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COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC-13172

Suffolk, ss.

VERVEINE CORP. D/B/A COPPA,
170 WASHINGTON LLC D/B/A TORO, AND
JFKFOODGROUP LLC D/B/A LITTLE DONKEY, Appellant,

v.

STRATHMORE INSURANCE COMPANY AND
COMMERCIAL INSURANCE AGENCY, INC., Appellees.

On Appeal From A Judgment Of The Suffolk Superior Court
Lower Court No. 2084CV01378-BLS2

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS

DATE: 12/17/2021

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CORPORATE DISCLOSURE STATEMENT

United Policyholders ("UP") is a nonprofit, 501(c)(3) corporation founded in 1991. UP is not publicly held and does not have any public company affiliates.

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INTEREST OF AMICUS CURIAE

United Policyholders submits the attached brief to address: (1) whether property impacted by SARS-CoV-2 and COVID-19 suffered "direct physical loss of or damage to" property under all-risk commercial property insurance policies; (2) whether Civil Authority coverage can be available without a total prohibition of access; and (3) whether the Superior Court erred by dismissing this case as a matter of law, thereby precluding a resolution of the fact issues.[1] This brief responds in part to this Court's request for *amicus curiae* briefs on this appeal. [2]

United Policyholders is uniquely qualified to address these questions because it speaks for policyholders. United Policyholders is an information resource and voice for individual and commercial insurance consumers throughout the United States. Its work is supported by grants, donations, and volunteers. It focuses on three programmatic areas: Roadmap to Recovery (disaster recovery and claim help), Roadmap to Preparedness (insurance and financial literacy; disaster preparedness), and Advocacy and Action (advancing pro-consumer laws and public policy). United

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[1] Pursuant to Massachusetts Rule of Appellate Procedure 17, United Policyholders confirms that: (1) no party's counsel authored any part of this brief; (2) no party or party's counsel contributed any money to fund preparation of submission of this brief; and (3) no person, other than UP and UP's counsel, contributed any money to prepare or submit this brief.

[2] This Court specifically solicited amicus briefs on the first two questions. See https://www.mass.gov/info-details/amicus-announcements-from-september-2021-to-august-2022

Policyholders provides a consumer-oriented voice based on its institutional experience and perspective, which helps to fill a gap that otherwise would exist between the well-organized insurance industry on the one hand and insurance consumers on the other.

Public officials, state insurance regulators, academics, and journalists routinely seek United Policyholders' input on insurance and legal matters. United Policyholders often works with state regulators on matters related to policy sales, claims, and consumer rights. Its executive director has been appointed for twelve consecutive terms to represent consumers in the proceedings of the National Association of Insurance Commissioners ("NAIC"). United Policyholders serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and in turn, the U.S. Treasury Department.

Since March 2020, United Policyholders has been engaged in efforts to assist policyholders around the country who suffered losses due to the pandemic and related government orders. It has conducted educational workshops for businesses and trade associations, and it maintains an online help library at uphelp.org/COVID. It also gave three presentations to NAIC in 2020 concerning insurance coverage for business interruption losses related to COVID-19.

Since its inception in 1991, United Policyholders has filed *amicus curiae* briefs in more than 450 state and federal cases across 42 states. It has submitted

amicus curiae briefs in numerous matters before this Court as well as before federal courts sitting in Massachusetts.[3] The U.S. Supreme Court and state appellate courts have favorably cited United Policyholders' *amicus curiae* briefs.[4] These briefs are invaluable because insurers are "repeat players" in insurance coverage litigation, but policyholders are not.

For all these reasons, United Policyholders respectfully asks this Court to consider this *amicus curiae* brief.

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[3] *See, e.g.*, *The Masonic Temple Association of Quincy, Inc. v. Jay Patel and Dipika, Inc.*, SJC-13109 (2021); *Mount Vernon Fire Ins. Co. v. Visionaid, Inc.*, 477 Mass. 343 (2017); *Auto Flat Car Crushers, Inc. v. Hanover Ins. Co.*, 469 Mass. 813 (2014); *Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London*, 449 Mass. 621 (2007); *John Hancock Mut. Life Ins. Co. v. Banerji*, 447 Mass. 875 (2006); *W. All. Ins. Co. v. Gill*, 426 Mass. 115 (1997); *Clark Equip. Co. v. Mass. Insurers Insolvency Fund*, 423 Mass. 165 (1996); *see also Legal Sea Foods, LLC v. Strathmore Ins. Co.*, No. 21-1202 (1st Cir. Mar. 19, 2021); *Doe v. Harvard Pilgrim Health Care, Inc.*, 974 F.3d 69 (1st Cir. 2020); *Boston Gas Co. v. Century Indem. Co.*, 588 F.3d 20 (1st Cir. 2009); *Denmark v. Liberty Life Assur. Co. of Boston*, 566 F.3d 1 (1st Cir. 2009); *Foreign Car Ctr., Inc. v. Salem Suede, Inc.*, Civ.A. No. 97-12587-REK, *sub nom. In re Salem Suede, Inc.*, 221 B.R. 586 (D. Mass. 1998).

[4] *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).

PRELIMINARY STATEMENT

Until the insurance industry reversed course on the meaning of physical loss or damage—specifically to avoid paying COVID-19 losses—it was firmly established among insurance companies, policyholders and the courts that structural alteration is *not* a requirement for coverage and that invisible or microscopic harm—such as is caused by COVID-19 and SARS-C0V-2—constitutes physical loss or damage.

As just one example, Defendant-Appellee Strathmore Insurance Co. ("Strathmore") acknowledged to the New York State Insurance Department years ago that losses from pandemics are covered under all-risks policies, especially for restaurants (such as Plaintiff-Appellant Verveine Corporation d/b/a Coppa and others) ("Verveine"). Strathmore acknowledged that its policyholders understand their property policies to include such coverage and that most would not agree with having it taken away.

Courts in Massachusetts and elsewhere have held consistently for more than 50 years, finding that invisible, yet noxious, substances in properties (such as odors and fumes) cause physical loss or damage. *See Matzner v. Seaco Insurance Co.*, No. 96-0498-B, 1998 Mass. Super. LEXIS 407 (Mass. Super. Aug. 12, 1998) (coverage found because carbon monoxide rendered property unfit for its intended use); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, No. 9400837, 1996 WL 1250616, at *2

(Mass. Super. Mar. 15, 1996) (coverage found because oil fumes present in house after oil leak constituted physical damage); *Essex Insurance Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399 (1st Cir. 2009) (coverage found because noxious odors from carpet constituted physical injury to tangible property). While a number of federal courts held differently in early COVID-19 decisions, they were relying on an erroneous passage in an insurance treatise: one that contradicted other treatises and that even its editor had admitted was wrong. The problem was aggravated when other courts followed the herd instead of following the facts and the law of each state. The Superior Court made the same mistake here, especially in finding no coverage under a policy that Strathmore sold to Verveine *without* a virus exclusion. That decision, which ignores fact and law, should be reversed.

The Superior Court also was wrong in finding that a complete prohibition of physical access was required for Civil Authority coverage to be triggered under "all risks" policies. That position finds no purchase in policy language or case law. Civil Authority coverage was triggered here because the government orders prohibited Verveine's ordinary use of its property. Even if Verveine mitigated some of its losses, its losses that it could not avoid should have been covered.

Aside from misinterpreting the policies and the law, the Superior Court erred by dismissing the case without addressing disputed factual issues. Verveine's complaint sufficiently alleged facts that needed to be explored in discovery,

including that the virus was omnipresent in all properties in Massachusetts (necessarily including Verveine's property) at the time of Verveine's losses. Verveine should have been allowed to prove that when coronavirus particles from infected persons were suspended in the air or landed on surfaces, they physically altered the molecular character of its property and transformed it from being safe and usable to being unsafe, unusable and potentially deadly. Verveine also should have been allowed to prove the extent to which the government's orders prohibited the use of its property. Such fact-finding was essential to Verveine's ability to prove that its claim for business interruption coverage should not have been denied.

Finally, there is no merit to the dire warnings of insurance companies, offered in cases across the country, that the entire industry could fail if courts require insurance companies to honor the terms and promises made in the policies they sell. Indeed, the reverse is true; insurance is one of the few industries that is *profiting* from this colossal disaster. Such an outcome is fundamentally incorrect.

ARGUMENT

I. ALL RISKS OF "DIRECT PHYSICAL LOSS OF OR DAMAGE TO PROPERTY" INCLUDES THE LOSS AND DAMAGE THAT OCCURS WHEN A DEADLY VIRUS RENDERS PROPERTY DANGEROUS AND UNUSABLE, AS VERVEINE ALLEGES HERE

The fundamental question in COVID-19 insurance cases is whether the undefined words "direct physical loss of ***or*** damage to" property reasonably encompass both (1) detrimental changes to the air or surfaces at property, and (2)

impairments to its function. As made clear by Strathmore's express statements to insurance regulators as well as 50 years of case law, including in Massachusetts, the answer is yes.

A. In 2010, Strathmore Told State Regulators That Without A "Virus Exclusion," Its Insurance Policies Would Cover Business Interruption Losses Due to Contagious Disease.

Ten years ago, Strathmore and its parent corporation, the Greater New York insurance companies, submitted a memorandum to the New York State Insurance Department that puts the lie to its denial of coverage for pandemic losses under policies without virus exclusions.[5] The memorandum leaves no doubt that such losses are covered.

In the memorandum, Strathmore and Greater New York explain to the New York insurance regulators that pandemics are a "a type of loss" that is covered under their property policies absent a virus exclusion.[6] They state that losses due to viruses "fall largely in Business Personal Property ('stock') and Business Interruption/Time Element coverage segments."[7] Such coverage is provided and necessary because, among other things, "it is possible that some type of disease (airborne Legionnaires

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[5] Explanatory Memorandum–Response to Objection 1 Dated 4-30-2010 (Addendum 1).

[6] *Id*.

[7] *Id*.

Disease, for example) could spread through a HVAC system."[8] That, of course, is exactly what happened during the pandemic—to Verveine as well as policyholders nationwide.

The purpose of the memorandum was to get permission to sell policies without a virus exclusion to certain types of policyholders, such as restaurants (like Verveine). That would enable those policyholders to continue to have coverage for "contagious disease."[9] The memorandum states: "[O]ur main object of this filing is to remove the carte blanch application of this [virus] Exclusion and *not deny coverage* to the majority portion of our book" for losses caused by virus.[10] It also admits that policyholders reasonably expect their all-risks policies to provide such coverage:

> [W]e do not anticipate that any of our insureds will voluntarily request this [virus] exclusion; some (habitational risks) because it would never enter their minds as a problem for which they would voluntarily reduce coverage; **others (restaurants) because they feel that such an event is well within the realm of possible fortuitous occurrences and should be covered should such an event arise**.[11]

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[8] *Id*.

[9] *Id.* While the memorandum deemed restaurants like Verveine to be at particular risk of suffering "losses from communicable disease", it also "acknowledge[d] the possibility for Apartments, Condominiums and Office/Retail Buildings to experience such an event." *See id.*

[10] *Id*. (emphasis supplied).

[11] *Id.* (emphasis supplied).

This memorandum puts the lie to the assertions of Strathmore here, and of insurance company defendants nationwide, that SARS-CoV-2 and COVID-19 do not cause "direct physical loss of or damage to" property under "all risk" policies. Indeed, it bluntly admits the opposite – that standard policies covering "direct physical loss of or damage to property" respond to losses caused by virus, so long as there is no virus exclusion (which is the case for most policies here).

B. Decades of Decisions Confirm that Property Rendered Unfit for Its Intended Use Has Suffered "Physical Loss of or Damage."

Defendant-Appellee Strathmore's pre-pandemic admission that virus-related losses are covered under its "all risk" policies is consistent with the purpose of business interruption insurance. Businesses pay premiums for policies that cover business interruption so that their properties can operate as designed and generate revenues. Where property is rendered unfit for its intended use—as by smoke from forest fires, toxic dust from nearby building collapses, or microscopic viruses that could kill inhabitants—policyholders are entitled to coverage even if property has not been structurally altered.[12]

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

This has been the law for decades. During the 1950s,[13] the 1960s,[14] the 1970s,[15] the 1980s,[16] and the 1990s[17]—courts consistently have found such losses to be covered as "physical loss or damage."

(Mar. 6, 2017) (smoke from wildfires).

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

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

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

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

[17] In chronological order: *Hetrick v. Valley Mut. Ins Co.*, 15 Pa. D. & C. 4th 271, 1992 WL 524309, at *3 (Pa. Comm. Pl. May 28, 1992) (finding there would be coverage for loss of use of a house if an outside oil spill made the house uninhabitable); *Largent v. State Farm Fire & Cas. Co.*, 842 P.2d 445, 446 (Or. App. 1992) (noting that insurance company conceded methamphetamine fumes could cause "accidental direct physical loss"); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. App. 1993) (finding costs of methamphetamine odor covered as direct physical loss or damage); *Azalea, Ltd. v. American States Ins. Co.*, 656 So. 2d 600, 602 (Fla. Dist. Ct. App. 1995) (finding damage to sewage treatment plant from chemicals that destroyed a bacteria colony necessary for the plant to operate amounted to "direct damage to the structure"); *Arbeiter v.*

These rulings continued into the 2000s,[18] when insurance companies paid claims for losses caused by a novel coronavirus, SARS-CoV-1.[19] Even after that

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Cambridge Mut. Fire Ins. Co., No. 9400837, 1996 WL 1250616, at *2 (Mass. Super. Mar. 15, 1996) (finding oil fumes present in house after discovery of oil leak constituted physical damage); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (finding the presence of asbestos could constitute physical loss or damage); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) (finding a home rendered unlivable by falling rocks had suffered a "direct physical loss to the property"); *Shade Foods*, *Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 78 Cal. App. 4th 847, 865 (2000) (holding that the intermingling of a quarter pound of wood shavings in 80,000 pounds of almonds caused physical loss or damage to the almonds even though the almonds were structurally unchanged); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. 98-434-HU, 1999 WL 619100, at *7-8 (D. Or. Aug. 4, 1999) (finding that policyholder could bear its burden to demonstrate that clothes containing mold or mildew suffered "direct physical loss or damage" if it established "at trial a class of garments which has increased microbial counts and that will, as a result, develop either an odor or mold or mildew"); *Board of Educ. v. International Ins. Co.*, 720 N.E.2d 622, 625-26 (Ill. App. 1999) (citing liability insurance coverage cases finding that incorporation of asbestos into buildings caused "property damage," defined under liability policies to be "physical injury to or destruction of tangible property").

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

[19] The coverage included a $16 million payout to one hotel chain, Mandarin

outbreak, insurance companies continued to use "physical loss or damage" in their policies, and courts continued to find coverage for policyholders' business interruption losses in the absence of structural alteration.[20] The substantial precedent

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Oriental International. Gavin Souter, Hotel Chain to get Payout for SARS-Related Losses, Nov. 02, 2003, https://www.businessinsurance.com/article/20031102/story/100013638/hotel-chain-to-get-payout-for-sars-related-losses.

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

on this issue was followed by courts nationwide for the next decade, leading up to the COVID-19 pandemic.

While the insurance industry is well aware of these decisions, neither Strathmore nor any other insurance company ever added a requirement of "structural alteration" to its policies. They left the language unchanged, knowing that phrase has been interpreted by policyholders and courts alike not to require structural alteration. This history makes clear that Strathmore, like the rest of the insurance industry, never intended the requirement of structural alteration on which it now purports to rely—and that it is unconscionable to read the policies as if such a requirement had been added.

Other insurance companies acknowledged the weight of case law and accepted the pro-policyholder interpretation prior to the COVID-19 pandemic. For example, three months before the pandemic began, Factory Mutual Insurance Company ("Factory Mutual")—perhaps the most sophisticated property insurance company in the United States—filed a motion in the U.S. District Court for the District of New Mexico, arguing that "physical loss or damage" to property exists when the presence of a physical substance renders property unfit for its intended use, even when it does not cause structural alterations.[21]

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[21] Factory Mutual's Mot. *in Limine* No. 5 re Physical Loss or Damage, filed Nov. 19, 2019 in *Factory Mut. Ins. Co. v. Fed. Ins. Co.*, No. 1:17-cv-00760-GJF-LF

At issue in *Factory Mutual Insurance Co. v. Federal Insurance Co.* was a mold infestation in a "clean room" at a drug manufacturing plant.[22] Mold and its spores, like SARS-CoV-2 virions, exist on the surface of property and in the air. Factory Mutual argued that the mold infestation constituted "physical loss or damage" under a property policy sold by Federal Insurance Company ("Federal Insurance") because the mold "destroyed the aseptic environment and rendered [the clean room] unfit for its intended use."[23] It also asserted that case law "broadly interprets the term 'physical loss or damage' in such policies,"[24] relying upon many of the cases discussed above:

> <u>Numerous courts have concluded that loss of functionality or reliability under similar circumstances constitutes physical loss or damage.</u> *See, e.g.*, *Western Fire Insurance Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (church building sustained physical loss or damage when it was rendered uninhabitable and dangerous due to gasoline under the building); *Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America*, Civ. No. 2:12-cv-04418 2014 U.S. Dist. LEXIS 165232, 2014 WL 6675934 (D. N.J. 2014) (unsafe levels of ammonia in the air inflicted "direct physical loss of or damage to" the juice packing facility "because the ammonia physically rendered the facility unusable for a period of time."); *Port Authority of N.Y. and N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (asbestos fibers); *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (unpleasant odor in home); *TRAVCO Ins. Co. v.*

(D.N.M.) (Doc. 127) (Addendum 2).

[22] *Id.* at 3.

[23] *Id.*

[24] *Id.*

> *Ward*, 715 F.Supp.2d 699, 709 (E.D. Va. 2010), *aff'd*, 504 F. App'x. 251 (4th Cir. 2013) ("toxic gases" released by defective drywall).[25]

According to Factory Mutual, the loss continued until the policyholder's customers viewed the property's use to be safe:

> The period of time as well as costs required to bring [the policyholder's] facility to the level of cleanliness following the mold infestation required by [the policyholder's] customers is also physical loss or damage covered by the Federal policy. The facility was damaged by stringent requirements of [the policyholder's] customers regarding production to the same extent it was damaged from the mold infestation itself as the facility was unusable as the result of a covered loss. . . . Without the customers' approval of the restored aseptic conditions following the mold infestation, [the] facility remained unusable.[26]

Factory Mutual further argued that at the very least, its interpretation was reasonable, so even if Federal could propose an alternative, that merely would establish that "physical loss or damage" is ambiguous.[27] Since black-letter law requires ambiguities to be construed against the policy drafter, coverage would exist either way.

No policyholder could have said it better. By making the exact argument that Verveine makes here, Factory Mutual put the lie to Strathmore's denial of coverage.

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[25] *Id.* at 3–4 (emphasis added).

[26] *Id.* at 4–5 (emphasis added).

[27] *See id.* at 3 n.1.

II. CIVIL AUTHORITY COVERAGE WAS TRIGGERED BY ORDERS THAT PROHIBITED VERVEINE'S ORDINARY USE OF ITS PROPERTY; THERE IS NO REQUIREMENT UNDER LAW FOR THE PROHIBITION TO BE ABSOLUTE.

The Superior Court was incorrect that Verveine failed to trigger Civil Authority coverage because "plaintiffs, their employees, and their customers have not been prohibited from accessing the insureds' restaurants." *See* Brief of Appellant Verveine Corp. d/b/a Coppa, 1704 Washington LLC d/b/a Toro, and JFKFOODGROUP LLC d/b/a Little Donkey, Addendum 1 at 9 ("Verveine ADD"). No policy provision or legal precept required Verveine to allege a total deprivation of access in order to have its day in court. Verveine alleged that, as a result of the civil authority orders, access to its properties was "closed" and "access and use of the dining rooms at restaurants . . . was expressly prohibited." RAI 15, Complaints pp. 24-25. Those allegations were sufficient to establish a fact issue about whether Civil Authority coverage applied. Massachusetts law is clear that "[i]f the meaning of the policy terms are unclear, the policy is generally construed in favor of the insured in order to promote the policy's objective of providing coverage." *Cohen v. Union Warren Sav. Bank*, 1991 Mass. App. Div. 95, 97, 1991 Mass. App. Div. LEXIS 49, at *7 (1991).

If Strathmore had intended to limit Civil Authority coverage to circumstances where access was "completely" or "totally" prohibited, it was required to make that restriction clear. It did not. Courts considering other COVID-19 related claims have

rejected such a sweeping construction of Civil Authority coverage grants. *See, e.g., Ungarean, DMD v. CNA*, No. GD-20-006544, 2021 WL 1164836, at *10 (Pa. Com. Pl. Mar. 25, 2021) (the policy "does not clearly and unambiguously state that any such prohibition must completely and totally bar *all* persons from *any* form of access to Plaintiff's property whatsoever") (emphasis in original); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 803-04 (W.D. Mo. 2020) ("the Policies require that the 'civil authority prohibits access,' but does not specify 'all access' or 'any access' to the premises").

Even the Supreme Court of the United Kingdom—where the insurance industry was born—rejected an insurance company argument that policy language covering loss resulting from "[p]revention of access to the Premises due to the actions or advice of a government or local authority" applied only to "complete closure[s]," in the context of COVID-19. *The Financial Conduct Authority v Arch Insurance (UK) Ltd & others* [2021] UKSC 1, ¶¶ 147–148. That Court held instead that such provisions cover "prevention of access to a discrete part of the premises and/or for the purpose of carrying on a discrete part of the policyholder's business activities," such as a restaurant that was prohibited from offering in-person dining but could permit takeaway or delivery. *Id.* ¶¶ 148, 151. In rejecting a requirement of total prevention, the UK Supreme Court held that a "more realistic view is that there is prevention of access to (and inability to use) a discrete part of the premises, namely

the dining area of the restaurant, and prevention of access to (and inability to use) the premises for the discrete business activity of providing a dining in service." *Id.* ¶ 152.

Here, Verveine alleged that the government orders prohibited normal access to Verveine's property, so Civil Authority coverage was triggered. Verveine's allegations must be accepted as true and all facts construed in Verveine's favor in determining a Rule 12 Motion. The failure to do so was reversible error.

III. THE SUPERIOR COURT ERRED BY DISMISSING THE COMPLAINT AND THEREBY DENYING VERVEINE ITS RIGHT TO PROVE THE FACTS ALLEGING COVERAGE FOR ITS CLAIM.

A. Verveine Adequately Pleaded That Its Losses Resulted From the On-Site Presence of Viral Particles.

The parties apparently dispute whether Verveine alleged that SARS-CoV-2 was present on its business premises and caused the business interruption at issue. *Cf.* Brief of Plaintiff-Appellant Verveine at 31-32; Brief of Defendant-Appellee Strathmore at 28. [A1] The Superior Court took Strathmore's view:

> [T]he Complaint here does not allege that the COVID-19 virus was actually present in plaintiffs' restaurants, resulting in physical, contamination of the premises. Rather, it alleges that the loss of income for which they seek coverage was the result of the Governor's Orders that prevented plaintiffs from using the premises as intended.

Verveine ADD at 7.

This holding was incorrect. First, it disregards the basic insurance principle that allegations should be read liberally, and in favor of coverage. *See Preferred Mut. Ins. Co. v. Vermont Mut. Ins. Co.,* 32 N.E.3d 336, 340–41 (2015) (“An insurer has a duty to defend an insured when the allegations in a complaint are reasonably susceptible of an interpretation that states or roughly sketches a claim covered by the policy terms. The duty to defend is determined based on the facts alleged in the complaint, and on facts known or readily knowable by the insurer that may aid in its interpretation of the allegations in the complaint. In order for the duty of defense to arise, the underlying complaint need only show, through general allegations, a possibility that the liability claim falls within the insurance coverage. There is no requirement that the facts alleged in the complaint specifically and unequivocally make out a claim within the coverage.”); *Billings v. Com. Ins. Co.*, N.E.2d 408, 414 (2010) (“In order for the duty of defense to arise, the underlying complaint need only show, through general allegations, a possibility that the liability claim falls within the insurance coverage.”) (further citations and internal quotations omitted). Second, it disregards allegations in the Complaint that the virus was physically present and causing widespread loss and damage all across Boston[28] at that time, which necessarily included at Verveine’s business locations.[29]

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[28] *See* RAI 13-14, June 29, 2020, Complaint at pp. 16-19.

[29] Insurance industry arguments that the SARS-CoV-2 virus is not dangerous and

Moreover, it bears remembering that our nation was in a different place when Verveine filed its Complaint in June of 2020. Case rates, hospitalizations, and deaths were skyrocketing, vaccines were still in development, tests were hard to come by even at hospitals, and personal protective equipment was in short supply. There was considerable debate as to the primary methods of viral transmission and the most effective way to avoid infection, including the relative merits of masking, hand washing, avoiding indoor spaces, avoiding touching surfaces, wiping down surfaces, erecting physical barriers in buildings, modifying ventilation, and maintaining social distancing. It was a time when everyone was locked down at home; when everyone wore gloves when they went to the gas station or grocery store; and everyone wiped down their groceries when they returned home from the store. Obviously, the business interruption losses for restaurants like Verveine during this environment were monumental. Yet Strathmore refused to pay, completely doubling back on what it told the regulators about its intent and desire to sell coverage for these exact types of losses through it removal of the ISO Virus Exclusion, as discussed above.

In this context, Verveine's allegations that the pandemic caused it to shut down its business were and are sufficient to assert a judiciable claim.[30] Verveine

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does not cause damage because it can be cleaned easily are disingenuous. Millions of people have died.

[30] Even if they were not, the proper outcome was remand with leave to amend, not dismissal.

should be given the opportunity to establish, through statistical evidence and epidemiological testimony, that the virus was present on its premises and constituted a grave risk to human health. It should be allowed to show, as a factual matter, that it limited its business operations because of the presence of the virus, not solely in response to government orders. The fact that government orders *also* required businesses to close should not give insurance companies a free pass to avoid coverage. Government restrictions commonly follow covered events, such as public safety orders barring access to property after a fire—but they do not wipe out the fire insurer's coverage obligations. Moreover, the fact that some businesses remained fully open does not preclude finding that non-essential businesses—or non-essential parts of otherwise essential businesses, such as the in-person dining area of a restaurant—suffered direct physical loss.

B. It is Well Established that Cases that Raise Fact Issues Must be Allowed to Progress Past the Pleading Stage

Legal scholars and insurance law experts have sharply criticized courts for dismissing COVID-19 coverage cases before the facts have been developed. *See* Prof. Erik S. Knutsen and Prof. Jeffrey W. Stempel, *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 CONN. INS. LAW J. 185, 192 (2020) ("Judges granting dismissal motions without any opportunity for discovery, and denying any possibility of coverage at the metaphorical starting gate, have undermined the traditional American commitment

to jury trials as well as widely accepted legal principles of insurance policy construction such as interpreting ambiguous terms against the drafter and considering policyholder reasonable expectations."). Most of these dismissals improperly rest upon factual presumptions that judges are not qualified to make. *See id.* at 193–94 ("Notwithstanding some shining exceptions, the first wave of decisions in these cases has been largely disappointing and reflects poorly on the legal and hyper-textual analysis of the bench.").

Many courts—especially state courts—are joining this chorus by denying motions to dismiss. For example, a state court in Illinois recently observed that too many courts are rushing to judgment on COVID-19 coverage disputes, blindly following inapposite decisions from other courts instead of focusing on the allegations before them:

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

See JDS Construction Group, LLC, and 9 Dekalb Fee Owner LLC v. Continental Casualty Co., Case No. 2020 CH 5678, at 4 (Ill. Cir. Ct. Oct. 25, 2021). Similarly, a state court in Connecticut observed: "The rush to judgment on the question of physical damage in some courts—without reasoning and without evidence—has

been ill advised. For now, in this court, and for this policy, it would be wrong to rush." *New Castle Hotels LLC v. Zurich American Ins. Co.*, No. X07-HHD-CV-21-6142969-S at p. 7 (Conn. Super. Ct. Sept. 7, 2021).[31] That court took aim at the

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[31] *See also, e.g., MacMiles LLC v. Erie Insurance Exchange*, No. GD-20-007753 at p. 12, n. 12 (Pa. Com. Pl. May 25, 2021) (Exhibit []) ("merely accepting the non-binding decisions of other courts 'by the purely mechanical process of searching the nations courts for conflicting decisions' amounts to an abdication of this Court's judicial role"); *Ungarean v. CNA et al*. No.: GD-20-006544 at p. 12, n. 12 (Pa. Com. Pl. March 22, 2021) (Exhibit []) (same); *Brown's Gym, Inc. v. The Cincinnati Ins. Co.,* No. 20 CV 3113, 2021 WL 3036545, at *19 (Pa. Com. Pl. July 13, 2021) ("State Superior Courts throughout the nation have agreed with the foregoing rationale articulated in the federal case law in denying insurers' attempts to dismiss business interruption insurance claims filed by insureds who assert that COVID-19 was present on their covered property"); *Goodwill Industries of Orange County, California v. Philadelphia Indemnity Insurance Co*., No. 30-2020-01169032-CU-IC-CXC at p. 3 (Cal. Super. Ct. Jan. 28, 2021) (stating that the Federal cases relied on by the insurance company "are not binding on this court and were decided under a different standard" [compared to a motion to dismiss] and that unlike the insurance company's cases, the plaintiff did allege that the coronavirus and COVID-19 caused physical loss or damage to the property at issue, which allegations must be accepted as true); *Snoqualmie Entertainment Authority v. Affiliated FM Ins. Co.,* No. 21-2-03194-0 SEA, 2021 WL 4098938, at *6 (Wash. Super. Sep. 3, 2021) ("This Court is not persuaded by [another judge's] reliance on the opinions of other federal district court opinions across the country that applied the laws of other states, nor its holding that the undefined phrase 'all-risks of physical loss or damage' cannot be reasonably interpreted by the average lay person to include the insured's inability to physically use, control, or manipulate its property as a result of the COVID-19 closure orders and Tribal resolutions"), *Boardwalk Ventures CA LLC v. Century-National Insurance Company,* 20STCV27359 (Cal. Super. Ct. Mar 18, 2021) (rejecting the "litany of unpublished federal district court cases" cited by the insurance company "in support of the proposition that courts applying California law have 'uniformly dismissed lawsuits like the instant action'" – recognizing that these cases are not binding and the dismissal was not proper); *Risinger Holdings, LLC v. Sentinel Ins. Co., Ltd*., No. 1:20-CV-00176, 2021 WL 4520968, at *12

courts that adopt insurance company views without carefully considering the arguments and evidence:

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

New Castle Hotels, slip. op. (Exhibit []) at 5 (emphasis supplied).

Many rulings rest improperly on an unsupported and erroneous passage in an insurance treatise, stating that structural alteration is required. *See* Richard P. Lewis, Lorelie S. Masters, Scott D. Greenspan and Chris Kosak, *Couch's "Physical Alteration" Fallacy: Its Origins and Consequences* 56:3 TORT, TRIAL & INS. PRAC. L.J. 621 (Fall 2021). Other treatises are to the contrary.[32] Moreover, one of the

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(E.D. Tex. Sept. 30, 2021) (holding that the policy's use of "physical loss" is ambiguous and concluding that the policyholder "may have suffered direct physical loss due to Governor Abbott's lockdown order by being deprived of the use or full use of the physical space of its covered property, or alternately, because of the severe material losses it endured when it was forcibly excluded from its businesses").

[32] *See e.g.*, 3 A.D. Windt, Insurance Claims & Disputes § 11:41 (6th ed. 2021) ("The

editors responsible for this passage published an article acknowledging the mistake. That article stated that structural alteration is *not* required, as "[t]he modern interpretive trend is liberalizing the meaning of direct physical loss to focus upon loss of use as opposed to direct physical loss involving physical alteration." Stephen Plitt, "Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alteration," CLAIMS JOURNAL (Apr. 15, 2013), available at https://amp.claimsjournal.com/magazines/idea-exchange/2013/04/15/226666.htm (emphasis added).

The Superior Court should have followed this admission, and the fifty years of precedent supporting it, along with the admissions to insurance regulators and courts by Defendant-Appellee Strathmore and other insurance companies—instead of following the herd.

IV. THE COURT SHOULD NOT BE DISTRACTED BY CRIES OF WOLF FROM THE INSURANCE INDUSTRY.

At times of crisis, insurance companies are quick to argue that they could be forced into bankruptcy if they are forced to cover resulting claims. *See* J. Robert

word "loss," as defined in the dictionary, can mean either of two things: (1) detriment/disadvantage, or (2) something that is lost. In the context of a standard insurance policy, the word "loss" can mean either of those things. Both definitions are reasonable. Applying the first definition, therefore, 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.")

Hunter, THE INSURANCE INDUSTRY'S INCREDIBLE DISAPPEARING WEATHER CATASTROPHE RISK: HOW INSURERS HAVE SHIFTED RISK AND COSTS ASSOCIATED WITH WEATHER CATASTROPHES TO CONSUMERS AND TAXPAYERS (Consumer Federation of America, Feb. 17, 2012), https://consumerfed.org/pdfs/InsuranceRegulationHurricaneRiskDisappearingCoverageStudy2-12.pdf), at p. 1 ("industry data demonstrates that insurers have significantly and methodically decreased their financial responsibility for [catastrophic] events in recent years and shifted much of this risk to consumers and taxpayers. . . . most of these savings have been achieved by hollowing out the coverage in homeowners insurance policies and raising rates").

For thirty years, insurance companies attempted to color the discussion of environmental coverage by asserting that they would be rendered bankrupt if they are required to cover claims that arise from the strict liability environmental statute, CERCLA. In testimony before Congress, insurance representatives claimed that the cost of such clean-ups will be five times their total "surplus" and could be ruinous. *See Insurer Liability for Cleanup Costs of Hazardous Waste Sites*, No. 101-175 (101st Cong., 2d Sess., Sept. 27, 1990) (Committee on Banking, Finance, and Urban Affairs), pp. 18-29 and 75-76. Although the industry was held accountable for many such clean-ups, the predicted collapse never arrived.

In response to the COVID-19 pandemic, insurance companies are "crying wolf" yet again. Insurance industry trade associations repeatedly have asserted in *amicus* briefs in COVID-19 cases that determinations in favor of coverage would bankrupt the industry.[33] While these outcome-determinative claims have no place in contract disputes, they are overtly false.

To the contrary, the pandemic has proved very *profitable* for insurance companies—one of the few industries able to make such a claim. To the knowledge of UP, no insurance company has entered insolvency due to the pandemic. Instead, insurance companies have enjoyed enormous windfalls. For example, in July 2020, Progressive Insurance Company "boasted about an 83% year over year increase in net income" which works out to about $800 million per quarter.[34] Chubb Limited reported net income of $1.19 billion in its third quarter, in 2020—up 9.4%, or $100 million, from the year before.[35] CNA Insurance similarly reported a $106 million

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[33] *See, e.g.,* Eli Flesch, "Trade Group Tells 1st Cir. Eateries Not Owed Virus Coverage" Law360.com (Sept. 15, 2021), https://www.law360.com/insurance-authority/property/articles/1422231/trade-group-tells-1st-circ-eateries-not-owed-virus-coverage.

[34] Richard Holober, *Progressive Insurance Hoards Covid-19 Windfall Profits*, Consumer Federation of California (Aug. 13, 2020), https://uphelp.org/wp-content/uploads/2021/02/cfc_progressive.pdf

[35] Claire Wilkinson, *Chubb reports gains in Q3 profit, net premium written*, Business Insurance (Oct. 28, 2020), https://www.businessinsurance.com/article/20201028/NEWS06/912337411/Chubb-reports-gains-in-Q3-profit,-net-premium-written.

increase in net income in the same period.[36] W.R. Berkley Corporation reported a massive 161% increase in its fourth quarter, in 2020.[37]

Indeed, despite not paying any COVID-19 related business interruption claims, insurance companies significantly *increased* their rates in 2020 across all lines of business. One large broker reported that 89% of its clients saw a rate increase for their property insurance—the "highest number recorded since the early 2000s."[38] From April through June 2020, property insurance rates spiked by 22%.[39] Insurance companies ratcheted up prices again between July and September, with a total increase of 24% for commercial property coverage.[40] From October to December

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[36] Angela Childers, *CNA Reports Higher Net Income Despite Cat Losses*, Business Insurance (Nov. 2, 2020), https://www.businessinsurance.com/article/20201102/NEWS06/912337508/CNA-reports-higher-net-income-despite-cat-losses.

[37] J. Greenwald, *Berkley Reports 161% Jump in Profits*, Business Insurance (Jan. 26, 2021), available at https://www.businessinsurance.com/ article/00010101/NEWS06/912339367/Berkley-reports-161-jump-in-profits.

[38] Matthew Lerner, *Most Policyholders See Rate Hikes Across Multiple Lines*, Business Insurance (Oct. 26, 2020), https://www.businessinsurance.com/article/20201026/NEWS06/912337341/Most-policyholders-see-rates-hikes-across-multiple-lines-Arthur-J-Gallagher-Re.

[39] Matthew Lerner, *U.S. Commercial Property Pricing up 22% in Q2*, Business Insurance (Aug. 10, 2020), https://www.businessinsurance.com/ article/00010101/NEWS06/912336034/US-commercial-property-pricing-up-22-in-Q2.

[40] Claire Wilkinson, *Insurance Prices Increased Sharply in Third Quarter*, Business Insurance (Nov. 5, 2020), https://www.businessinsurance.com/article/00010101/NEWS06/912337590/Insurance-prices-increased-sharply-in-third-quarter-Marsh.

2020, premiums increased another 20%.[41] In late 2020, property insurance companies told consumers to expect increases of 15% to 25% in 2021.[42]

It is a sad irony that the pandemic has been a boondoggle for the insurance companies that were supposed to bear the brunt of the losses, even as it ravaged the policyholders who they were supposed to protect.

CONCLUSION

COVID-19 coverage cases are not a one-size-fits-all exercise. While not every claim is covered, some claims with broad policy wordings surely are. This case falls squarely in the latter category, based on Strathmore's explicit admissions that its standard-form provides coverage for losses that policyholders—particularly restaurants—suffer due to viruses and communicable disease. The Superior Court's erroneous ruling should be reversed and remanded.

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

[42] Judy Greenwald, *Continued Rate Increases Expected: Willis*, BUSINESS INSURANCE (Nov. 19, 2020), https://www.businessinsurance.com/article/ 20201119/NEWS06/912337904/Continued-rate-increases-expected-Willis-Towers-Watson.

Respectfully submitted,

ANDERSON KILL PC

Dated: December 17, 2021

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ADDENDUM

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EXPLANATORY MEMORANDUM – RESPONSE TO OBJECTION 1 DATED 4-30-2010

The chief object of this filing is to submit a Company Exception to ISO State Exception Rule A.6.

Currently, this ISO rule imposes a Mandatory application of a Virus and Bacteria Exclusion CP 01 78 to the coverage afforded by the ISO Commercial Property Coverage Form. The ISO initial filing of this endorsement indicated that the exclusion was appropriate due to "pandemic" exposure to loss which was not anticipated in the standard coverage forms or in development of the loss costs for Commercial Property. Therefore, we assume that this Exclusion is deleting coverage across the entire NY Commercial Fire and Allied book written by the ISO member companies that utilize the ISO product, unless modified by such a Company exception.

Because the application of this Exclusion is to Commercial Property, we anticipate losses to fall largely in Business Personal Property ("stock") and Business Interruption/Time Element coverage segments. We also anticipate that it will not affect large segments of GNY's current book, but rather solely to some isolated risks.

The GNY Insurance Companies wishes to make this endorsement CP 01 78 Optional on individual risks rather than Mandatory on a panacea basis. Because the GNY Insurance Companies is largely a niche market of habitational business, we feel that our exposure to this type of loss ("pandemic") is minimal, since such contagious disease is largely is transmitted to third parties via ingestion or some other direct contact to an insured's products. While it is possible that some type of disease (airborne Legionnaires Disease, for example) could spread through a HVAC system in any selected Apartment or Condo Building, it is highly unlikely that it would spread throughout a vast proportion of the apartments and condominiums across NYC that we insure.

While GNY does write some business in the restaurant classifications and we acknowledge that some exposure is inherent in such classifications due to the "Typhoid Mary" or contagious disease hazard (as some saw in the Hepatitis B exposure via a green onion vector some years ago), we feel such exposure is minimal since we do not write large concentrations of these risks in the same locales who could potentially use the same vendors of supplies. We do not write "chain" restaurants utilizing the same suppliers.

For all of the above reasons, we believe application of this Exclusion is appropriate on occasion, only to certain individual risks which sell or distribute products to the public. Additionally, GNY's underwriting management feels that such an endorsement would be considered imposed on a restaurant account only if the risk presented with claim history indicative of recent incident and loss control with little remediation.

Therefore, to answer your specific questions, we do not anticipate that any of our insured's will voluntarily request this exclusion; some (habitational risks) because it would never enter their minds as a problem for which they would voluntarily reduce coverage; others (restaurants) because they feel that such an event is well within the realm of possible fortuitous occurrences and should be covered should such an event arise.

We anticipate that the Company will impose this exclusion on such individual risks that present with recent loss history of this type of claim and loss control that would give us concerns of an on-going nature (cavalier attitude of management regarding implementation of hand washing procedures by food handling staff); i.e., we would impose attachment of this Exclusion in accordance with prudent supportable underwriting analysis of risk (since the variables involved could be of substantial scope). We do not anticipate imposing this exclusion on any specific classification (though restaurants are probably the most likely to experience such events) or across large segments of our book of business, since we do not feel the exposure to loss is very high in any segment of our existing Commercial Property book (though we acknowledge the possibility for Apartments, Condominiums and Office/Retail Buildings to experience such an event).

Because of the broad scope of the potential events which may occur, we feel that it is largely impossible to create a rule which takes in every aspect of exposure to communicable disease. Is it possible to simply indicate something in your proposed revision of our rule to state "This Exclusion will be applied on a case-by-case basis to risks which present with recent loss history which in the underwriters judgment indicates a potential higher than average exposure to loss"?

As indicated, our main object of this filing is to remove the carte blanch application of this Exclusion and not deny coverage to the majority portion of our book.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FACTORY MUTUAL INSURANCE COMPANY (as Assignee of ALBANY MOLECULAR RESEARCH, INC. and OSO BIOPHARMACEUTICALS MANUFACTURING, LLC)	)	
Plaintiff,	)	**CASE NO.: 1:17-cv-00760-GJF-LF**
vs.	)	
FEDERAL INSURANCE COMPANY and DOES 1-10,	)	
Defendants.	)	

PLAINTIFF FACTORY MUTUAL INSURANCE COMPANY'S MOTION *IN LIMINE* NO. 5 RE PHYSICAL LOSS OR DAMAGE

I. INTRODUCTION

Plaintiff Factory Mutual Insurance Company ("FM Global") hereby moves this court for an order excluding any and all evidence, references to evidence, testimony and argument that the mold infestation, as well as the costs incurred to remediate and return the facility to its pre-loss condition, is not physical loss under the Federal Insurance Company policy. Plaintiff further moves the court to instruct defendant and defendant's counsel to advise all witnesses accordingly.

Evidence and argument that mold is not physical damage have no tendency to prove or disprove disputed facts relevant to the determination of this action and are contrary to the law in this regard. Accordingly, such assertions cannot lead to proper evidentiary inferences, i.e., a deduction of *fact* logically and reasonable drawn from another established *fact*. It will consume unnecessary

time and create an extreme danger of confusing and misleading the jury about what is physical loss or damage for purposes of establishing coverage under the Federal policy.

II. ARGUMENT

A. Legal Standard.

The Court has the inherent authority to control trial proceedings, including ruling on motions *in limine*. See, e.g., *Luce v. United States,* 469 U.S. 38, 40, n.2 and 4 (1984). In addition, a motion *in limine*:

> affords an opportunity to the court to rule on the admissibility of evidence in advance, and prevents encumbering the record with immaterial or prejudicial matter, as well as providing a means of ensuring that privileged material as to which discovery has been allowed by the court will not be used at trial if it is found to be inadmissible.

75 Am.Jur.2d, *Trial* § 94 (1991) (footnotes omitted).

Federal Rule of Evidence Rule 401 states that evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. *Sprint/United Mgmt. Co. v. Medelsohn*, 552 U.S. 379, 388 (2008). Rule 402 specifically prohibits irrelevant evidence. The Advisory Committee has stated that "relevance is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." *Fed. R. Evid*. 401. In addition, the Court may exclude otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." *Fed. R. Evid.* 403. Further, evidence may be excluded when there is a significant danger that the jury might base its decision on emotion, or when non-party events would distract reasonable jurors from the real issues in the case. *Tennison v. Circus Circus Enterprises, Inc*., 244 F.3d 684, 690 (9th Cir. 2001). With this in mind, "motion[s] in limine allow[] the parties to resolve evidentiary disputes before trial and avoid[] potentially prejudicial evidence being presented in front of the jury, thereby relieving the trial judge from the formidable

task of neutralizing the taint of prejudicial evidence." *Brodit v. Cambra*, 350 F.3d 985, 1004-05 (9th Cir. 2003).

B. The Mold Infestation Is Physical Loss or Damage Under the Federal Policy.

FM Global anticipates that Federal will argue and attempt to introduce evidence that the mold infestation is not "physical loss or damage" under its policy and thus, not covered. In addition, Federal has indicated it will assert that the costs to remediate and return the facility to its pre-loss condition are not "physical loss or damage." These arguments are contrary to the facts of this loss and the case law which broadly interprets the term "physical loss or damage" in property insurance policies.[1]

It is undisputed that the mold infestation destroyed the aseptic environment and rendered Room 152 unfit for its intended use – manufacturing injectable pharmaceutical products. Numerous courts have concluded that loss of functionality or reliability under similar circumstances constitutes physical loss or damage. *See, e.g., Western Fire Insurance Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (church building sustained physical loss or damage when it was rendered uninhabitable and dangerous due to gasoline under the building); *Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America*, Civ. No. 2:12-cv-04418 2014 U.S. Dist. LEXIS 165232**,** 2014 WL 6675934 (D. N.J. 2014) (unsafe levels of ammonia in the air inflicted "direct physical loss of or damage to" the juice packing facility "because the ammonia physically rendered the facility unusable for a period of time."); *Port Authority of N.Y. and N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (asbestos fibers); *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (unpleasant odor in home); *TRAVCO Ins. Co. v. Ward*, 715

[1] At best for Federal, 'physical loss or damage,' which is undefined, is susceptible of more than one reasonable interpretation and is therefore ambiguous and must be construed against Federal. See Memorandum and Order, docket 118, p. 9, citing *United Nuclear Corp. v. Allstate Ins. Co.*, 285 P.3d 644, 647 & 649 (N.M. 2012); *Battishill v. Farmers All. Ins. Co.*, 127 P.3d 1111, 1115 (N.M. 2006).

F.Supp.2d 699, 709 (E.D.Va. 2010), aff'd, 504 F. App'x. 251 (4th Cir. 2013) ("toxic gases" released by defective drywall).

Loss of functionality and/or reliability is especially significant where, as here, the property covered involves a product to be consumed by humans. Courts have concluded that the product is damaged where its "function and value have been seriously impaired, such that the product cannot be sold." *Pepsico, Inc. v. Winterthur International America Insurance Co*., 806 N.Y.S.2d 709, 744 (App. Div. 2005), citing *General Mills, Inc. v. Gold Medal Insurance Co*., 622 N.W.2d 147 (Minn. Ct.App. 2001); *Pillsbury Co. v. Underwriters at Lloyd's, London*, 705 F Supp 1396 (D. Minn. 1989); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Terra Indus*., 216 F Supp 2d 899 (N.D. Iowa 2002), aff'd 346 F3d 1160 (8th Cir. 2003), cert denied 541 US 939 (2004); *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc*., 93 Cal Rptr. 2d 364 (Cal.App. 2000); *Zurich Am. Ins. Co. v. Cutrale Citrus Juices USA, Inc*., 2002 WL 1433728, 2002 US Dist LEXIS 26829 (M.D. Fla. 2002). These courts' rationale regarding food products applies equally, if not more so, to the injectable pharmaceuticals OSO manufactured which were exposed to mold and no longer met industry safety standard. *See*, *General Mills v. Gold Medal Insurance*, 622 N.W.2d at 152 (food product which no longer met FDA safety standard sustained property damage.); *Motorists Mutual Ins. Co. v. Hardinger*, 131 F.Appx. 823 (3d Cir. 2005) (E coli in water well was physical loss or damage to insured's home.)[2]

The period of time as well as costs required to bring OSO's facility to the level of cleanliness following the mold infestation required by OSO's customers is also physical loss or damage covered by the Federal policy. The facility was damaged by stringent requirements of OSO's customers regarding production to the same extent it was damaged from the mold infestation itself as the facility was unusable as the result of a covered loss. See, e.g., *Western Fire v. First Presbyterian*,

[2] The Court appears to agree that the mold infestation at the OSO facility was "physical loss or damage" as that term is used in property insurance policies such as the one issued by Federal. See Memorandum and Order, docket 118, p. 9.

437 P.2d at 55 (insured was awarded costs to remediate infiltration and contamination when gasoline rendered church unusable); *Farmers Insurance Co. v. Trutanich,* 858 P.2d 1332, 1335 (Ore.App. 1993) (costs of rectifying methamphetamine odor covered as direct physical loss or damage.)

The case of *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co*., 256 Minn. 404, 98 N.W.2d 280 (1959 Minn.) is instructive. There, the insured manufactured food products for the army pursuant to a contract that required the manufacturing plant be smoke free. When smoke from a fire on a neighbor's property permeated the insured's plant for some period of time, the army refused to accept any of the products, rendering them worthless. The Minnesota Supreme Court rejected the insurer's argument that there was no physical loss or damage. According to the court, the food was damaged because of army regulations that set forth stringent requirements for the manufacturing environment. The court also noted that the impairment of value, not the physical damage, was the measure of damages. *Id.* 98 N.W. 2d at 293.

Here, Federal was familiar with OSO's manufacturing process and the contracts which required OSO to maintain an aseptic manufacturing standards at its facilities. Federal was also aware that a mold infestation could cause significant damage not only to the products exposed to the mold, but also because of the time and cost to clean the mold to the standards required by the manufacturing contracts. Without the customers' approval of the restored aseptic conditions following the mold infestation, OSO's facility remained unusable. Indeed, had OSO manufactured products without the customers' approval of the facility, the customers could have properly refused to accept the products and they would have been as worthless as the food products at issue in *Marshall Produce v. St. Paul*. See also, *General Mills, Inc. v. Gold Medal Insurance Co*., 622 N.W.2d 147 (Minn. Ct.App. 2001) (The function and value of food products was impaired where the

FDA prevented the insured from selling them.); *Pepsico, Inc. v. Winterthur International America Insurance Co*., 806 N.Y.S.2d 709, 744 (App. Div. 2005) (Insured sustained property damage where its beverages had become "unmerchantable," i.e., the product's function and value were seriously impaired, such that the product could not be sold.)

Accordingly, evidence or argument that the mold infestation or the time and costs to remediate the infestation are not physical loss or damage does not create a reasonable inference as to the probability or lack of probability of a fact. *Fed. R. Evid*. 401; *A.I. Credit Corp v. Legion Insurance Co*., 265 F.3d 630, 638 (7th Cir. 2001). There being no legal basis to require FM Global to prove demonstrable structural damage or alteration to property or products, evidence or argument in this regard does not involve or establish a controverted fact and should be barred from trial. Allowing Federal to argue or elicit testimony that the loss did not create structural damage or alteration to property or products, so is not covered is inconsistent the law, prejudicial to FM Global and will only confuse the jury. See *Fed. R. Evid*. 403.

III. CONCLUSION

Based on the foregoing, FM Global respectfully requests that the Court grant this motion *in limine* to preclude questions, testimony or argument that the mold infestation and costs to remediate the infestation are not physical loss or damage under the Federal policy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on November 19, 2019, a true and correct copy of the foregoing was delivered to all counsel of record in accordance with the Federal Rules of Civil Procedure and the Local Rules of this Court.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limit of L. FED. R. APP. P. 32.1(a)(4) because, excluding parts of the document exempted by FED. R. APP. P. 32(f), this document contains 7493 words.

Additionally, this brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman style.

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CERTIFICATE OF SERVICE

Pursuant to Rule 13(e) of the Massachusetts Rules of Appellate Procedure, I, Marshall Gilinsky, attorney for United Policyholders, hereby certify that on December 17, 2021, I served this brief by email and Electronic Filing System upon:

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