hospital-grade disinfection techniques and equipment.[9]

Boris Pastorino, et al., *Prolonged Infectivity of SARS-CoV-2 in Fomites*, 26 Emerging Infect. Diseases 2256-2257 (2020) (documenting virus survival on surfaces and potentially enhanced persistence in real-world scenarios);

Yang Xin, et al., *Adsorption of SARS-CoV-2 Spike Protein S1 at Oxide Surfaces Studied by High-Speed Atomic Force Microscopy*, 1 Adv. NanoBiomed Rsch. 1-7 (2021) (documenting adsorption on various types of surfaces).

[9] *See, e.g.*:

Zarina Brune, et al., *Effectiveness of SARS-CoV-2 Decontamination and Containment in a COVID-19 ICU*, 18 Int'l J. Env't Rsch. and Public Health 2479 (2021) (finding reduction, but not total elimination, of virus on surfaces in ICUs despite disinfection);

Isaac Amoah, et al., *Detection of SARS-CoV-2 RNA on Contact Surfaces Within Shared Sanitation Facilities*, 236 Int'l J. Hygiene and Env't Health 113807 (2021) (finding reduction, but not complete elimination, of virus despite cleaning);

Po Ying Chia, et al., *Detection of Air and Surface Contamination by SARS-CoV-2 in Hospital Rooms of Infected Patients*, 11 Nature Commc'ns 2800 (2020) (finding continued viral presences in majority of hospital rooms despite twice-daily cleaning by trained hospital staff);

Zhen-Dong Guo, et al., *Aerosol and Surface Distribution of Severe Acute Respiratory Syndrome Coronavirus 2 in Hospital Wards, Wuhan China*, 26 Emerging Infectious Diseases (2020) (finding significant

Importantly, neither Westport nor the insurance industry cite any evidence, scientific testimony, or documents refuting Consolidated Restaurant's assertion that viral particles do, as a matter of scientific fact, detrimentally alter property. The court below likewise cited no such evidence. To the contrary, scientists and medical professionals flatly disagree with the insurance industry's factual assertions regarding the nature and chemistry of SARS-CoV-2.[10]

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surfaces remained impaired in hospital and ICU despite twice-daily decontamination efforts by hospital staff);

Joshua Santarpia, et al., *Aerosol and Surface Contamination of SARS-CoV-2 Observed in Quarantine and Isolation Care*, 10 Sci. Reps. 12732 (2020) (finding virus throughout hospital rooms despite rigorous hospital cleaning);

Jie Zhou, et al., *Investigating Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) Surface and Air Contamination in Acute Healthcare Setting During the Peak of the Coronavirus Disease 2019 (COVID-19) Pandemic in London*, 73 Clinical Infectious Diseases e1870-e1877 (2021) (finding virus on a range of high-touch surfaces, despite rigorous twice-daily cleaning).

See also:

Abigail Harvey, et al., *Longitudinal Monitoring of SARS-CoV-2 RNA on High-Touch Surfaces in a Community Setting*, 8 Env't Sci. & Tech. Letters 168-175 (2021).

[10] *See* Amicus Brief of New Hampshire Medical Society, filed in *Scleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co.*, No. 217-2020-CV-0039 (N.H. June 23, 2022), available at

Moreover, although washing one's hands or using a sanitizing wipe on a shopping cart may seem trivial for individuals, many policyholders operate businesses on significantly larger commercial scales. The operational steps needed to respond to contaminated—*i.e.*, damaged—surfaces are not nearly so simple at this scale. Indeed, that is why numerous studies have found that the virus persists on high-touch surfaces common in restaurants, such as plastic, glass, and steel, despite intensive cleaning. *See* n.8 & n.9, *supra*.

In no other type of lawsuit would allegations supported by numerous peer-reviewed scientific publications and experts in the relevant field be deemed insufficient. For instance, if a plaintiff in a product liability lawsuit adduced peer-reviewed articles evidencing a mechanism for injury, our notice-pleading standard would rightly accept it, even if it was unexpected or counter-intuitive.

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https://www.nhms.org/News/ArtMID/123811/ArticleID/1519/NH-Medical-Society-Denounces-Insurers-COVID-19-Science; *see also* Amicus Brief of MedChi, the Maryland State Medical Society, filed in *Tapestry, Inc. v. Factory Mut. Ins. Co.*, No. COA-MISC-0001-2022 (Md. July 13, 2022).

The Court should grant review to correct the lower courts' drift away from New York's notice-pleading standard. And it should remind lower courts that no special procedural rules apply to pandemic-related insurance coverage disputes.

II. The Court Should Grant Review to Provide Clear Guidance About the Meaning of "Physical Loss or Damage."

The phrase "all risks of direct physical loss or damage" forms the organizing principle of most all-risk property insurance policies. Despite insurers' widespread use of this undefined language and the importance of this insurance product to businesses, this Court has never had occasion to provide clear guidance about its meaning. This case presents that opportunity.

"All risks of direct physical loss or damage" means just that: *any* kind of physical loss *or any* kind of physical damage. Any other reading would render parts of that phrase and other sections of the policy superfluous, contrary to New York law. *See Cty. of Columbia v. Cont'l Ins. Co.*, 83 N.Y.2d 618, 628 (1994) (policies "should not be read so that some provisions are rendered meaningless").

A. The Policy Insures Against Both "Loss" and "Damage."

Dictionaries help explain the ordinary meaning of undefined policy terms. *First Invs. Corp. v. Liberty Mut. Ins. Co.*, 152 F.3d 162, 168 (2d Cir. 1998). And where a "failure of the policy to define the term" at issue "gives rise to an ambiguity," "that [ambiguity] must be construed in favor of the insured." *Kennedy v. Valley Forge Ins. Co.*, 203 A.D.2d 930, 930 (4th Dep't 1994).

The Appellate Division failed to consider what the average person understands these undefined terms to mean when given their basic dictionary definitions. "Physical" means "having material existence";[11] "of or relating to the body, as distinguished from the mind or spirit."[12] "Loss" means "the partial or complete . . . *absence of a physical capability or function*."[13] It includes "being deprived of" property, or the

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[11] *Physical*, Merriam-Webster.com Dictionary, available at https://www.merriam-webster.com/dictionary/physical.

[12] *Physical*, Collins English Dictionary (12th ed. 2014), available at https://www.thefreedictionary.com/physical.

[13] *Loss*, Merriam-Webster.com Dictionary (emphasis added), available at https://www.merriam-webster.com/dictionary/loss.

"failure to keep . . . a . . . quality" of it.[14] "Damage" means "[i]njury, harm; esp. *physical injury* to a thing, such as *impairs its value or usefulness*."[15]

"Loss" thus focuses on the inability of property to fulfill its intended function. A "physical loss" includes, for example, instances when property loses a "capability or function" due to a problem of a material (*i.e.*, "physical") kind, such as a danger of imminent structural collapse. By contrast, a non-physical loss would involve a problem of a conceptual kind, such as a loss of legal title (addressed by other insurance products). "Damage" focuses on a "harm" to property that reduces ("impairs") either its "value" or its "usefulness." "Physical damage" includes, for example, a detrimental alteration. Physical loss or damage is "direct" when it bears a close causal connection to the covered (non-excluded) peril from which it springs.

By using the disjunctive "or," the policy promises to cover *both* physical "loss" *and* physical "damage" to property. Substituting the

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[14] *Loss*, OED Online, Oxford University Press, available at https://www.oed.com/view/Entry/110406.

[15] *Damage*, OED Online, Oxford University Press (emphasis added), available at https://www.oed.com/view/Entry/47005.

dictionary definitions, the policy applies *either* if COVID-19 causes any "harm" that "impairs" the property's "value or usefulness," *or* if there is "the partial or complete . . . absence of a physical . . . function." The reason is straightforward: Where insurance provisions are framed "in the disjunctive, each must be separately considered and either would support coverage." *Cataract Sports & Entm't Grp. v. Essex Ins. Co.*, 59 A.D.3d 1083, 1084 (4th Dep't. 2009).

Consolidated Restaurant's claim for coverage falls comfortably within the ordinary meaning of physical "loss" and physical "damage." Each coronavirus particle is a physical (not mental or spiritual) thing. Their presence at an insured business premises causes, in the words of the dictionary, the "absence of a physical . . . function"—here, safe dining. R.1932-43 (cataloging the ways that the virus physically impaired functionality of property). Viral particles further cause "harm" to that property by adhering to it in a manner that renders it unsafe, "impair[ing]" both its "value" and its "usefulness." *Id.* (cataloging the ways that the virus physically harmed property by reducing value and usefulness). The complaint did not need to allege anything more to put Westport on notice of these facts.

B. The Appellate Division's Interpretation Improperly Narrows the Term "Damage."

By reading the term "damage" as requiring a "tangible difference in the property," Slip Op. at 9, the Appellate Division (like numerous lower courts) improperly inserted unexpressed limitations found nowhere in the policy language. The Appellate Division's reading contravenes long-settled principles precluding courts from removing coverage "by interpretation or implication." *See Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 311 (1984).

First, and most prominently, the Appellate Division (and many lower courts) held that "damage" requires "tangible" alteration. Slip Op. at 9, 11, 13. The ordinary meaning of "tangible" is something "capable of being perceived especially by the sense of touch."[16] But neither the dictionary definition of "damage" nor the policy itself suggest that the parties intended to limit coverage to just those instances in which the damage happens to be "tangible."

Physical "damage" is much broader: It encompasses *any* "injury" or "harm" to property of a physical kind. *See* Part II.A, *supra*. For

[16] *Tangible*, Merriam-Webster.com Dictionary, available at https://www.merriam-webster.com/dictionary/tangible.

instance, intense heat from fire will weaken steel to the point of failure. The ordinary person would understand such detrimental alteration to constitute damage requiring correction, and no reasonable insurer would say otherwise. Yet such changes are not "tangible."

Similarly, courts and insurers treat environmental contamination, such as polluted groundwater, as "property damage." *See, e.g.*, *Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208 (2002) (accepting as non-controversial that groundwater contamination is "property damage"); *Olin Corp. v. Certain Underwriters at Lloyd's London*, 468 F.3d 120, 125, 126-132 (2d Cir. 2006) (same, and holding that the migration of contamination constituted "additional property damage"). But such contamination typically amounts to pollutant concentrations on the order of parts per million or parts per billion—again, not something that is "tangible."

The Appellate Division's decision fails to appreciate this industry context, and by dismissing this case on the pleadings, foreclosed Consolidated Restaurant's ability to obtain discovery and present evidence regarding the insurance industry practices regarding

"property damage," all of which shape policyholders' reasonable expectations.

Second, implicit in the Appellate Division's reasoning is the error, made express by many lower courts, that property cannot be "damaged" if it can be "cleaned," because in that case the detriment is not permanent. *See* Slip Op. at 11 (reasoning that property itself must "change[] from what it previously was to what it is now"), *see also, e.g.*, *Mangia Rest. Corp. v. Utica First Ins. Co.*, 72 Misc. 3d 408, 415 (Sup. Ct. Queens Cty. 2021) (finding no coverage because the presence of viral particles "can be eliminated by routine cleaning and disinfecting").

Setting aside Consolidated Restaurant's factual allegations regarding the persistence of viral particles even after cleaning (well supported by the science), *see* Parts I.B & I.C, *supra*, an interpretation of "damage" that excludes property which can be "cleaned" adds further limitations to coverage found nowhere in the policy language. An ordinary person understands that "damaged" property may at times require only cleaning, and insurance industry custom and practice recognizes the same.

Insurers routinely pay to clean muddy basements after floods, or to remove sand from hotel pools after hurricanes. Mold damage often is repaired by cleaning with bleach. Indeed the policy here expressly excludes "loss or damage" by "mold, mildew, fungus, spores or other microorganism"[17] in recognition of this understanding. R.128. That exclusion would be surplusage if "damage" did not include detrimental alteration that could be remedied by cleaning. And environmental contamination, which as noted above constitutes "property damage," is often remediated by passing groundwater through filters—cleaning it.

Nor does the word "damage" include any requirement that the impairment be permanent, rather than fade with time. For decades, insurers have paid for industrial-grade fans to dry floors, rugs, sofas, and beds after hurricanes or floods, even though those items of property are not otherwise damaged. Water will evaporate one way or another, but insurers pay to accelerate the drying (and pay for business interruption losses during the drying process). That practice likewise informs reasonable policyholder expectations. Indeed, even if time will

[17] The term "microorganism" in this exclusion does not include viruses because they are not living organisms.

eventually restore property, it does not "resolve whether contaminated property had been damaged in the interim, nor would it alleviate any loss of business income or extra expenses" during the impairment. *Marina Pacifica Hotel*, 2022 WL 2711886, at *10.

Third, closely related to the notion that viral particles cannot cause physical "damage" because property can be "cleaned" is the idea that the impact of viral particles is too trivial to constitute "damage." *See, e.g.*, *Kim-Chee LLC v. Philadelphia Indem. Ins. Co.*, 535 F. Supp. 3d 152, 159 (W.D.N.Y. 2021) ("The virus is short-lived.").

The notion of "trivial" damage appears nowhere in the insuring clause. Instead, the parties mark the line between substantial and non-substantial problems through another part of the policy: the deductible provisions. Policyholders cannot recover for losses and damages if the quantum falls below a specific amount (*e.g.*, $25,000), or if an interruption lasts less than a specific period of time (*e.g.*, 24 hours). *See, e.g.*, R.97-99. If loss or damage exceeds the deductible amounts, it is by definition sufficiently serious to trigger coverage. Courts should not re-write the parties' bargain by injecting a subjective notion of severity into the word "damage"—the deductible provisions already do

that, and are one of the few areas actually open to negotiation. *See Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004) (courts should not "make a new contract for the parties under the guise of interpreting the writing").

Moreover, the ordinary person reasonably understands that seemingly small amounts of "damage" can cause serious problems. Courts have long recognized that when it comes to property damage, what matters is not the size of the alteration but the scale of its impact. *See, e.g.*, *Baker v. Saint-Gobain Performance Plastics Corp.*, 232 F. Supp. 3d 233, 237-39, 246 (N.D.N.Y. 2017) (negligence claim for property damage was "not fairly categorized as purely economic in nature," even where groundwater contamination was in the range of parts per trillion).[18]

Finally, the Appellate Division (and many lower courts) reason that viral particles cannot cause "damage" to property because "[n]othing stopped working." Slip Op. at 14; *see, e.g.*, *Food for Thought*

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[18] One part per trillion is "equivalent to one drop of water in 20 Olympic-sized swimming pools." U.S. Department of Energy, Office of Environmental Health, Safety, & Security, *Per- and Polyfluoroalkyl Substances (PFAS) Awareness* (Sept. 2019), available at https://perma.cc/7NWS-4RGV.

Caterers Corp. v. Sentinel Ins. Co., 524 F. Supp. 3d 242, 249 (S.D.N.Y. 2021) ("[T]he coronavirus damages lungs, not printing presses.").

Nothing in the policy or the definition of "damage" limits that term to mechanical failure. The ordinary person views a dented automobile or a store vandalized with spray paint as damaged even though both still work. No reasonable insurer would deny coverage for that damage simply because the car still could be driven, or the store's aisles were clear and cash registers still worked. Again, by prematurely resolving the case, the Appellate Division failed to appreciate this important context, and foreclosed the policyholder from obtaining discovery and presenting evidence regarding these insurance industry practices, which likewise inform policyholders' reasonable expectations.

Indeed, the Second Department has recognized insurance coverage for physical damage that does not affect the mechanical operation of property. *See Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co.*, 24 A.D.3d 743, 744 (2d Dep't 2005). There, the court held that "physical damage" includes a benign but unpleasant flavor change to soda, caused by faulty raw ingredients that seriously impaired the soda's "function and value." 24 A.D.3d at 744. The court expressly *rejected* the insurer's

argument that "damage" required "a distinct demonstrable alteration of the physical structure" of insured property "by an external force." *Id.*

The loss in *Pepsico* has important parallels with SARS-CoV-2. Just as with this virus, the changes in *Pepsico* occurred at a molecular level. They were neither visible nor capable of being touched. They constituted "physical damage" for the sole reason that the soda tasted bad; that is, although safe, it became undesirable for human consumption. Here, the effect of SARS-CoV-2 on business property similarly involves invisible alterations at the molecular level. But unlike the benign change at issue in *Pepsico*, the fomites that the virus creates are quite dangerous.

C. The Appellate Division's Interpretation Improperly Reads the Term "Loss" Out of the Policy.

The Appellate Division committed a fundamental error of policy interpretation when it declined to give effect to the term physical "loss," and thereby rendered it surplusage. *See Cragg v. Allstate Indem. Corp.*, 17 N.Y.3d 118, 122 (2011) (holding that courts must give effect to *all* policy terms, and treat none as surplusage). "Loss" and "damage" have different meanings. The ordinary person understands and reasonably expects those words to promise coverage for different situations.

"Physical loss" includes any impairment to functionality of insured property, including dangerous conditions hindering safe human occupation. *See* Part II.A, *supra*. Notably, neither Westport nor the insurance industry have, or can offer, any reasonable explanation of how real property (*e.g.*, the buildings and premises that are insured by the policy) can be "lost" other than by losing their ability to function as intended. Nor does "loss" mean "destruction"—in fact, the insurance industry long ago replaced the word "destruction" with the word "loss" in property insurance policies in order to expand coverage.[19]

As a leading insurance treatise explains, "when an insurance policy refers to physical loss of or damage to property, the 'loss of property' requirement can be satisfied by any 'detriment,' and a 'detriment' can be present *without there having been a physical alteration of the object*." Allan D. Windt, *Loss of Property*, 3 Insurance Claims & Disputes § 11:41 (6th ed. West) (emphasis added).

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[19] *See* Charles M. Miller et al., *COVID-19 and Business Income Insurance: The History of 'Physical Loss' and What Insurers Intended It to Mean*, 57 Tort Trial & Ins. Prac. L.J. __, at 10-14 (Forthcoming 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4130730.

The Appellate Division rejected the argument that "loss" means "the impaired function . . . [of] property for its intended purpose." Slip Op. at 9. But the court failed to explain what physical "loss" means if not that, or how it differs from "damage." Instead, the court (like many other lower courts) simply assumed that New York law forecloses coverage for what it called "loss of use." *Id.* at 6, 8, 10.

No decision of this Court endorses such a position, nor is it compatible with the text of the policy. Rather, the lower courts' invocation of "loss of use" uniformly flows from a serious misreading of an inapplicable First Department decision, *Roundabout Theatre Company v. Continental Casualty Company*, 302 A.D.2d 1 (1st Dep't 2002). That case, however, merely held that when a peril causes damage or danger to *someone else's property*—there, dangerous conditions existing in a public street—it does not cause loss or damage "to the insured's property" itself. *Id.* at 7. Here, by contrast, the hazardous conditions that impaired physical use occurred directly to Consolidated Restaurant's *own insured property*. That distinction makes all the difference under the policy language.

Finally, the Appellate Division's interpretation threatens to shift New York law far afield from the historical understanding of the all-risk coverage grant, and foreclose coverage for on-site hazards and dangers that have long been understood as covered. As this Court has explained, a policyholder's reasonable expectations are informed by the policy's purpose. *See J.P. Morgan Secs. Inc.*, 37 N.Y.3d at 567. Those expectations likewise are framed by the operative legal framework in place when the policy was purchased, and on the relevant insurance practices at that time. *See id.* The Appellate Division failed to consider these factors.

For more than five decades, courts have held that "physical loss" includes a broad range of invisible or intangible things that make property unsafe for occupation, resulting in impairment of its function—safe shelter. *See, e.g.*, *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 825-26 (Minn. 2000) ("[A]sbestos fibers . . . present[ed] a health hazard to the tenants" that "seriously impaired" property); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 16-17 (W. Va. 1998) (home imperiled by nearby falling rocks, but not struck by them, suffered a "direct physical loss to the property"); *W. Fire Ins. Co.*

v. First Presbyterian Church, 437 P.2d 52, 54-55 (Colo. 1968) (church suffered a "direct physical loss" when gasoline fumes permeated building, rendering it dangerous).

Put simply: Property suffers "physical loss" when "rational persons" would not "be content to reside there." *Murray*, 509 S.E.2d at 17.

CONCLUSION

To date, the phrase "all risks of direct physical loss or damage" in property insurance has escaped the careful and text-driven analysis that exemplifies New York insurance law. United Policyholders respectfully requests that the Court grant the policyholder permission to appeal in this case, and now undertake that review.

Dated: New York, New York
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