To be submitted by Rukesh Korde, Esq. (of the bar of the District of Columbia) by permission of the Court.

New York Supreme Court

Appellate Division—First Department

CASE NOS.:
2021-02971
2021-04034

CONSOLIDATED RESTAURANT OPERATIONS, INC.,

Plaintiff-Appellant,

– against –

WESTPORT INSURANCE CORPORATION,

Defendant-Respondent.

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS

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CORPORATE DISCLOSURE STATEMENT

United Policyholders is a non-profit section 501(c)(3) organization. It has no parent corporation, 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 organization that advocates for policyholder interests as a counterbalance to the well-funded insurance industry lobbying groups.

Public officials, state insurance regulators, and academics routinely seek United Policyholders' input on insurance and legal matters. United Policyholders often works with state regulators on matters concerning the marketing of insurance policies, insurance claims issues, and consumer rights. Its executive director has served for twelve consecutive terms at the proceedings of the National Association of Insurance Commissioners as a representative of insurance consumers.

United Policyholders has filed amicus briefs in more than 450 cases across more than 40 states. In each, it provides an intellectual counterbalance to industry arguments and promotes the evenhanded development of insurance law. The U.S. Supreme Court and state

appellate courts regularly accept and cite these briefs,[1] including the New York Court of Appeals.[2]

An amicus is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern et al., *Supreme Court Practice*, 570–71 (1986). United Policyholders does just that in its proposed brief by providing insight on key issues related to "all risks" property insurance coverage for COVID-19 claims. This brief supplements the efforts of counsel to the parties, and highlights important law that might otherwise escape consideration.

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[1] *See, e.g.*, *Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Sproull v. State Farm Fire & Cas. Co.*, 2021 IL 126446 ¶ 53 (2021); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 234 N.J. 23, 64 (2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 629 Pa. 444, 452–53 (2014); *Julian v. Hartford Underwriters Ins. Co.*, 45 Cal. 4th 747, 760 (2005).

[2] *See, e.g.*, *Keyspan Gas E. Corp. v. Munich Reinsurance Am., Inc.*, 73 N.Y.3d 113 (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).

During the pandemic, United Policyholders' commitment to advocating for policyholders' rights has become more vital than ever. In cases around the country, the insurance industry has worked to dramatically narrow the historically broad understanding of "all risks" insurance, and routinely suggested that accepting policyholders' reasonable views of the coverage they bought would threaten to bankrupt the entire insurance industry.

United Policyholders here makes the counterpoint: insurers' proposed narrowing of their "all risks" insurance promise contradicts both the ordinary understanding of the words of that promise and decades of law. If successful, it will effectuate an unjustified transfer of risk away from insurers and to New York consumers.

Proposed amicus curiae United Policyholders respectfully requests that the Court accept this brief, and for the reasons set forth below, adhere to the settled understanding of insurers' promise to cover "all risks of direct physical loss or damage" to insured property.

PRELIMINARY STATEMENT

This appeal presents a critical question that will decide whether business owners who purchased standard form "all risks" property and business interruption policies can recover for their losses resulting from the COVID-19 pandemic.

The question: Can an ordinary person reasonably read the undefined words "direct physical loss *or* damage" to property (used in the insuring clause of many "all risks" property policies) as encompassing both (1) detrimental alterations to the surface of insured property, and (2) impairments to its function, where either results from the on-site presence of dangerous viral particles?

The Trial Court erred, at the pleading stage, when it answered this question "no" despite the extensive allegations by policyholder Consolidated Restaurants Operations, Inc. ("CRO") about the physical characteristics of the novel SARS-CoV-2 virus, and its effects on insured property.[3] *See, e.g.*, R-1929 ¶¶ 3–5, 13–31, 41–54. That holding

[3] Unless otherwise noted, the citations to the pleadings in this brief are to CRO's proposed Amended Complaint, for which the Trial Court denied leave to amend as "futile." R-48.

exemplifies a troubling trend that threatens to upend decades of law affirming the broad scope of "all risks" insurance.[4]

The Trial Court misapprehended core points of insurance law:

First, "[a]ll risks" insurance represents a "special type of insurance" designed to protect against novel, unanticipated risks and unforeseen types of loss or damage. *See Coverage Under All-Risk Insurance*, 30 A.L.R. 5th 170. It historically has been understood as covering *any* peril of loss, so long as that loss was fortuitous (*i.e.*, unintentional) and not otherwise expressly excluded. *See id.*

Second, against this backdrop, the undefined phrase "all risks of direct physical loss or damage" creates an extraordinarily broad coverage grant for all fortuitous perils causing physical loss or damage. It encompasses *all* loss *or* damage to insured property of a material (i.e., physical) nature, in contrast to conceptual losses (such as loss of legal title or credit) addressed by other categories of insurance.

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[4] This troubling rush to judgment—before any evidence has been presented—is documented by Prof. Erik S. Knutsen and Prof. Jeffrey W. Stempel in *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 Conn. Ins. Law J. 185, 192 (2021).

Third, as courts have recognized over the past fifty years, that coverage promise protects the policyholder against "physical damage," meaning any detrimental alteration to its insured property, whether visible or microscopic. It also protects against "physical loss," meaning any impaired functionality, including dangerous conditions that hinder the normal, safe occupation of property.

COVID-19 embodies precisely the kind of novel, unanticipated risk, and unforeseen type of loss and damage, that an ordinary person reasonably believes constitutes a "risk[] of direct physical loss or damage." As CRO alleged, when coronavirus particles from infected persons land on the surfaces of insured property, they physically alter its molecular character and transform objects once safe for human touch into a vector for disease; when those particles mix with the clean air of premises, they render it physically hazardous, as surely as toxic smoke in a room would do; and when those premises thereby become physically dangerous, the property loses its ability to function as a safe place for previously-normal human activity—its fundamental purpose. *See* R-1929 ¶¶ 13–31.

Fourth, the Trial Court held that the very real physical impacts to property caused by COVID-19 could never amount to covered loss or damage by relying on a decision addressing coverage for the closure of a public street, where the insured property itself remained functional and safe, *Roundabout Theatre Company v. Continental Casualty Company*, 302 A.D.2d 1 (1st Dep't 2002). From that narrow premise, the Trial Court read *Roundabout* in sweeping manner as eliminating coverage for (1) damage involving invisible or non-structural alterations to insured property, and (2) loss due to hazards that impair the function of insured property. R. 40.

But *Roundabout* held no such thing. It simply held that when a peril causes only "off-site property damage," *i.e.*, damage to *someone else's property*, it does not cause loss or damage "to the insured's property." 302 A.D.2d at 7. The Trial Court compounded its error by overlooking the Appellate Division's directly-applicable decision in *Pepsico, Inc. v. Winterthur International American Insurance Company*. There, the court affirmed that physical "damage" includes impairment of "function and value" and does not require "a distinct demonstrable

alteration of the physical structure" of property. *See* 24 A.D.3d 743, 744 (2d Dep't 2005).

Fifth, these errors rest on a fundamental misunderstanding fostered by the insurance industry. Having for decades sold "all risks" policies that broadly cover "direct physical loss or damage" to property, insurers denied coverage for COVID-19 claims *en masse*, even under policies that omit widely-available exclusions specifically for virus-related losses. Insurers then petitioned the courts to sanction their dramatic constriction of the "all risks" insuring clause, changing its meaning post-claim to an exclusion for pandemic-related loss and damage.

But New York law requires insurers to state coverage limitations specifically, expressly, and unambiguously. The broad, undefined words in the insuring clause nowhere restrict coverage to losses or damages that are tangible, structural, or permanent, as insurers now claim. Nor do those words even impliedly exclude coverage for physical losses and damage caused by viruses and disease on insured premises.

As other amici discuss, the trial court's decision raises important procedural concerns. *See, e.g.*, Proposed Brief of New York State Trial

Lawyers Association, NYSCEF No. 12, Ex. A at 16–19, 25–29 ("Trial Lawyers Assoc. Br."). Dismissing a complaint is proper only where the plaintiff *cannot* allege *any* facts that create a dispute. Here the policyholder alleged that the virus could and did cause physical loss and damage—but the Trial Court, without receiving any evidence, found those allegations unconvincing. Evidence-based proceedings like courts (and science) work only where a party has a fair opportunity to present its evidence. The Trial Court should have let the policyholder do so.

Finally, underlying it all is a suggestion, repeated in insurance industry amicus briefs, that holding insurers to their bargain would bankrupt the industry. Aside from being untrue, such speculation also is legally irrelevant. New York law requires courts to enforce the terms of contracts freely entered into, even if a party may later regret the language to which it agreed.

The Court should reaffirm the historically broad scope of the "all risks" insurance promise, reject insurers' post-claim efforts to rewrite their policies, and vacate the Trial Court's dismissal order.

ARGUMENT

I. Policy Terms Should Be Given Their Ordinary Meaning and Understood as Deliberately Included.

Justice Cardozo explained that the "guide" in insurance policy interpretation "is the reasonable expectation and purpose of the ordinary business [person]." *Bird v. St. Paul Fire & Marine Ins. Co.*, 224 N.Y. 47, 51 (1918). "It is his intention, expressed or fairly to be inferred, that counts." *Id.* "Phrased differently, . . . we must construe the word[s] . . . as would the ordinary [person] on the street or ordinary person when he purchases and pays for insurance." *Arthur A. Johnson Corp. v. Indem. Ins. Co. of N. Am.*, 7 N.Y.2d 222, 227 (1959).

The "understanding by the *average person,*" not "technical definition[s]," determines the meaning of policy terms. *Michaels v. Buffalo*, 85 N.Y.2d 754, 757 (1995) (emphasis added). Where "the policy may be reasonably interpreted in two conflicting manners, its terms are ambiguous" and thus resolved in favor of coverage. *Mostow v. State Farm Ins. Co.*, 88 N.Y.2d 321, 326 (1996).

Equally, policies "should not be read so that some provisions are rendered meaningless." *Cty. of Columbia v. Cont'l Ins. Co.*, 83 N.Y.2d 618, 628 (1994); *see also Cragg v. Allstate Indem. Corp.*, 17 N.Y.3d 118,

122 (2011). Policy terms are presumed to be deliberately included, not surplusage. *See Cragg*, 17 N.Y.3d at 122.

II. "All Risks of Direct Physical Loss or Damage" Includes Losses and Damage from the Coronavirus.

"All risks" insurance, like the instant policy, "covers 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). Insurers have long advertised, and policyholders long bought, all risks coverage to protect themselves against known risks (e.g., fire, flood, and theft), and novel, unknown, or unforeseen risks. *See* 70 N.Y. Jur. 2d Ins. § 1712.

Business owners buy such insurance both for "eventual monetary proceeds of a policy," and "for the peace of mind, or comfort, of knowing that [they] will be protected in the event of a catastrophe." *See Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 10 N.Y.3d 187, 194 (2008). To achieve that end, insurers often sell "business interruption" coverage with "all risks" policies, which protects the policyholder's income stream and secures the means "necessary to sustain its business operation[s]" after disaster strikes. *Id.*

A. "All Risks" Insurance Covers All Fortuitous Losses.

The undefined phrase "all risks of direct physical loss or damage" to property forms the organizing principle of "all risks" property insurance. Its key term is "all risks," with "direct physical loss or damage" following as a broad categorical description of the policy's subject matter—losses and damages grounded in the material (i.e., physical) world.

New York courts have long understood "all risks" policies as "creating a special insurance, and extending to other risks than are usually contemplated." *Goix v. Knox*, 1 Johns. Cas. 337, 340 (Sup. Ct., N.Y. Cty. 1800).[5] New York law thus affords "all risks" coverage "a liberal construction, and appl[ies] it to all losses, except such as arise from the fraud of the insured." *Id.*

The principal limitation for "all risks" coverage has always been the nominal requirement that the loss be fortuitous. *See, e.g.*, *In re Sept. 11 Litig.*, 751 F.3d 86, 92–93 (2d Cir. 2014) ("The purpose of an all-risk insurance contract is to protect against *any insurable loss* not expressly

[5] *Confirmed in relevant part by* 2 Johns. Cas. 480 (N.Y. Sup. Ct. 1802), granting additional relief to the policyholder in the companion case *Goix v. Low*, 1 Johns. Cas. 341 (Sup. Ct., N.Y. Cty. (1800)).

excluded by the insurer or caused by the insured." (emphasis added)); *see also, e.g.*, *City of Burlington v. Indemnity Ins. Co. of N. Am.*, 332 F.3d 38, 47–49 (2d Cir. 2003) (tracing history of "fortuity" requirement in property insurance, and noting that affording "expansive reading" of such policies gives insurers "a powerful incentive to insert explicit language"); *Northwestern Mut. Life Ins. Co. v. Linard*, 498 F.2d 556, 560–61 & n.5 (2d Cir. 1974) (an "'all risk' policy" covers "all losses attributable to external causes," "absent specific exclusion").

To demonstrate fortuity, the policyholder need show only that its loss results from a chance occurrence.[6] *See David Danzeisen Realty Corp. v. Cont'l Ins. Co.*, 170 A.D.2d 432 (2d Dep't 1991). A policyholder "need not prove the cause of the loss" or "the exact nature of the accident or casualty which, in fact, occasioned the loss." *Simplexdiam, Inc. v. Brockbank*, 283 A.D.2d 34, 39 (1st Dept. 2001).

To obtain coverage, a policyholder must prove simply "the existence of the all risk polic[y], and the loss of the covered property."

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[6] As one insurance industry lawyer explained, the main limitation is that "the loss for which claim is made must result from a risk, i.e., from a fortuitous or a chance occurrence." John P. Gorman, *All Risks of Loss v. All Loss: An Examination of Broad Form Insurance Coverages*, 34 Notre Dame L. Rev. 3, 355 (1959).

Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 993–99 (2d Cir. 1974). As this historical context makes clear, the key term—"all risks"—has long been understood by courts and insurance market participants as setting only a nominal bar for policyholders seeking coverage.

B. "Direct Physical Loss or Damage" Includes The Damage and Loss COVID-19 Causes to Property.

The phrase "all risks" encompasses the possibility that a global pandemic will cause viral particles to intrude upon insured property. Thus, the question animating COVID-19 coverage disputes is whether damage or loss from viral particles amounts to "direct physical loss or damage." It plainly does. "All risks of direct physical loss or damage" means just that: *loss or damage of any physical kind*. Any other reading would render much of the policy superfluous, contrary to New York law.

1. The Ordinary Meaning of Those Five Words Says as Much.

The insuring clause nowhere defines any word in the phrase "direct physical loss or damage." When words are undefined in an insurance policy, dictionaries help explain their ordinary meaning, *First Invs. Corp. v. Liberty Mut. Ins. Co.*, 152 F.3d 162, 168 (2d Cir. 1998), and insurers are charged with resulting ambiguity. As the Fourth

Department has recognized, "[t]he failure of the policy to define the term [at issue] or to exclude it from coverage gives rise to an ambiguity that must be construed in favor of the insured." *See Kennedy v. Valley Forge Ins.*, 203 A.D.2d 930, 930 (4th Dep't 1994).

"*Physical*" means "having material existence"; "of or relating to material things."[7] In other words, "of or relating to the body, as distinguished from the mind or spirit."[8] "*Loss*" means "the partial or complete deterioration or *absence of physical capability or function*."[9] That is, "loss" means "being deprived of, or the failure to keep" some object. "*Damage*" means "loss or harm resulting from injury to person, property, or reputation."[10] "Injury, harm; esp. *physical injury* to a thing, such as *impairs its value or usefulness*."[11]

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[7] *Physical*, Merriam-Webster.com Dictionary (emphasis added), *available at* https://www.merriam-webster.com/dictionary/physical.

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

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

[10] Damage, Merriam-Webster.com Dictionary, *available at* https://www.merriam-webster.com/dictionary/damage.

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

Physical "loss" thus focuses on the inability of property to fulfill its intended function due to impairment, whereas physical "damage" focuses on injury that affects value or usefulness. Such loss or damage is physical where it relates to things "having a material existence," rather than "the mind or spirit" (such as loss of title or faith). The loss or damage is "direct" when it bears a causal connection to a covered (non-excluded) peril.

By its express terms, reflected in the disjunction "or," the insuring clause covers both physical loss of property and damage to it. Using the dictionary definitions, it protects the policyholder *either* if COVID-19 causes any "harm . . . to a thing . . . such as impairs its usefulness" *or* if there is "the partial or complete deterioration . . . of function." The reason is straightforward: where insurance coverage provisions are framed "in the disjunctive, each must be separately considered and either would support coverage." *See Cataract Sports & Entm't Grp. LLC v. Essex Ins. Co.*, 59 A.D.3d 1083, 1084 (4th Dep't. 2009).

As the Court has explained in construing a waiver clause that applied to "any loss *or* damage," "the use of the words 'any loss,' followed by the disjunctive 'or,' requires a much broader reading" that

extends beyond just "property damages." *Cresvale Int'l Inc. v. Reuters Am., Inc.*, 257 A.D.2d 502, 505 (1st Dep't 1999) (emphasis added).

CRO's claim for coverage falls comfortably within these ordinary meanings. Each coronavirus is a physical (not mental or spiritual) thing. Their presence at an insured business premises causes, in the words of the dictionary, the "deterioration . . . of physical . . . function"—here, safe dining. *See* R-1929 ¶¶ 13–31, 41–54 (describing physical impacts on CRO's 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." *See id.*

In refusing to accept CRO's allegations to this effect, the Trial Court erroneously adopted insurers' preferred—unproven—claims about the science of COVID-19's effects on property. That was procedural error, and as other amici show, poor science. *See* Proposed Trial Lawyers Assoc. Br. at 19–25.

2. Other Policy Terms Confirm the Broad Meaning of "Physical Loss or Damage."

The Trial Court's interpretation further contradicts the principles that contract language "must be read in the context of the entire agreement," *see Westmoreland Coal Co. v. Entech, Inc.*, 100 N.Y.2d 352, 358 (2003), and "should not be read so that some provisions are rendered meaningless," *Cty. of Columbia*, 83 N.Y.2d at 628.

In addition to reading the words "loss" and "or" out of the policy, the Trial Court's interpretation would render numerous other policy provisions pointless. Contrary to the contentions of insurer amici, New York law requires harmonizing policy exclusions with their surrounding provisions. *Westview Assocs. v. Guar. Nat'l Ins. Co.*, 95 N.Y.2d 334, 339 (2000) (policy language must be read in a manner that effectuates its "specific exclusions" and does not render them "unnecessary").[12]

CRO identifies several exclusions that would be surplusage should insurers' reading prevail. *See* Appellant's Br. at 23–24 . There are many other terms, which regularly appear in standard policies, that likewise

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[12] *Raymond Corp. v. Nat'l Union Fire Ins. Co.*, 5 N.Y.3d 157, 163 (2005), is not to the contrary. That case saw no reason for "negative inferences from the policy's exclusions" where those provisions were *already* in harmony with the policy as a whole. *Id.*

would serve no purpose unless "direct physical loss or damage" means both (1) any detrimental alteration, and (2) any impairment of functionality, to insured property.

The policy excludes "loss or damage caused by . . . the *unlawful* . . . release . . . of any chemical, bacteriological, *viral*, radioactive or similar *agents or matter*." R-129 (§ VI(C)(6)(d)) (emphasis added). If a virus cannot cause "physical loss or damage" as a matter of law (a necessary predicate to the Trial Court's ruling), then there is no meaning served by an exclusion for "loss or damage caused by . . . the unlawful release . . . of any . . . viral . . . agents." New York law does not permit such a result.

The policy also excludes coverage for "loss or damage" by "mold, mildew, fungus, spores or other microorganism[13] of any type, nature or description" whose presence "*poses an actual or potential threat to human health*." R-128 (§ VI(B)(6)) (emphasis added). The exclusion applies "regardless whether there is," among other things, "any *loss of use, occupancy, or functionality*." *Id.* (§ VI(B)(6)(c)) (emphasis added).

[13] The term "microorganism" does not include viruses because they are not living organisms. Appellant's Br. at 45–47.

This exclusion, too, would be meaningless if "loss of use, occupancy, or functionality" due to dangerous microscopic material could not constitute "physical loss or damage" to property in the first place.

Similarly, the policy excludes coverage for "the cost of correcting or making good . . . deficiency or omission in construction [or] design." R-127 (§ VI(B)(2)(a)). A "deficiency in design" cannot alter or change property: it is an inherent characteristic of the affected property from the outset. But it can render the property physically less capable of serving its intended function. This exclusion likewise would be unnecessary if "physical loss or damage" did not encompass impaired function.

In short, the insurance industry's attempt to rewrite its insuring agreement cannot be reconciled with a reading of the "all risks" insuring clause in context of the policy as a whole.

3. Insurance Law Recognizes the Broad Meaning of "Direct Physical Loss or Damage."

Consistent with ordinary speech and the surrounding policy language, insurance case law in New York and elsewhere recognizes that "direct physical loss or damage" includes alterations to property

that reduce its value or usefulness ("damage"), as well as the presence of a hazard that impairs its ability to function as intended ("loss").

In *Pepsico*, the Second Department held that "physical damage" includes a benign but unpleasant flavor change to soda, caused by faulty raw ingredients that seriously impaired its "function and value." *See* 24 A.D.3d at 744. The court expressly *rejected* the insurer's argument that the policyholder needed to prove "a distinct demonstrable alteration of the physical structure of the [policyholder's] products by an external force" to establish physical damage. *Id.*

Just as with COVID-19, the changes in *Pepsico* occurred at a molecular level. Those changes constituted "damage" because humans perceived the resulting soft drinks as tasting bad. Here by contrast, COVID-19's effect on business property is not a benign matter of taste; it causes dangerous physical changes that, as CRO has pleaded, required extensive physical remediation efforts to even partially restore safe use of the property. Thus, the detrimental alteration of property by COVID-19 substantially impaired the "function and value" of CRO's property. *Pepsico*, 24 A.D.3d at 744.

Similarly, "physical loss" includes the inability to safely occupy a home due to "[m]old and mycotoxins" that trigger "severe allergic reactions." *See Hritz v. Saco*, 18 A.D.3d 377, 378 (1st Dep't 2005). Were it otherwise, the Court in *Hritz* would not have needed to consider whether the mold exclusion in that case precluded coverage for the physical loss caused by the presence of such toxins. *Id.*; *see also Siegel v. Chubb Corp.*, 33 A.D.3d 565, 566 (1st Dep't 2006) (same).

Likewise, a "physical loss" includes a homeowner's inability to occupy a home due to contamination after a nearby explosion released dangerous chemicals into the atmosphere. *See Trupo v. Preferred Mut. Ins. Co.*, 59 A.D.3d 1044, 1045 (4th Dep't 2009). That was true even though the explosion itself did not in any way disturb the home's physical structure. *Id.* The mere presence of dangerous material on premises, that is, constituted "direct physical loss or damage."

These decisions follow the arc of case law from around the country:

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) ("If rental property is contaminated by asbestos fibers and presents a health hazard to the tenants, its function is seriously impaired."); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 16–17 (W. Va. 1998) (home imperiled by nearby presence of 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 in the ground permeated building and rendered it dangerous).

Other decisions hold that a property also suffers "physical loss" when it merely becomes unreasonable for people to occupy and use it normally, even if it remains safe. *See, e.g.*, *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 805 (N.H. 2015) (pervasive odor could cause "physical loss"); *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (same); *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332, 1335–36 (Or. Ct. App. 1993) (same).

As a leading insurance treatise puts it, "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*." 3 Allan D. Windt, *Insurance Claims & Disputes* § 11:41 (6th ed. 2013) (emphasis added)).

C. New York Law Prohibits Narrowing Coverage by Implication.

In the context of COVID-19 claims, insurers across New York have impermissibly sought to add unexpressed limitations to the broad undefined words "all risks of direct physical loss or damage," telling courts that insurers never meant for loss and damage from viral particles or disease to trigger coverage.

But New York law makes clear that "exclusions or exceptions from policy coverage must be specific and clear in order to be enforced." *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 311 (1984). Exclusions are "not to be extended by interpretation or implication," but "accorded a strict and narrow construction." *Id.*

The Trial Court erred by adopting implied limitations nowhere found in the insuring clause's express terms, relying on the reasoning of *Northwell Health v. Lexington Insurance Company*, 2021 WL 3139991

(S.D.N.Y. July 26, 2021). *See* R-40. That case, however, rests on significant errors of insurance law.

First, the Trial Court's holding that loss or damage must be permanent cannot be reconciled with the insurance policy that CRO bought. *See id.* (adopting *Northwell Health*, 2021 WL 3139991 at *6). The insuring clause never uses the word "permanent," and we are aware of no modern dictionary which uses that word in its definition of "damage" or "loss."[14]

The Trial Court's holding is also contrary to common sense. Ordinary people use "loss" to include temporary deprivation. Even small children understand it that way. *See* Anonymous, *Little Bo Peep* ("Little Bo-peep has lost her sheep . . . . Leave them alone, and they'll come home." (quoted in Bartlett's Familiar Quotations, 895 (18th ed. 2012)). That is why the court in *Gregory Packaging* held that an ammonia release, which dissipated in less than a week, caused a "physical loss" when it seriously impaired normal operation and function of the insured

[14] We have reviewed the following: The American Heritage Dictionary, The Chambers Dictionary, Collins English Dictionary, Oxford English Dictionary, Merriam-Webster Dictionary, and Cambridge Dictionary of American English.

facility. *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *5–6 (D.N.J. Nov. 25, 2014).

Second, the Trial Court erroneously reasoned that physical loss or damage must be total to trigger coverage. *See* R-40 (adopting *Northwell Health*, 2021 WL 3139991, at *6). But the dictionary itself defines "loss" to include "partial" deprivation. Indeed, the Trial Court's reasoning would eliminate coverage where a fire destroys only part of an insured premises, or where an electrical arc disables part of a factory while the rest continues to operate at reduced levels—both things that "all risks" policies plainly cover.

Inherent in the Trial Court's reasoning is the notion that a policyholder does not suffer a physical loss or damage where it "continued to operate with extra precautions." *Northwell Health*, 2021 WL 3139991, at *6. But that would eviscerate the "Extra Expense" coverage that CRO and many other policyholders purchased specifically to insure the "extra costs to temporarily continue as nearly normal as practicable the conduct of the Insured's business" after catastrophe. R-117 (§ V(F)).

Third, the Trial Court erred in holding that no "physical loss or damage" can occur if—contrary to the actual pleadings—the peril is (supposedly) ephemeral, fleeting, or easily corrected. *See* R-40 (adopting *Northwell Health*, 2021 WL 3139991, at *6).

The impact of COVID-19 can hardly be labeled fleeting, ephemeral, or inconsequential as we enter the twentieth month of a global pandemic. Moreover, the "all risks" insuring clause nowhere says "we cover direct physical loss or damage, *unless it is short lived or easy to correct*." Rather, where insurers wish to eliminate coverage for small problems, minor losses, and brief shutdowns, they include *deductibles* in their policy. *E.g.*, R-97 (§ III). Policyholders cannot recover claims for losses and damage if the quantum falls below the deductible, and policyholders pay higher or lower premiums depending on its amount.

The trial court should not have substituted its own judgment for the express terms that the parties negotiated to mark the line where a loss or damage becomes sufficiently consequential to trigger coverage.

Fourth, it likewise is incorrect to say, as insurance industry amici often argue, that to trigger coverage there must be some physical remediation that accompanies a health hazard.

The insuring clause nowhere says that, and in any event, CRO like many policyholders alleges it made extensive changes to its physical property to repair and remediate the on-site presence and hazards of viral particles. *See* R-1929 ¶¶ 43–45, 51; *Matzner v. Seaco Ins. Co.*, 1998 WL 566658 (Mass. Super. Ct. Aug. 12, 1998) (apartment suffered "physical loss or damage" where carbon monoxide leak required upgrades to chimney).

Nor do such alterations violate the requirement of a fortuitous loss, as some insurance industry amici casually insinuate. Policyholders like CRO did not make alterations to their property on a whim or plan to make them in advance of a chance occurrence. They made them to remediate the physical loss and damage caused by an unexpected and fortuitous external event, the presence of COVID-19.

Finally, underlying insurers' arguments is the premise that the presence or imminent threat of a hazard at a covered premises cannot by itself work a "physical loss," thereby impliedly limiting that phrase to instances where the hazard can be physically remediated.

But the undefined words "physical loss" do not speak of remediation. Indeed, a property that is rendered irredeemably hazardous still suffers a physical loss. As discussed above, New York courts and courts around the country have consistently recognized that "physical loss" flows not merely from remediation but from the actual on-site hazard itself. *See supra*, Part II.B.3. As the West Virginia Supreme Court explained of rocks perched perilously above a policyholder's home, "rational persons" would not "be content to reside there." *Murray*, 509 S.E.2d at 17.

D. Inapplicable Lower Court Decisions Do Not Resolve This Case or Establish New York Law.

The insurance industry and their amici regularly contend that the "scoreboard" of COVID-19 cases favors their position, suggesting that all cases involving COVID-19 are effectively equivalent. The Court should reject the invitation to ignore important differences in policy language and facts pleaded.

To date, the significant majority of New York lower court cases dismissing pandemic-related coverage claims turned on either: (1) the policyholder's failure to allege the presence of the coronavirus on its property, or (2) a policy term expressly *excluding* coverage for losses arising from on-site viral presence.

Here, by contrast, CRO alleged on-site viral damage and loss. Moreover, the instant policy omits the widely-available standard "Exclusion for Loss Due to Virus or Bacteria" that courts deemed critically important in other New York cases. *See* Proposed Brief of The Chef's Warehouse, NYSCEF No. 10, Ex. A at 10 & Ex. 1. As the Court of Appeals has taught, "if parties omit contractual terms—particularly terms that are readily found in other similar contracts," then established rules of construction "preclude[] the court from implying" those absent terms "from the general language of the agreement." *Quadrant Structured Prods. Co. v. Vertin*, 23 N.Y.3d 549, 560 (2014) (citing *In re Ore Cargo, Inc.*, 544 F.2d 80, 82 (2d Cir. 1976)).

Contrary to Westport's assertion, CRO's case is not about loss "due to government restrictions." R-36. Instead, like many business owners, the loss and damage that CRO suffered from COVID-19 flowed directly

from the unexpected on-site infiltration and deposition of novel physical particles, which physically altered its property and further rendered it dangerous. The attendant governmental recognition of that danger does not eliminate this physical loss and damage to insured property. It highlights its severity.

III. The Trial Court Misread *Roundabout Theatre*.

At the insurance industry's urging, lower courts including the Trial Court misread *Roundabout Theatre* as eliminating coverage for COVID-19 as a matter of law. *Roundabout* does no such thing. Rather, it stands for the proposition that, absent a common coverage extension (which the policyholder in that case chose not to buy), property policies do not cover lost business income resulting from damage occurring at *someone else's* property.

Roundabout involved a claim by a theater for lost business income following the collapse of an exterior elevator attached to a different building nearly half a block away. 302 A.D.2d at 3. The collapse caused "only minor damage to the [theater's] roof and air conditioning system, which was repaired within one day." *Id.*

Due to the continuing "danger from the partially collapsed [elevator] scaffold" to the surrounding streets, however, the City closed those streets. *Id.* As a result, although the theater remained fully functional and safe, it became inaccessible and had to cancel 35 performances. *Id.* The theater's claim for coverage did not involve the minor damage to its roof *at all*; instead, the claim was limited to "monetary losses" for lost "ticket and production-related sales" and for the "additional expenses incurred in re-opening." *Id.*

The *Roundabout* court observed that the theater's insurance policy covered "all risks of direct physical loss or damage *to the property described in Paragraph I [i.e., the theatre building or facilities].*" *Id.* (brackets in original, emphasis added). The court framed the issue as whether the policy "provide[s] coverage for *off-site* property damage," *i.e.*, damage to *un*insured property. *Id.* at 6 (emphasis added). It rejected the policyholder's argument that physical loss of property extended to the inability to use that property due to a government order closing the streets. *Id.* The court explained, "coverage is limited to losses involving physical damage *to the insured's property*." *Id.* at 7 (emphasis added).

Roundabout thus provides a textbook example of loss to insured property of a non-physical nature: prohibition of means of access by government orders. As the court recognized, policyholders can and regularly do buy insurance coverage extensions for precisely such non-physical risks. *Id.* 8 (discussing coverage extensions for loss by orders of government authority); *see, e.g.*, R-123 (§ V(H)(11)). But due to a mistake, Roundabout's broker failed to buy that coverage.

That mistake led Roundabout, the policyholder, to sue its insurance broker for malpractice, where Roundabout told the court its policy did *not* cover losses for off-site property damage. *Id.* When Roundabout asserted the opposite contention in its subsequent lawsuit against the insurer, the court showed little patience. *Id.*

Roundabout thus forecloses coverage where (1) a *non-physical* impact to insured property (e.g., a government order closing the means of access) results from damage to *uninsured* property, and (2) the policyholder declines to buy the standard coverage extension that protects against losses resulting from that eventuality.

Ignoring the actual ruling in *Roundabout*, the Trial Court incorrectly read the case as holding that "direct physical loss or

damage" to insured property can never include situations where, in the court's own words, insured property "couldn't function" due to an on-site danger. R-25. *Roundabout* nowhere purports to address, much less foreclose, coverage for those situations.

The Trial Court's reading of *Roundabout* further treats it as effectively overruling decades of law. Namely, the Trial Court interpreted *Roundabout* as reading the words "loss" and "or" out of the phrase "physical loss or damage." *See supra*, Parts I & II.B. If *Roundabout* forecloses coverage where the policyholder's property "couldn't function" due to an on-site peril, then the words "loss" and "or" have no meaning. The purpose of the contract—protection from curtailed operations due to detrimental alterations, or impairments to function, by a catastrophe—would be defeated. Instead, *Roundabout* fits within the corpus of insurance law addressing the circumstance where a policyholder fails to allege an actual impairment *to insured property*.

Nor does *Roundabout* hold that "physical loss" means solely "theft" or "misplacement." Although *Roundabout* gave those as examples of a "loss," the court did not purport to offer them as an exhaustive list. 302 A.D.2d at 7. Indeed, such an implied limitation

makes little sense here, because "physical loss" appears in the context of insurance covering, among other things, improvements to real property that cannot be physically stolen or misplaced.

Finally, the Trial Court's reading of *Roundabout* would create an unnecessary split between the First and Second Departments. It cannot be the case that business owners enjoy coverage for events that cause impairment to the function and value of their property when they live in the Second Department, but not the First. The better approach is treat *Roundabout* and *Pepsico* as consistent articulations of the same basic rule: to establish coverage for "direct physical loss or damage" to insured property, the policyholder must allege *either* that some peril detrimentally altered insured property *or* otherwise impaired its function.

IV. Insurers Cannot Shift the Risks Covered Under Policies They Already Sold by Speculating about Insolvency.

The insurance industry likes to suggest that if courts allow policyholders to recover for COVID-19 losses, insurers will become insolvent. Insurers' recent financial reports say otherwise: the insurance industry is doing fine, and indeed, earning record profits. In any event, insurers' financial health is not a relevant consideration

under New York law. A party cannot refuse to perform its promises merely because it regrets the terms of the bargain that it struck.

A. The Insurance Industry is Doing Fine.

The property and casualty insurance sector, which sells products including "all risks" property insurance, has turned a profit every single year over the past decade. *See* Nat'l Assoc. of Ins. Comm'rs, *U.S. Property & Casualty 2020 Full Year Results*, at 1, 9.[15] No loss event between 2010 and 2020 caused that sector to pay more in annual claims than insurers made in annual revenue. Not hurricanes, fires, floods, or the pandemic.

During that same time, the "policyholders' surplus" in the sector (i.e., the amount of funds that insurers have on hand *in excess of loss reserves*) skyrocketed to nearly $1 trillion. *Id.* at 10. That is, property and casualty insurers today can afford to pay $1 trillion above and beyond any amount for which they have already set reserves.

For 2020, when insurers denied COVID-19 claims *en masse*, the property and casualty sector turned a $60 billion profit. *Id.* Despite

[15] Available at https://content.naic.org/sites/default/files/inline-files/Property%202020%20Annual%20Industry%20Report.pdf

those widespread claims denials, industry surveys show that 2020 also brought the biggest wave of premium hikes for property insurance since the early 2000s, affecting nearly 90% of policyholders.[16]

Yet insurance industry amicus briefs filed in case after case tell the courts that the industry stands on the brink of bankruptcy. They misleadingly quote talking points that "business interruption policies were generally not designed or priced to provide coverage against communicable diseases," but omit the critical end of the sentence: "and therefore include *exclusions for that risk*."[17] (Critically, the insurer here omitted that standard form exclusion from its policy, a decision which must be given effect. *See supra*, Part II.D.)

Although insurers promised to protect policyholders against all manner of novel, unanticipated risks and unforeseen types of physical loss and damage, they now argue that they only meant to cover

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[16] Matthew Lerner, *Most Policyholders See Rate Hikes Across Multiple Lines*, Business Insurance (Oct. 26, 2020), https://perma.cc/NTC2-WH26.

[17] *See, e.g.*, Proposed Brief of American Property Casualty Association, NYSCEF No. 11, at 7 (emphasis added) (citing a statement available at https://content.naic.org/article/statement_naic_statement_congressional_action_relating_covid19.htm)

traditional forms—like fire or flood—from which they can predictably profit. In New York, however, courts give effect to the parties' intentions at contract inception, not when the promise comes due and one party regrets its bet that a novel type of catastrophe would not occur. *See, e.g.*, *Morelee Sales Corp. v. Mfr's Tr. Co.*, 9 N.Y.2d 16, 19–20 (1961) (courts may not "make a new contract for the parties under the guise of interpreting the writing").

B. Our Law Does Not Relieve Insurers from Their Promises Even If They Would Go Bankrupt.

Neither the threat of insolvency nor the novelty of a global pandemic has excused any other sophisticated party from its contractual promises in the wake of COVID-19.

New York law is clear that a contracting party may not "abrogate a contract, unilaterally, merely upon a showing that it would be financially disadvantageous to perform it." *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 282 (1968). "[T]he law is well-established that economic inability to perform contractual obligations, even to the extent of insolvency or bankruptcy, is simply not a valid basis for excusing compliance." *Stasyszyn v. Sutton East Assocs.*, 161 A.D.2d 269, 271 (1st Dep't 1990).

Likewise, granting insurers a selective narrowing of the "all risks" insuring clause to protect their assets from *potential* insolvency would circumvent New York's comprehensive statutory scheme for addressing insurer insolvencies, designed to balance the rights of all policyholders and other interested parties. *See* N.Y. Ins. Law, Art. 74.

Nor is COVID-19 the first time that the insurance industry has raised the specter of bankruptcy in an attempt to artificially narrow insurers' coverage promises. In the 1970s–1990s, the industry attempted to avoid its liability insurance obligations by asserting that insurers would be rendered insolvent if they were held to cover claims arising from the strict liability environmental statute, CERCLA.

In testimony before Congress, insurance industry representatives claimed that the cost of such clean-ups would swamp their total "surplus" and could be ruinous. *See Insurer Liability for Cleanup Costs of Hazardous Waste Sites*, 101st Cong. 2d sess., Serial No. 101-175, at 16–26, 75–76 (Sept. 27, 1990).[18] When courts rightly upheld coverage

[18] Statements of Michael Frinquelli, Amy Bouska, and John Butler before the Subcommittee on Policy Research and Insurance of the House Committee on Banking, Finance and Urban Affairs.

for many such clean-ups, *see, e.g.*, *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807 (1990), the predicted collapse never arrived.

In short, for more than fifty years, New York business owners have paid billions in premiums for property and business interruption insurance that broadly protects against "all risks of direct physical loss or damage" to property. True to its roots in centuries-old "all risks" insurance, and consistent with the common-speech meaning of those undefined words, an ordinary person can reasonably expect that a "risk[] of direct physical loss or damage to property" occurs when potentially deadly viral particles physically infiltrate business property, or otherwise create a hazard that seriously impairs their property's function for previously-safe human activity.

Insurers should not now be allowed to shift the risk of loss that they accepted back to business owners by retroactively defining "all risks of direct physical loss or damage" as an implied exclusion for loss or damage caused by on-site viral particles and dangerous viral disease.

CONCLUSION

The Court should reaffirm the historically broad scope of the "all risks" insurance promise, reject insurers' post-claim efforts to rewrite their policies, and vacate the Trial Court's dismissal order.

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