ROCKLEIGH COUNTRY CLUB, LLC, Plaintiff-Appellant, v. HARTFORD INSURANCE GROUP a/k/a THE HARTFORD d/b/a HARTFORD FIRE INSURANCE COMPANY, STRATEGIC INSURANCE PARTNERS, INC., PHILIP D. MURPHY, in his capacity as Governor of the State of New Jersey, and STATE OF NEW JERSEY, Defendants-Respondents.	)	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-1826-21 Civil Action LAW DIVISION DOCKET NO.: BER-L-4013-20 SAT BELOW: Hon. Mary F. Thurber, J.S.C.

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS

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Preliminary Statement

The Trial Court failed to apply with fidelity this Court's controlling decision in *Wakefern Food Corp. v. Liberty Mutual* because it misconstrued the import of footnote 7 of that decision without regard to whether the footnote should actually apply to the circumstances of this case. As the decision below resolved a motion for summary judgment, the standard of review on this appeal is *de novo*.

The grant of coverage in the policy at issue in this case is standard-form language that the insurer drafted and sold on a take-it-or-leave-it basis for a premium that was paid up front and in full. It provides coverage for all risks arising from two distinct causes: "direct physical loss of ***or*** direct physical damage to" covered property. By virtue of settled rules of insurance policy construction, the phrase "physical loss of" property must mean something different from "physical damage to" property. Contrary to the decision below, "physical loss of" property does not require that the loss be attributable to some physical event or material alteration of property.

The Trial Court distinguished this Court's controlling decision in *Wakefern* -- which held that business interruption coverage may be triggered by loss of use, access, or functionality of covered property -- by pointing to footnote 7 of that decision. In footnote 7, this Court said, "We would reach a different result

if, for example, a governmental agency had ordered that the power be shut off to conserve electricity." The footnote cites an Eighth Circuit Court of Appeals opinion in support of that statement. A review of that Eighth Circuit decision places the statement in context and makes it clear that the core of the *Wakefern* decision should apply in a case such as this one, in which a government agency ordered the policyholder temporarily out of business.

Specifically, the Eighth Circuit decision in *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.,* interpreted a policy that (like the policy in *Wakefern*) provided coverage only for "direct physical loss to" property, where a government prohibition against the importation of Canadian beef resulted in the policyholder's damage. The federal court found that "one word" in that policy had made all the difference: If, instead of "direct physical loss ***to***" property, the policy in *Source Foods* had provided for "direct physical loss ***of***" the property, the case would have been decided differently. Here, of course, the policy provides coverage for "direct physical loss of" covered property. Had the Trial Court reviewed the *Source Food* decision, it would have realized that this Court's statement in footnote 7 applied to the specific circumstances of the *Wakefern* case, but that it does not apply to the circumstances of a case such as this one, where coverage is triggered by "direct physical loss of" property.

Since footnote 7 makes a distinction between the more

restrictive policy language that appeared in the policies at issue in *Wakefern* and in *Source Foods,* and the more expansive language that appears in the policy in this case, the Trial Court erroneously interpreted and distinguished *Wakefern*.

Procedural History and Statement of Facts

United Policyholders incorporates here the Procedural History and Statement of Facts set forth in the Plaintiff's Brief on this appeal.

Legal Argument

I. Properly applying the rules of interpreting insurance policy language to the coverage grant requires a finding that the temporary shutdown of the Rockleigh Country Club property constituted the "physical loss of" the premises.

The policy provision that triggers coverage in this case says: "We will pay … for the actual loss of Business Income you sustain … due to direct physical loss of or direct physical damage to property caused by or resulting from a Covered Cause of Loss at 'Scheduled Premises.'" New Jersey courts apply a number of rules that aid in the interpretation of insurance policy language.

It is well-settled that an insurance policy is a contract of adhesion. *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 175 (1992); *Longobardi v. Chubb Ins. Co.*, 121 N.J. 530, 537 (1990); *Solomon v. Continental Ins. Co.*, 122 N.J. Super. 125, 134 (App. Div. 1972). New Jersey courts interpret coverage-granting language in an insurance policy liberally; they interpret coverage

limitations narrowly. "Insurance policies are strictly construed against the insurer, the courts being obligated to protect the policyholder to the full extent that any fair interpretation of the policy will allow." *Mazzilli v. Accident & Casualty Ins. Co. of Winterthur*, 35 N.J. 1, 7 (1961). As the New Jersey Supreme Court put it in *Harr v. Allstate Ins. Co.*, 54 N.J. 287, 303 (1969): "We have realistically faced up to the fact that insurance policies are complex contracts of adhesion, prepared by the insurer, not subject to negotiation, in the case of the average person, as to terms and provisions and quite unintelligible to the insured even were he to attempt to read and understand their unfamiliar and technical language and awkward and unclear arrangement."

If the terms of a policy are ambiguous, they must be construed in favor of coverage and against the insurer. "It is well-established that the coverage sections of an insurance policy are to be liberally construed in favor of the insured, exclusions are to be read narrowly, and ambiguities are to be construed against the insurer." *DEB Assocs. v. Greater New York Mut. Ins. Co.*, 407 N.J. Super. 287, 293 (App. Div. 2009) (citations omitted).

In addition, "[t]he reasonable expectations of the insured should be accorded so far as the language of the policy permits." *Powell v. Alemaz, Inc.*, 335 N.J. Super. 33, 39 (App. Div. 2000) (citing *American Motorists Ins. Co. v. L-C-A Sales Co.*, 155 N.J. 29, 41 (1998)). That is, the policy should be read in a light

most favorable to the insured and consonant with the insured's objectively reasonable expectations. *Powell*, 335 N.J. Super. at 39 (*citing Sparks v. St. Paul Ins. Co.*, 100 N.J. 325, 337 (1985)). *See also Sosa v. Massachusetts Bay Ins. Co.*, 458 N.J. Super. 639, 646 (App. Div. 2019) ("We are guided by general principles: 'coverage provisions are to be read broadly, exclusions are to be read narrowly, potential ambiguities must be resolved in favor of the insured, and the policy is to be read in a manner that fulfills the insured's reasonable expectations.'").

The operative coverage grant in the policy at issue is expressed in the disjunctive: "We will pay for direct physical *loss of* or physical *damage to*" the covered property. (Emphasis added.) By using the disjunctive, the insurer necessarily meant for the phrase "physical loss of" property to mean something different from "physical damage to" property. In addition, the insurer could have defined the terms "physical loss of" and "physical damage to," and thus removed all doubt about the scope of these terms, but it failed to do so. These undefined terms should therefore be accorded their plain and ordinary meaning.

"[I]n the absence of a specific definition in an insurance policy, the words must be interpreted in accordance with their ordinary, plain and usual meaning." *Boddy v. Cigna Prop. & Cas. Companies*, 334 N.J. Super. 649, 656 (App. Div. 2000). "When interpreting undefined terms within an insurance policy, we

'resort to the general rule that the terms in an insurance policy should be interpreted in accordance with their plain and commonly-understood meaning.'" *Cypress Point Condo. Ass'n, Inc. v. Adria Towers, L.L.C.*, 226 N.J. 403, 425–26 (2016) (quoting *Morton Int'l v. Gen. Accident Ins. Co.*, 134 N.J. 1, 56 (1993)). Courts will refer to the dictionary definitions of the undefined terms of an insurance policy to determine their ordinary, plain, and usual meaning: "This common-sense approach often begins with an examination of dictionary definitions." *Cypress Point*, 226 N.J. at 426.

The Merriam-Webster Dictionary defines the adjective "direct," as "characterized by close logical, causal, or consequential relationship." www.merriamwebster.com/dictionary/direct. "Physical" is defined as "having material existence: perceptible especially through the senses and subject to the laws of nature." www.merriam-webster.com/dictionary/physical. "Loss" is "the act of losing possession: deprivation" and "the harm or privation resulting from loss or separation." www.merriam-webster.com/dictionary/loss.

Construing the phrase "direct physical loss of" property liberally, as required by New Jersey law and in accordance with the dictionary definitions of the words, it is certainly consistent with a policyholder's reasonable expectations that, as a consequence of a government mandate to close covered premises, and

thus physically depriving the insured of the use of, and access to, the property for its intended purpose, a "physical loss of" that property has occurred. Such a construction is the only one under these circumstances that will "protect the policyholder to the full extent that any fair interpretation of the policy will allow." *Mazzilli v. Accident & Casualty Ins. Co. of Winterthur*, *supra*, 35 N.J. at 7.

This construction of the coverage grant in the policy also comports with this Court's decision in *Wakefern*.

II. This Court has held that the phrase "physical damage" is ambiguous and the Trial Court's decision to distinguish that holding was erroneous.

In *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524 (App. Div.), *certif. denied*, 200 N.J. 209 (2009), a group of supermarkets purchased insurance coverage for the interruption of their business caused by a loss of electrical power. The case involved the 2003 cascading power outage that affected major parts of the northeastern United States, which resulted in food spoilage at the Wakefern retail stores. The policy provided that the interruption of power had to be the result of "physical damage to off-site electrical equipment," a phrase that is significantly narrower than the coverage trigger at issue here.

The insurer in *Wakefern*, Liberty Mutual, argued that the blackout resulted not from "physical damage to" the off-site power

grid, but from safety relays that automatically de-energized the transmission lines and succeeded in *preventing* any physical damage to the equipment. *Id.* at 535. The trial court agreed with Liberty. This Court reversed, finding that decision "inconsistent with well-settled principles of insurance law." *Id.* at 529.

The heart of the *Wakefern* decision, for purposes of coverage for the New Jersey Executive Order closures, was a finding that the phrase "physical damage" was ambiguous:

> We conclude that the undefined term "physical damage" was ambiguous and that the trial court construed the term too narrowly, in a manner favoring the insurer and inconsistent with the reasonable expectations of the insured. In the context of this case, the electrical grid was "physically damaged" because, due to a physical incident or series of incidents, the grid and its component generators and transmission lines were physically incapable of performing their essential function of providing electricity.
>
> *Id.* at 540.

In reaching this conclusion, the *Wakefern* court noted that "it is well settled that those purchasing insurance 'should not be subjected to technical encumbrances or to hidden pitfalls,' and that insurance policies 'should be construed liberally in their favor to the end that coverage is afforded to the full extent that any fair interpretation will allow.'" *Id.* at 539. The Trial Court here made the same errors of interpretation that the trial court in *Wakefern* made; errors that this Court then reversed.

The Trial Court here noted that the *Wakefern* court found

"physical damage" only in cases where loss of use was attributable to a physical cause (Pa040). The implication is that the *Wakefern* court required the insured to prove some physical alteration of property as a prerequisite to coverage.

In fact, this Court found the opposite to be true: "Since 'physical' can mean more than material alteration or damage, it was incumbent on the insurer to clearly and specifically rule out coverage in the circumstances where it was not to be provided, something that did not occur here." *Wakefern*, 405 N.J.Super. at 541-42 (citing *Customized Distribution Services v. Zurich Ins. Co.*, 373 N.J.Super. 480, 491 (App. Div. 2004), *certif. denied*, 183 N.J. 214 (2005)). The *Wakefern* decision also cited with favor out-of-state decisions that interpreted the policy phrase "physical damage" to include "loss of access, loss of use, and loss of functionality." *Id.* at 543 (quoting *American Guar. & Liab. Ins. Co. v. Ingram Micro, Inc.*, 2000 WL 726789 (D. Ariz. [April 18,] 2000) ("'physical damage' is not restricted to the physical destruction or harm of computer circuitry but includes loss of access, loss of use, and loss of functionality")). These interpretations of "physical damage" constitute binding New Jersey authority for purposes of applying that phrase to the facts of this case.

Significantly, the Trial Court relied on footnote 7 of the *Wakefern* opinion to distinguish that case from this one. Footnote

7 says, "We would reach a different result if, for example, a governmental agency had ordered that the power be shut off to conserve electricity. *See Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.,* 465 *F.*3d 834 (8th Cir.2006) (no coverage for insured's inability to obtain beef product due to government action prohibiting importation of Canadian beef)." The Trial Court apparently did not review the *Source Food* decision to place footnote 7 in proper context. Had it done so, it would have led to the conclusion that the language in the policy in *this* case triggers coverage for loss caused by a government shutdown order.

The coverage-triggering language in *Wakefern* required "*physical damage to* off-site electrical equipment." This trigger is much narrower than the standard-form language in the policy at issue, which provides coverage for "physical ***loss of or*** damage to" property. Like the policy language in *Wakefern*, the policy in the *Source Food* case required proof of a "physical loss ***to***" property. Obviously, a prophylactic government order to shut down electrical equipment would not constitute "physical damage ***to***" that equipment; but such an order would constitute a "physical ***loss of***" the equipment. Indeed, this is precisely the implication of the *Wakefern* court's citation to *Source Food* in fn. 7.

The 8th Circuit in *Source Food* noted that a one-word change in policy language that replaced the word "to" with the word "of" would have made all the difference in that case: "Moreover, the

policy's use of the word 'to' in the policy language 'direct physical loss to property' is significant. Source Food's argument might be stronger if the policy's language included the word 'of' rather than 'to,' as in 'direct physical loss *of* property' or even 'direct loss *of* property.'" *Source Food*, 465 F.3d at 838 (emphasis in original). In other words, the government-ordered prohibition in *Source Food* would have been covered if the policy had contained the coverage-triggering language, "physical loss ***of*** property," that the policy at issue here contains.

The controlling import of this Court's decision in *Wakefern* is that the phrase "physical loss of or damage to" covered property can and does include "loss of access, loss of use, and loss of functionality" of the property in the absence of any physical event or material alteration of the property. For these reasons, it was erroneous for the Trial Court to distinguish the *Wakefern* case on the basis of the statement that appears in footnote 7 of that decision.

Conclusion

For all of the foregoing reasons, the decision of the Trial Court should be reversed and the case should be remanded for further proceedings.

Dated: April 22, 2022

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