No. 22-1336

IN THE

United States Court of Appeals

For the Seventh Circuit

STANT USA CORPORATION; STANT FOREIGN HOLDING CORPORATION; VAPOR US HOLDING CORPORATION

Plaintiff-Appellants,

v.

FACTORY MUTUAL INSURANCE COMPANY

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division
Hon. Sarah Evans Barker, U.S. District Judge
No. 1:21-cv-00253-SEB-TAB

BRIEF FOR UNITED POLICYHOLDERS AS *AMICUS CURIAE* IN SUPPORT OF STANT AND REVERSAL

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Date: April 18, 2022

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-1336

Short Caption: Stant USA Corp. v. Factory Mutual Ins. Co

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

United Policyholders, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Plews Shadley Racher & Braun, LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: George M. Plews Date: 4/18/2022

Attorney's Printed Name: George M. Plews

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: Gregory M. Gotwald Date: 4/18/2022

Attorney's Printed Name: Gregory M. Gotwald

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

Attorney's Signature: Christopher E. Kozak Date: 4/18/2022

Attorney's Printed Name: Christopher E. Kozak

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Treatises

INTEREST OF *AMICUS CURIAE*[1]

United Policyholders ("UP") is a non-profit organization that advocates for policyholder interests to promote the evenhanded development of the law and to counterbalance pervasive and well-funded lobbying by insurance industry interests.

UP is committed to assisting courts in upholding the fundamental principles of insurance law that advance the goal of loss indemnification, fairness in interpreting policy language, and fair claim practices. In connection with COVID related losses, the insurance industry has sought a dramatic narrowing of historically broad "all risks" property and business-interruption insurance, disclaimed special and additional coverages sold to protect businesses against pandemic risk, and made misleading suggestions that accepting policyholders' reasonable views of the coverage they bought might bankrupt the entire insurance industry. UP's interest in this matter is to help courts recognize and reject the industry's campaign to upend decades of carefully reasoned decisions and fundamental principles.

Public officials, state insurance regulators, academics, and journalists routinely seek UP's input on insurance and legal matters. UP's executive director has been appointed for twelve consecutive terms to officially represent consumers at the National Association of Insurance Commissioners. In this role, UP has for many years engaged with Commissioner of the Indiana Department of Insurance. UP is also a

[1] The parties have consented to the filing of this brief. No party or its counsel authored this brief, in whole or in part. No party or its counsel contributed money that was intended to fund preparing or submitting this brief. No person, other than *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

member of the Federal Advisory Committee on Insurance to the U.S. Treasury, and a regular participant before the National Association of Insurance Legislators. UP is active in disaster-impacted regions and has Platinum status on the Guidestar charity rating platform. In the past year, over 600,000 Americans visited the libraries, reports, and resource materials available on UP's website.

Over the last thirty years, UP has filed many amicus briefs in state and federal courts. *E.g.*, *Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999) (favorably citing UP's amicus brief). UP has filed four amicus briefs in this Court in connection with the Covid-19 litigation, either with the parties' consent or by leave of the Court. *Circle Block Partners v. Fireman's Fund Ins. Co.*, No. 21-2459; *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, No. 21-1186; *TJBC, Inc. v. Cincinnati Ins. Co.*, No. 21-1203; *Crescent Plaza Hotel Owner, L.P. v. Zurich American Ins. Co.*, No. 21-1316.

SUMMARY OF THE ARGUMENT

UP submits this brief to highlight some key principles of Indiana insurance law and two major, conceptual problems with FM's positions in this case.

***First*,** FM's crabbed interpretation of the word "physical" is at war with the fundamental bargain represented by insurance policies—and particularly by all-risk policies. Insurers in general and FM in particular meant for these policies to cover this precise risk, despite their recent protests to the contrary. It is not unreasonable for Stant to take positions that FM has itself adopted.

***Second*,** this case is controlled by Indiana law. As a result, this Court's predictions about Illinois law in *Sandy Point* and its companion cases are neither binding nor instructive—particularly with regard to Stant's claims that the SARS-CoV-2 virus injured its property. In the past, this Court's predictions about Indiana law have tried to squeeze every possible drop of meaning from terms before declaring them ambiguous. The Indiana Supreme Court has, multiple times, disapproved of that approach because it leads to rules that are underinclusive or difficult to administer. FM's arguments invite the Court to repeat its past errors. The Court should decline.

***Third*,** applying the Indiana Supreme Court's mandate to construe coverage broadly and its strong preference for simplicity, there is no reason to treat the virus as any less "physical" than the harmful substances the courts have confronted in the past. Before Covid, the courts found coverage in every one of those cases, reasoning that the substance was "physical," and the danger it causes was a "loss." FM says

that "physical" requires a greater degree of injury to count. Nothing in the law or the policy compels that view, however, making Stant's interpretation reasonable—even if FM's is also plausible.

FM and other courts point to *Couch on Insurance 3d*'s "distinct, demonstrable, physical alteration" test. However, that theory has been largely discredited by recent scholarship. Rather than refute that scholarship on the merits, the insurance industry has generally lobbed *ad hominem* attacks at the scholars while passing off *Couch 3d* as neutral. That ignores at least two things. First, the insurers are wrong: *Couch 3d*'s authors generally represent insurance companies, and so they are no more neutral than we are. Second, as Madison said, "[t]he prudent inquiry, in all cases, ought surely to be, not so much *from whom* the advice comes, as whether the advice be *good*." THE FEDERALIST NO. 40. Ultimately, the recent scholarship provides good advice on this issue; *Couch* provides bad advice. If FM or its *amici* have a response to that, then we challenge them to provide it. If they cannot, then the Court has heard all it needs to know.

The Court should **REVERSE** and **REMAND** for further proceedings.

ARGUMENT

As Stant points out, this case is very different than the one the Court confronted in *Sandy Point* and its companion cases. (Stant Br., at 17-26, 33-37.) The policy is different. The facts are different. But most importantly, the *law* is different. The Court has guidance from the Indiana Court of Appeals that, read in light of the Indiana Supreme Court's past jurisprudence, should compel reversal here.

I. Stant purchased traditional "all risks" coverage, and the district court failed to appreciate that fact.

In *Indiana Repertory Theatre v. Cincinnati Casualty Company* (a Covid-19 decision), the Indiana Court of Appeals confronted a policy materially identical to the one this Court reviewed in *Sandy Point*. 180 N.E.3d 403, 407 (Ind. Ct. App. 2022); *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 331 (7th Cir. 2021) (Illinois law). In denying coverage, the *IRT* opinion found that property did not suffer a "physical loss" merely because it was dangerous. 180 N.E.3d at 407-09.

In doing so, the court reasoned that the sea of past decisions finding coverage when property was dangerous generally shared something in common: they insured against "risk of" the loss, while Cincinnati only insured against the loss itself. *Id.* It analogized the Covid-19 pandemic to a "construction accident" that cut off access to the insured property without actually changing its physical characteristics in any way. *Id.* at 410 (relying on *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 302 A.D.2d 1, 3, 6-7 (N.Y. App. Div. 1st Dep't 2002)). Without the "risks of" term, it interpreted the word "physical" to require "some physicality to the loss or damage of property—e.g.,

a physical alteration, physical contamination, or physical destruction." *Id.* (quoting *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1144-45 (8th Cir. 2021)).

FM is in an entirely different situation. It *did* insure against "all risks of physical loss or damage." (App.36.) Stant *has* alleged that there is "some physicality to the loss," 180 N.E.3d at 410 (quotations omitted), specifically the presence of the virus at its property and its customers' properties. (App.5-10.) And rather than stating that payments end when property is "repaired, rebuilt, or replaced"—a fact of great significance to the *IRT* panel—FM said that payments would end when "the results of the business shall [no longer] be directly affected" by the "physical loss or damage." (App.82.)

The Indiana Supreme Court may alter or correct the denial of coverage in *IRT*, but this Court must make the best *Erie* guess with what it has. *IRT* establishes that FM sold a classic "all risks" policy that is triggered where a physical substance renders property too dangerous for its intended use, regardless of any "physical alteration."

FM's own advocacy and internal statements confirm that this is a reasonable way to interpret the policy. (Stant Br., at 27-33, 42-47.) "When the insurance industry itself has offered differing interpretations of the same language"—as FM has here—courts applying Indiana law "must assume that the insured understood the coverage in the more expansive way." *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 948 (Ind. 1996). FM's own statements are nearly conclusive evidence that the terms are ambiguous and must be construed against it. *Id.*

Construction in favor of the policyholder and against the insurer is not an empty formality or a blind guide. It is at the core of how Indiana understands the insurance bargain. In one of its very first cases on policy interpretation, the Indiana Supreme Court insisted that the coverage grant in an insurance policy must "be liberally construed in favor of the insured." *Grant v. Lexington Fire, Life & Marine Ins. Co.*, 5 Ind. 23, 27 (1854) (citing 1 JOHN DUER, A TREATISE ON THE LAW AND PRACTICE OF MARINE INSURANCE 161 (1845)). Indiana follows this rule, "not in obedience to a mere technical rule," but rather because it is "probably most consonant to the *intentions of the parties*." DUER ON INSURANCE at 161 (emphasis added). "It is certain that the assured desires as ample an indemnity as he can obtain, and it is probable that the insurer means he shall understand the indemnity given, to be as expansive as its terms, upon any fair interpretation, import." *Id.*

That is true here. Stant, in buying a classic "all risk" policy, sought to obtain as much indemnity as it could. FM, selling to that desire, subjectively and objectively meant for the policy to cover this particular risk. FM backs away from that position now, but such regret is not a reason to abandon its intent at the time of contracting, as manifested by the language it used.

II. *Sandy Point* and its companion cases are not binding or instructive under Indiana law, which approaches ambiguity through a different lens.

Predicting the Indiana Supreme Court's view on a novel insurance question is not a new task for this Court. *E.g.*, *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 629 (7th Cir. 1997) ("*Flanders II*"). But the back-and-forth between

this Court and the Indiana Supreme Court on those issues is instructive, and it sounds a note of caution for the Court in its disposition of this case.

In *Flanders*, the Court found that the words "sudden and accidental" in a pollution exclusion were unambiguous and barred coverage. *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146, 152-54 (7th Cir. 1994) ("*Flanders I*") (Indiana law). It parsed dictionary definitions, statutes, and other cases and divined one, clear, exclusive meaning of the phrase "sudden," reasoning that it was a term that "only a lawyer's ingenuity could make ambiguous." *Id.* at 152-53 (quotations omitted). It rejected evidence of the industry's conflicting statements, reasoning that those things could not re-establish, as reasonable, the alternative meanings the Court had boxed out by selecting the term it thought best fit the "context" of the policy. *Id.*

The Indiana Supreme Court disagreed with this approach entirely. *Kiger*, 662 N.E.2d at 947-48. Instead, it found ambiguity at a very high level, noting that *some* insurer statements, *some* courts, and *some* dictionary definitions supported the policyholder's view. *Id.* at 947-48 & nn.1-2. "That [such] interpretation[s] w[ere] advanced simply demonstrates the presence of the ambiguity that requires this Court to construe the insurance policy in favor of the insured and against the insurer who drafted it." *Id.* at 948.

Consider another example. *Red Ball Leasing, Inc. v. Hartford Acc. & Indem. Co.*, 915 F.2d 306 (7th Cir. 1990) (Indiana law). There, the Court was asked whether the tort of conversion could be an "accident" where the tortfeasor intended to take the property but negligently thought they were the owner. *Id.* at 309-12. Once again, the

Court parsed the term, the dictionaries, and the case law and crafted one, exclusive, freestanding definition: a deliberate act could only cause an "accident" if the negligence was sufficiently "attenuated from the volitional act" so that the damage was "neither expected nor intended." *Id.* at 311.

Once again, the Indiana Supreme Court disagreed. *Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1284-85 (Ind. 2006). The Court expressed its appreciation for the "insight gained from federal court opinions." *Id.* at 1285. Still, it ultimately found that this Court's definition of "accident" was "rather unclear, potentially confusing, and likely to result in subjective and unpredictable judicial applications." *Id.* In particular, the Court worried that analyzing how "attenuated" two acts were from one another in every case "runs counter to our well-established principle that where insurance policies are ambiguous, they are to be "construed strictly against the insurer." *Id.* at 1285-86 (citing, among other cases, *Kiger*, 662 N.E.2d at 947). As a result, the Court concluded that the simple understanding was a reasonable one: There is an accident unless you specifically intend the consequences of your actions. *Id.* at 1286.

FM's arguments in this case invite the Court to employ the analysis from *Sandy Point* and its progeny. Doing so would repeat the Court's predictive errors in *Flanders I* and *Red Ball*—indulging in the temptation to *define* terms at a granular level rather than simply asking whether the policyholder's view is plausible, possible, or reasonable. That may be the framework in Illinois. As history has shown, it is not the framework in Indiana.

As an example of how that error would manifest itself here, take one of *Sandy Point*'s companion cases. *Crescent Plaza Hotel Owner, L.P. v. Zurich American Insurance Company*, 20 F.4th 303 (7th Cir. 2021) (Illinois law). There, after a lengthy exegesis, the Court adopted one, exclusive meaning of "microorganism," which favored the insurer. *Id.* at 309-11. The Court rejected the policyholder's reliance on sharply divergent dictionary definitions, reasoning that "competing dictionary definitions and debate among experts is not necessarily enough to render the [term] ambiguous." *Id.* at 309. Yet that is precisely the framework the Court used in *Flanders I* (indeed, *Crescent Plaza* cited *Flanders I* to support this proposition) and it is *precisely* the framework the Indiana Supreme Court has rejected. *Id.*

UP does not recount this history to disparage the Court's valid and good-faith efforts to predict Indiana law. UP simply urges the utmost caution in light of the adage that those who forget the past are doomed to repeat it. Some Indiana policyholders, like Stant, are in federal court because they just happen to be diverse from their insurers. This Court refused to reopen the judgment in *Flanders I* after *Kiger* was decided. *Flanders II*, 131 F.3d at 629. Likewise, this Court will, in all likelihood, dispose of this appeal before the Indiana Supreme Court passes on the underlying question. The Court should, therefore, be extremely careful to avoid an erroneous framework, lest Stant be mired beneath a similar erroneous judgment that buried Flanders's (meritorious) claim.

III. Before the pandemic, courts unanimously held that property invaded by dangerous substances triggered coverage, and there is no reason to treat SARS-CoV-2 any differently.

Drawing on the lessons from *Kiger* and *Harvey*, the proper outcome of this case is clear. There is ample evidence that a policyholder could reasonably interpret the term "physical loss" to encompass property rendered dangerous by a harmful substance like the virus. That is the end of the inquiry, even if FM or the Court could construct a "better" definition.

Until the pandemic, courts *unanimously* found coverage where (1) a physical substance invaded property and (2) made it dangerous. Judicial efforts to explain why SARS-CoV-2 is "different" falter for a variety of reasons.

A. Historically, when a "physical" substance invade property and made it dangerous, there was always a "physical loss."

For decades, insurers urged courts to adopt a "structural alteration" or "tangible damage" trigger for property policies. Until the Covid-19 litigation, courts unanimously rejected that argument where physical substances were present on the property and made it dangerous. The "physical alteration" concept was derived as a way to explain why, in the view of some courts, pure loss-of-use or loss-of-function claims did not satisfy the policy. That term, however, was never used to deny coverage for cases where a "physical" substance invaded the property, causing a "loss" by making it dangerous.

As one industry writer observes, "[i]t is well recognized by courts that physical loss exists without destruction to tangible property." Steven Plitt, *All-Risk Coverage for Stigma Claims Involving Real Property*, 35:9 INS. LITIG. RPTR. 253 (Jun. 5, 2013).

The Indiana Court of Appeals recognized some of these cases. *IRT I*, 180 N.E.3d at 408-09 (discussing cases finding a "physical loss" because of contamination by foul odors, gasoline, methamphetamine pesticides, asbestos, ammonia, and lead). There are many others. Richard P. Lewis, et al., Couch*'s "Physical Alteration" Fallacy: Its Origins and Consequences*, 56 TORT, TRIAL & INS. L.J. 621, 633, 636-38 (2021). The test is simple. The presence of the physical substance satisfies the word "physical." And if that substance renders the property dangerous, there is a "loss."

This basic principle is as old as the "physical loss" dispute itself. *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 655 (Cal. Ct. App. 1st Dist. 1962). Early on, the courts established that it is unreasonable for an insurer to interpret "physical loss" as providing no coverage for a building "so long as its paint remains intact and its walls still adhere to one another." *Id.*

Whatever *Hughes* means at the margins in California, it still stands squarely for the proposition that *structural* or *tangible* damage is not required to show "physical loss." *Inns-by-the-sea v. Cal. Mut. Ins. Co.*, 71 Cal. App. 5th 688, 700-05 (4th Dist. 2021). Courts drew on that insight for decades while grappling with harmful substances in the property insurance context. Although some courts have found *Hughes* inapposite on some facts,[2] no pre-pandemic court repudiated the basic principle and required a physical hazard to cause "tangible" or "structural" damage.

[2] The main case is *Ward Gen. Ins. Servs., Inc. v. Emplr's Fire Ins. Co.*, 114 Cal. App. 4th 548 (Cal. Ct. App. 4th Dist. 2003), which found *Hughes* unhelpful in a case involving *in*tangible property—there, a database that crashed.

A textbook example is *Sentinel Management Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296 (Minn. Ct. App. 1997). There, the policyholder sought coverage for asbestos fibers that were present in one of its apartment buildings and were creating a health hazard for occupants. *Id.* at 298. The insurer argued that "contamination, absent structural damage, cannot constitute 'direct physical loss under the policy." *Id.* at 300. It pointed out that Sentinel "has neither closed its rental properties nor taken action to remove the released fibers from the buildings." *Id.* Indeed, tenants still lived there. *Id.* at 298.

The Minnesota Court of Appeals disagreed with this cramped view of the word "physical." *Id.* at 300. "'Direct physical loss' provisions require only that a covered property be injured, not destroyed." *Id.* Citing *Hughes* and its progeny, the court held that "direct physical loss also may exist in the absence of structural damage to the insured property." *Id.* The court conceded that the loose asbestos fibers "d[id] not result in a tangible injury to the physical structure of a building," but it found that was not necessary. *Id.* The presence of a physical substance (the asbestos) coupled with a loss (the "hazard to human health") was sufficient to cause a "direct physical loss." *Id.*

In another case (*Farmers Insurance Co. v. Trutanich*) the insurer and its amici made a similar argument: that methamphetamine odor did not qualify as a "physical loss" because the property was "intact and undamaged." 858 P.2d 1332, 1336 & n.4 (Or. Ct. App. 1993). The court disagreed, equating the odor's physicality with the kind

of "damage" required. *Id.* Because "the odor produced by the methamphetamine lab had infiltrated the house," there was "a direct physical loss." *Id.* at 1336.

Trutanich has been understood as holding that "physical damage can occur at the molecular level and be undetectable in a cursory inspection." *Columbiaknit Inc v. Affiliated FM Ins. Co.*, 1999 WL 619100, *6 (D. Or., Aug. 4, 1999). That observation is particularly apt here, as the virus is very real and very physical, but only causes injury at "a molecular level" and is not detectable using the five senses. *Id.* Although *Columbiaknit* also insisted that the harm be "distinct and demonstrable," no case law supported that qualifier, and the court relied exclusively on commentary that failed to account for *Trutanich*. Lewis, et al., 56 TORT, TRIAL & INS. L.J. at 633, 636-38.

The New Hampshire Supreme Court rejected similar insurer arguments in *Mellin v. Northern Security Ins. Co.*, 115 A.3d 799 (N.H. 2015). There, the insurer argued that "the words 'direct' and 'physical loss' . . . are commonly understood to require tangible change to the property." *Id.* at 803. Because the cat urine odor at issue in that case "did not cause a tangible alteration to the appearance, color, or shape" of the property, the insurer argued it was not covered. *Id.*

The Court disagreed with the insurer's view of the case law and the policy. *Id.* at 803-04. After surveying the case law, it held that the word "physical" includes "not only tangible changes to the insured property, but also changes that are perceived by the sense of smell and that *exist in the absence of structural damage*." *Id.* at 805 (emphasis added). A New Hampshire trial court has already concluded that the rationale in *Mellin* is not limited to cat urine, but also includes the presence of SARS-

CoV-2. *Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co.*, 2021 WL 4029204 (N.H. Super. Ct., Jun. 15, 2021).

Finally, in *Gregory Packaging, Inc. v. Travelers Property & Casualty Co. of America*, the court rejected the insurer's argument that ammonia contamination in the air and surfaces of a plant was not covered because the property did not suffer any "structural alteration." 2014 U.S. Dist. LEXIS 165232, *15 (D.N.J., Nov. 25, 2014). "[T]here is no dispute that the ammonia release physically transformed the air within [the] facility so that it contained an unsafe amount of ammonia," something that qualified as "direct physical loss." *Id.* at *16-17.

In sum, the great weight of authority holds that the hazard need not cause tangible or structural damage to property before it causes a "physical loss." A physical substance, physically present at the property, and creating a physical hazard, has always been sufficient. The Court should hold that it is sufficient here.

B. The cases denying coverage for lack of a "physical alteration" never involved the fact pattern here.

Some courts, including *IRT*, denied coverage for *other* claims for want of a "physical alteration." 180 N.E.3d at 410-11. But the key difference is that, before the pandemic, none of those cases involved a dangerous substance actually present on the property. They involved economic losses,[3] preemptive shutdowns,[4] inherent

[3] *Pentair, Inc. v. Am. Guar. & Liab. Ins. Co.*, 400 F.3d 613, 614-15 (8th Cir. 2005) (supply chain disruption); *Newman Myers Kreines Gross, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 324-25 (S.D.N.Y. 2014) (power outage preventing access to property); *Simon Mktg., Inc. v. Gulf Ins. Co.*, 149 Cal. App. 4th 616, 623 (2d Dist. 2007) (cancelled contracts and lost business).

[4] *Phila. Parking Auth. v. Fed. Ins. Co.*, 38 F. Supp. 2d 280, 281-82 (S.D.N.Y. 2005) (FAA order preemptively grounding airlines after 9/11); *United Air Lines, Inc. v. Ins. Co. of Pa.*, 385 F. Supp. 2d 343, 346 (S.D.N.Y. 2005) (same); *Source Food Techs., Inc. v. U.S. Fid. & Guar. Co.*,

defects,[5] electronic data,[6] or harmless physical conditions.[7] To date, counsel has not been able to locate a single pre-pandemic case where a court denied coverage for a dangerous substance present on the property. That is an invention of courts addressing disputes in the last few years, and as we explain below, it is deeply flawed.

A decision from the Third Circuit is illustrative. *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 234-35 (3d Cir. 2002). The case involved asbestos that, by law, had to be removed. *Id.* However, the asbestos was intact and not dangerous to anyone in its current state. *Id.* The policyholder argued, by analogy to *Sentinel* (also involving asbestos), that the presence of the asbestos was a "physical loss." The court disagreed—but only because the asbestos was contained and not dangerous to anyone. *Id*. Indeed, the Third Circuit emphasized that it would have found coverage under the facts from *Sentinel*, i.e., if the evidence had shown "the

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465 F.3d 834, 835 (8th Cir. 2006) (preemptive USDA import ban); *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 302 A.D.2d 1, 3, 7 (N.Y. App. Div. 1st Dep't 2002) (government order barring use of streets needed to access theatre).

[5] *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 769-70 (Cal. Ct. App. 2010) (defective MRI machine); *Trinity Indus., Inc. v. Ins. Co. of N. Am.*, 916 F.2d 267, 268 (5th Cir. 1990) (misaligned boat hull); *City of Burlington v. Indem. Ins. Co. of N. Am.*, 332 F.3d 38, 40-41 (2d Cir. 2003) (faulty welds); *Doyle v. Fireman's Fund Ins. Co.*, 21 Cal. App. 5th 33, 35 (Cal. Ct. App. 2018) (counterfeit wine).

[6] *Ward Gen. Ins. Servs., Inc. v. Emplr's Fire Ins. Co.*, 114 Cal. App. 4th 548 (Cal. Ct. App. 2003) (database crash); *AFLAC, Inc. v. Chubb & Sons, Inc.*, 581 S.E.2d 317, 318 (Ga. Ct. App. 2003) (impact of Y2K computer bug).

[7] *Mama Jo's v. Sparta's Ins. Co.*, 823 F. App'x 868, 870 (11th Cir. 2020) (harmless dust); *Universal Image Prods. v. Fed. Ins. Co.*, 475 F. App'x 569, 570-71 (6th Cir. 2012) (mold near the property where policyholder conceded premises were safe); *Harry's Cadillac-Pontiac-GMC Truck Co. v. Motors Ins. Corp.*, 486 S.E.2d 249, 250-52 (N.C. Ct. App. 1997) (inaccessible dealership); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130 1144 (Ohio Ct. App. 2008) (mold growing on exterior of building).

presence of large quantities of asbestos in the air of a building" rendering it unsafe or unusable. *Id.* at 236.

In summary, before the pandemic, courts *never* denied coverage when a physical substance was present on the property and rendered it dangerous. They certainly did not require proof that the substance "structurally" or "tangibly" altered the property. The use of the term "physical alteration" was simply a device to explain why, in the view of some courts, the policy did not apply to loss-of-use or loss-of-function claims. It was never used as a proxy to impose the "tangible" or "structural" alteration requirement that courts had never accepted.

C. The limited body of Covid-19 cases addressing the presence of the virus do not provide a persuasive reason to change the law.

The vast majority of Covid-19 decisions, so far, have not confronted evidence that the SARS-CoV-2 virus was present at the insured premises. Most have left the issue open. Those that have denied coverage are unpersuasive.

Most of the appellate cases on this point offer cursory reasoning about how the virus can be cleaned, dies quickly, or is "different" from hazards in the historical case law. Many were government-orders cases with viral allegations as "throwaway" arguments, and in many cases the statements are dicta. *Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Ins. Co.*, 2021 U.S. App. LEXIS 26196, *5-7 (11th Cir., Aug. 31, 2021) (Georgia Law) (stating, without explanation, that "we do not see how the presence of [viral] particles would cause physical damage or loss to the property"); *Ascent Hosp. Mgmt. Co., LLC v. Emplr's Ins. Co.*, 2022 U.S. App. LEXIS 1161, *2, *6-7 (11th Cir., Jan. 14, 2022) (New York law) (citing cleaning argument but concluding

there is "no proof" that the virus was at the premises); *Bridal Expressions, LLC v. Owners Ins. Co.*, 2021 U.S. App. LEXIS 35676, *5-7 (6th Cir., Nov. 30, 2021) (Ohio Law) (noting that the viral-presence argument "has not made an appearance today either"); *Sandy Point*, 20 F.4th at 335 (citing the cleaning argument without much reasoning); *Kim-Chee LLC v. Phila. Indem. Ins. Co.*, 2022 U.S. App. LEXIS 2655, *4-5 (2d Cir., Jan. 28, 2022) (New York law) (same).

None of these cases venture beyond their own assumptions about the facts and the law. None attempt to explain *why* cleaning or longevity are the benchmark for what is "physical." The few cases that venture down that path have produced reasoning that is still seriously flawed. *Brown Jug, Inc. v. Cincinnati Ins. Co.*, 27 F.4th 398 (6th Cir. 2022) (Michigan law); *Sweet Berry Café, Inc. v. Soc'y Ins. Co.*, 2022 Ill. App. LEXIS 120 (Ill. Ct. App. 2d Dist., Mar. 15, 2022).

Start with *Brown Jug*. There, the Sixth Circuit concluded that the policy required the virus to cause "tangible, physical losses" that "physically alter the appearance, shape, color, structure, or other material dimension of the property." 27 F.4th at 401 (cleaned up). It distinguished SARS-CoV-2 by reasoning that the policyholder was only required to "take remediation measures, such as cleaning and reconfiguring spaces" in response to the virus. *Id.* at 404. It brushed off those costs as "not tangible, physical losses, but economic losses." *Id.* (quotations omitted).

That argument proves too much. If true, every claim for indemnity under an insurance policy would be an excluded "economic" loss. Insurance companies do not employ armies of contractors who rebuild and repair buildings after a fire. They do

not employ environmental remediation experts to clean up homes impaired by asbestos or methamphetamine. They are financial behemoths that write checks so that the policyholder can "restore its [property] for its benefit" and to "make the insured whole." *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1056 (Ind. 2001) (brackets omitted); *Rockford Mut. Ins. Co. v. Pirtle*, 911 N.E.2d 60, 65 (Ind. Ct. App. 2009). So if a policyholder incurs costs to "clean" their property to eliminate a physical hazard—regardless of what it is—then the property insurer is liable. Because of the way property-insurance policies are structured, the business-income forms promise to pay the lost income while the physical hazard is removed.

The pre-pandemic courts recognized this argument as impermissible sleight of hand. *E.g.*, *Trutanich*, 858 P.2d at 1336 (rejecting insurer's argument that costs of cleaning up methamphetamine were "economic," pointing out that they were incurred in response to a physical impairment); *Sentinel*, 563 N.W.2d at 298-300 (same, regarding asbestos contamination). Indeed, this very Court detected and rejected that fallacy the last time insurers used it to try and justify their unreasonably narrow view of the word "physical" in an insurance policy. *Eljer Mfg. v. Liberty Mut. Ins. Co.*, 972 F.2d 805, 808-12 (7th Cir. 1992) ("[A]ll the losses for which tort victims sue are economic."). This Court should follow *Eljer* and reject that fallacy once again.

Sweet Berry is the only other case. 2022 Ill. App. LEXIS 120. The court concluded that the policy "unambiguously requires a physical alteration or substantial dispossession, not merely loss of use." *Id.* *20. The word "physical," it reasoned, meant that the loss had to be caused "by a material thing." *Id.* *21. It

conceded that the virus "has a material existence," but held that it could not cause a "physical alteration" for two reasons. *Id.* *23-25. Neither is persuasive.

First, it distinguished the pre-pandemic cases involving invisible hazards by claiming that, in all of them, the substance "rendered the premises unusable." *Id.* *23-24, *38 (citing *Sandy Point*, 20 F.4th at 334); *see also Green Beginnings, LLC v. W. Bend Ins. Co.*, 2021 WL 2210116, *5 (E.D. Wis., May 28, 2021) (similar). That is simply wrong. Some of the pre-pandemic cases involved that fact pattern. In others, the courts found coverage *in spite of* the express acknowledgement that the property was still being used, *e.g.*, *Sentinel*, 563 N.W.2d at 298, 300-01 (noting that tenants still lived in the property), or still retained some usability to its owners. *Mellin*, 115 A.3d at 803-04 (noting that the owners occasionally lived in the condominium but just could not use it as a rental property, as they had before the loss). So that reason is not persuasive.

Second, *Sweet Berry* reasoned that "no property needed to be repaired or replaced" because "unlike a noxious gas," the virus could be cleaned "by routine, not specialized or costly, cleaning and disinfecting or will die off after a few days." *Id.* *24-25, *38-39. Thus, in its view, "there would be nothing for an insurer to cover." *Id.* *25 (quotations omitted). This commits the same error as *Brown Jug*, because there *is* something for the insurer to cover. The cost of cleaning surfaces—and replacing the virus-laden air with clean air—is squarely within the indemnity promise of the policies. Such costs are necessary to "restore [the policyholder's property] for its benefit" and to "make the insured whole." *Dana*, 759 N.E.2d at 1056; *Pirtle*, 911

N.E.2d at 65. It does not matter that any business-income losses are disproportionate to the cost of repairs, because it is the insurer's responsibility (through its underwriters) to foresee that problem and attach appropriate monetary limits.

Although it has yet to appear in appellate decisions in meaningful ways, one other (flawed) argument warrants treatment. Some courts, including some federal courts in Indiana, have argued that the past hazards were "persistent," the virus is not, and so that makes all the difference. *E.g.*, *Circle Block Partners, LLC v. Fireman's Fund Ins. Co.*, 2021 WL 3187521, *7 (S.D. Ind., Jul. 27, 2021), *appeal pending*, 7th Cir. No. 21-2459. That judicial innovation is a mistake. The word "persistence" is not defined in the policy—indeed, it is not in the policy at all. If adopted as the law, its contours will prove elusive and maddening for insurers, policyholders, and judges alike.

"Persistence" is a relative concept, not an objective one. There are thousands of hazardous substances in regular use within the United States. Most can be neutralized or remediated with varying degrees of effort. Carbon monoxide saturation can be cured by opening a window. *Matzner v. Seaco Ins. Co.*, 1998 Mass. Super. LEXIS 407, *3-4, *9-13 (Suffolk Cnty., Aug. 26, 1998) ("physical loss" existed for brief spell where apartment unit was filled with carbon monoxide). Mold can sometimes be scrubbed off with bleach. *deLaurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 722-23 (Tex. Ct. App. 2005) (mold growth was unambiguously a "physical loss"). Other things are far tougher, requiring complicated chemical and biological

processes. *Introduction, Contaminated Site Clean-Up Information*, U.S. ENVT'L PROT. AGENCY, https://clu-in.org/contaminantfocus/ (last updated Jun. 30, 2021).

Nearly all dangerous substances also degrade, decay, or dissipate over time. Liquid ammonia, for example, vaporizes at room temperature and will dissipate on its own in the space of a few days or a few weeks. *Gregory Packaging*, 2014 U.S. Dist. LEXIS 165232, *4-5 (temporary ammonia spill caused "physical loss" to facility). A molecule of Uranium-235 will decay too (or at least half of it will)—in 700 *million* years. *Radioisotope Brief: Uranium*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nceh/radiation/emergencies/isotopes/uranium.htm (last visited Mar. 24, 2022).

This scientific reality raises a whole host of impossible legal questions—yet if "persistence" is the rule, then judges will have to answer them when the next dangerous substance triggers a coverage dispute. How long must a substance persist to qualify? A week? A month? Is a week enough if it can't be cleaned easily, but not enough if it can? What does it mean for cleaning to be "too easy"? Is there coverage if a policyholder has to go to Home Depot to get a cleaner, but not if she can find it on the shelves at Wal-Mart? *Cf. Sweet Berry*, 2021 Ill. App. LEXIS 120, *24-25 (coming close to a suggestion like this).

The Court has tried to develop nuanced rules like this before in coverage cases. The Indiana Supreme Court rejected that framework as "rather unclear, potentially confusing, and likely to result in subjective and unpredictable judicial applications." *Harvey*, 842 N.E.2d at 1285. If insurers want to use complicated formulas to

determine coverage for their most widely used insurance products, then they can write the forms that way. But such you-know-it-when-you-see-it tests have no place when insurers use broad, vague words like "physical" and "accident." Such tests "run[] counter to [Indiana's] well-established principle that where insurance policies are ambiguous, they are to be construed strictly against the insurer." *Id.* at 1285-86.

But does an insurer *really* promise to provide business-income payments annually when flu season arrives each year? No—for the same reason an automobile policy does not pay for every scratch, dent, or stain. Insurers have been aware of the "transient loss" problem for decades. They have developed time-tested tools for dealing with it: deductibles and retentions. Such terms limit the insurer's exposure to small-dollar losses by "oblig[ing] the policyholder itself to absorb expenses up to" a specified amount. *Allianz Ins. Co. v. Guidant Corp.*, 884 N.E.2d 405, 410 n.2 (Ind. Ct. App. 2008).

FM used those deductibles for some of its coverages, but not all of them. It specified that, in some cases, payments would begin "when the period of interruption is in excess of 48 hours," or some other time period. (App.84, 88.) Such deductibles represent a conscious decision, by the insurer, to assume some transient risks while hedging against others. The Court should not override those decisions by imbuing the word "physical" with an amorphous "transience" exception.

In contrast with these cases, the California Court of Appeals recognized that it is impossible to distinguish the virus from past hazards with any consistency. *Inns-by-the-sea*, 71 Cal. App. 5th at 700-05. "[T]he COVID-19 virus—like smoke, ammonia,

odor, or asbestos—is a physical force" and is capable of making property "uninhabitable or *unsuitable for its intended use*." *Id.* at 701-03 (emphasis added). It agreed that such fact patterns were covered, and it declined to deprive the policyholder of coverage on that ground. *Id.* Instead, it denied coverage on causation issues unique to the hotels and locations of that case, and which do not exist here. *Id.*

D. The *Couch 3d* test is fatally flawed, and the insurers have provided no substantive response to that criticism.

One final word, and UP will conclude. Another way insurers attempt to avoid the ambiguity in the word "physical" and to distinguish the virus is to cite *Couch on Insurance 3d*'s "distinct, demonstrable, physical alteration" test. Lewis, et al., 56 TORT TRIAL & INS. PRAC. L.J., at 621-22. As Stant explains and as the Lewis article shows, *Couch 3d* invented this test out of whole cloth and has provided no reasoning to justify it. (Stant Br., at 48-51.) The section's principal author, Steven Plitt, has contradicted his own test in multiple other writings. (App.172-75); Steven Plitt, *All-Risk Coverage for Stigma Claims Involving Real Property*, 35:9 INS. LITIG. RPTR. 253 (Jun. 5, 2013); JOHN K. DIMUGNO, STEVEN PLITT & DENNIS WALL, CATASTROPHE CLAIMS: INSURANCE COVERAGE FOR NATURAL AND MAN-MADE DISASTERS §8.6.

The Lewis article speaks for itself, and Stant's discussion of it is appropriate here. UP comments further only because insurers have generally resorted to *ad hominem* attack on the authors' integrity rather than respond to the article on the merits. *See oral argument in Circle Block Partners, LLC v. Fireman's Fund Ins. Co.,* Case No. 21-2459 (7th. Cir., Jan. 14, 2022). For example, in *Circle Block*, the Court raised concerns about this section of *Couch 3d*. *Id.* (discussion begins at 32:40).

Insurer counsel responded by attacking the article as biased because it was written by policyholder lawyers. In contrast, he represented, *Couch 3d* was "neutral" and thus reliable. That is both wrong and irrelevant.

First, the *Couch 3d* authors are not academics—like UP's and Stant's counsel, they are practitioners with clients. Mr. Plitt works at the Cavanagh Law Firm, which states on its website that "[w]e represent the interests of insurers in all areas of defense and coverage matters and maintain an active relationship with insurers nationwide."[8] If our arguments are disqualified because we have clients who agree with them, then so is *Couch 3d*. They are not, of course. In our adversary system, errors are identified by the parties aggrieved by them, aided by their lawyers.

Second, the Lewis article is not a blog post, a partisan op-ed, or even a classic student-edited law review article. The *Tort, Trial & Insurance Practice Law Journal* is run by the ABA and edited by veteran insurance practitioners on both sides of the aisle. It is a highly respected publication trusted by state high courts and federal judges alike. *E.g.*, *Utica Mut. Ins. Co. v. Clearwater Ins. Co.*, 906 F.3d 12, 16 (2d Cir. 2018); *Global Reins. Corp. of Am. v. Cent. Indem. Ins. Co.*, 93 N.E.2d 1186, 1189 (N.Y. 2017). It publishes serious legal scholarship, not propaganda.

Third, Mr. Plitt's errors are errors, regardless of who points them out. "The prudent inquiry, in all cases, ought surely to be, not so much *from whom* the advice comes, as whether the advice be *good*." THE FEDERALIST, No. 40 (Madison). That is what the Court should, and does, care about. We challenge the insurers and their

[8] https://www.cavanaghlaw.com/practices/insurance-defense/ (last accessed Apr. 15, 2022).

amici to address the merits of this criticism, rather than to make scurrilous claims about their adversaries' counsel. If they cannot do so, then the Court should view it as a confession of error and proceed accordingly.

CONCLUSION

The Court should **REVERSE** and **REMAND** for further proceedings.

Respectfully Submitted,

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This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and 7th Cir. R. 32(c). This document contains 6,952 words, excluding the portions exempted by Fed. R. App. 32(f). The document complies with the typeface and typestyle requirements of Fed. R. App. P. 32(a)(5)-(6) because it was prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 12-point font, except for footnotes, which are prepared in Century Schoolbook 11-point font. 7th Cir. R. 32(b).

/s/ *Christopher E. Kozak* /

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was filed electronically this 18th day of April, 2022. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's electronic filing system.

/s/ *Christopher E. Kozak* /