IN THE
COURT OF APPEALS OF MARYLAND

September Term 2022

Misc. No. 1
COA-MISC-0001-2022

TAPESTRY, INC.,

Appellant,

vs.

FACTORY MUTUAL INSURANCE COMPANY,

Appellee.

BRIEF OF *AMICI CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT

Certified Question From United States District Court
for the District of Maryland
(Honorable George L. Russell, III, Judge)

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STATEMENT OF INTEREST[1]

United Policyholders[2] is a respected national policyholder advocate and non-profit section 501(c)(3) organization. For over three decades, United Policyholders has served as a voice for individual and commercial insurance consumers throughout the country to protect important policyholder rights, counterbalancing well-funded insurance companies and insurance industry groups.

United Policyholders helps insurance consumers when pursuing insurance claims in the wake of natural disasters such as floods, wildfires, hurricanes, and, now, the pandemic. Since March 2020, United Policyholders has assisted business owners around the country disrupted by COVID-19 and related public safety orders. United Policyholders also engages on an ongoing basis with insurance regulators through the National Association of Insurance Commissioners, where United Policyholders has served as a consumer representative since 2009, and it has given that body presentations concerning coverage for pandemic-related losses.

Since 1991, United Policyholders has filed *amicus* briefs in federal and state appellate courts across 42 states and in more than 500 cases, including before this Court in *People's Insurance Counsel Division v. State Farm Fire & Casualty Co.*, 442 Md. 55

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[1] All parties have consented to the filing of this brief. Thus, a motion for leave to file is not necessary. Rule 8-511.

[2] United Policyholders affirms that no counsel for a party authored this brief in whole or in part and that no person other than its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

(2014) and *National Union Fire Insurance Co. v. The Fund For Animals, Inc.*, 451 Md. 432 (2017). Many state supreme courts, as well as the U.S. Supreme Court, have cited United Policyholders' *amicus* briefs in their opinions. Since the pandemic began, United Policyholders has filed close to 50 *amicus* briefs in insurance cases involving COVID-19 losses.[3]

ARGUMENT

I. THIS COURT SHOULD REJECT "FACTUAL" ASSERTIONS THAT REST SOLELY ON INSURANCE INDUSTRY SAY-SO.

The certified question asks whether "a toxic, noxious, or hazardous substance—such as Coronavirus or COVID-19" can "damage[] … property" or otherwise impair that property's "functional use." In effect, the referring court asks this Court to determine whether such damage or loss is, *as a matter of fact*, possible. The appellee, an insurance company, and various insurance industry *amici* like to pretend that judicial decisions across the country have resolved that *factual* question. They argue that numerous other courts have found that the coronavirus simply cannot cause such damage. After all, the insurers argue, viruses harm people not property, and a table wiped with a rag and sanitizer is perfectly fine. *But see* below at 3-5 and accompanying footnotes.

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[3] A complete list of the cases can be found at https://www.uphelp.org/resources/amicus-briefs.

The insurance industry does not tell this Court, however, that the judicial decisions they rely on did not actually look at facts or evidence; nor did they consult any experts.[4] Many courts interpreted the key policy language, which requires "physical loss or damage" to require (among other things) deleterious alteration to insured property.[5] They then rejected as "conclusory" allegations that a virus can detrimentally alter physical things, like tables, seats, and air.[6]

The novelty of the pandemic left courts unprepared to understand the science. No court would dismiss a breach of contract action based on defense counsel's unsworn statement that the plaintiff could, as a factual matter, have easily mitigated any damages. But court after court accepted insurance industry assurances that the virus does not in any way alter physical properties or otherwise cause physical loss. Rather than consider the evidence, rather than permit experts to testify, court after court dismissed policyholder complaints *based on no evidence at all*.

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[4] Statements in those decisions reciting "scientific" facts are not subject to judicial notice. This Court has recognized, "[a]s a general rule, a court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it." *Attorney Grievance Comm'n of Maryland v. Bear*, 362 Md. 123, 138 (2000) (quoting *M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983)).

[5] *See, e.g.*, *Consolidated Rest. Operations, Inc. v. Westport Ins. Co.*, 205 A.D.3d 76, 78 (N.Y. App. Ct. 2022).

[6] *See, e.g.*, *Cordish Cos. v. Affiliated FM Ins. Co.*, No. ELH-20-2419, 2021 WL 5448740 (D. Md. Nov. 22, 2021); *Bel Air Auto Auction, Inc. v. Great N. Ins. Co.*, 534 F. Supp. 3d 492 (D. Md. 2021).

Scientific research has demonstrated that the virus detrimentally alters property. Study after study, published in peer-reviewed scientific journals, has shown that the virus *does* in fact detrimentally alter property surfaces and air.[7] One court noted that the virus harms people not property. In fact, the virus harms both people *and* property. The spike proteins of the coronavirus latch onto carbon molecules and alter carbon compounds.[8] It does ***not*** matter whether those carbon compounds are in human lungs, wooden tables, or

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[7] *See, e.g.*: Edris Joonaki, et al., *Surface Chemistry Can Unlock Drivers of Surface Stability of SARS-CoV-2 in a Variety of Environmental Conditions*, 6(9) Chem. 2135-2146 (2020), https://europepmc.org/backend/ptpmcrender.fcgi?accid=PMC7409833&blobtype=pdf (property alteration through viral absorption); Yi-Nan Liu, et al., *Optical Tracking of the Interfacial Dynamics of Single SARS-CoV-2 Pseudoviruses*, 55(7) Env't. Sci. & Tech. 4115-4122 (2021), https://europepmc.org/backend/ptpmcrender.fcgi?accid=PMC7885801&blobtype=pdf (same); Nicolas Castaño, et al., *Fomite Transmission, Physicochemical Origin of Virus-Surface Interactions, and Disinfection Strategies for Enveloped Viruses with Applications to SARS-CoV-2*, 6(10) ACS Omega 6509-6527 (2021), https://europepmc.org/backend/ptpmcrender.fcgi?accid=PMC7944398&blobtype=pdf (documenting chemical mechanisms thorough which virus alters property); Yang Xin, et al., *Adsorption of SARS-CoV-2 Spike Protein S1 at Oxide Surfaces Studied by High-Speed Atomic Force Microscopy*, 1(2) Adv. NanoBiomed Rsch. 2170023 (2021), https://onlinelibrary.wiley.com/doi/10.1002/anbr.202170023 (same); *Transmission Of SARS-Cov-2: Implications For Infection Prevention Precautions: Scientific Brief*, World Health Org. (July 9, 2020), https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions (describing how COVID-19 virus converts surfaces into fomites property); *SARS-CoV-2 Transmission*, Ctrs. Disease Control & Prevention, https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fscience%2Fscience-briefs%2Fscientific-brief-sars-cov-2.html (last updated May 7, 2021) (The COVID-19 virus "can build-up in the air space").

[8] *See id.*

elevator buttons. Said otherwise, people and property are both composed of many of the same types of chemical compounds, and no magic prevents the virus from attacking those compounds just because the locus of interaction is a table and not a person. Viruses—like fire, acids, and extreme temperatures that cause physical damage—do not recognize such distinctions because they operate on a molecular level.

Study after study, again published in peer-reviewed scientific journals, has found that the virus cannot be easily cleaned, judicial statements to the contrary notwithstanding.[9]

History illustrates the legal mistakes courts make when issuing factual pronouncements without consulting scientists or other experts. Courts refused to admit scientific testimony about when, how, and why eyewitness identification was problematic until they looked closely at the science.[10] Courts viewed segregation as harmless until the Supreme Court took a hard look at the science. *Brown v. Board of Education*, 347 U.S.

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[9] These studies include scientific articles that discuss how "surface disinfection" performed by trained workers "once- or twice-per-day had little impact on reducing estimated risks." *SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, Ctrs. Disease Control & Prevention, https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html (last updated Apr. 5, 2021). That is the case even in hospitals, where cleaning and disinfecting practices are conducted under the supervision of health care professionals, yet the virus is still present on surfaces after cleaning. *See* Zarina Brune, et al., *Effectiveness of SARS-CoV-2 Decontamination and Containment in a COVID-19 ICU*, 18(5) Int. J. Env't Res. Pub. Health 2479 (Mar. 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7967612/; *see also* Nicolas Castaño et al., *Fomite Transmission and Disinfection Strategies for SARS-CoV-2 and Related Viruses*, Dep't of Mech. Eng'g, Stanford Univ. (May 23, 2020), https://arxiv.org/ftp/arxiv/papers/2005/2005.11443.pdf.

[10] Compare, *e.g.*, *State v. Kemp*, 507 A.2d 1387, 1389 (Conn. 1986) (refusing to admit scientific testimony on eyewitnesses) with *State v. Guilbert*, 49 A.3d 705, 721 (Conn. 2012) (reversing position after considering science).

483, 494 n.11 (1954). Judges of the Renaissance convicted Galileo because the sun in the sky appeared much smaller than horses (and other objects) and appeared to move across the sky. They disregarded the astronomers of the day who taught that the earth was vastly smaller than the sun; and that the earth orbits it, not *vice versa*. In the now infamous Scopes Monkey trial, the court refused to allow scientific expert testimony, and the jury convicted the defendant for teaching evolution.[11] Science, careful investigation, and hard evidence have proven these various judges wrong. Indeed, in each case, the science was available at the time, but the judges for too long ignored it. *See Parke-Davis & Co v. H.K. Mulford Co*, 189 F.95 115 (S.D.N.Y. 1911) (Hand, J.) (criticizing courts for "blundering along without the aid of unpartisan and authoritative scientific assistance in the administration of justice").

Recognizing these historical errors, our judicial system prides itself on resolving difficult questions after reviewing *all* the relevant facts, and after considering *all* the material evidence. As Justice Breyer wrote, "legal disputes … increasingly involve the principles and tools of science." Stephen G. Breyer, *Science in the* Courtroom, 16 Issues in Sci. Tech. 4, ¶1 (Summer 2020). Fairly resolving disputes that turn on scientific questions demands a healthy dose of judicial humility as judges are "not … scientist[s]." *Id.*, ¶9.

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[11] *See Scopes v. State*, 289 S.W. 363 (1927).

But since the pandemic, court after court has resolved coverage disputes for pandemic-related losses based on the insurance industry's (unsworn) assurances that the virus causes no damage; or that it can be easily cleaned. In an era where brief Google searches threaten to replace the subject matter expertise of trained scientists as the basis for making difficult decisions, this Court is called upon to answer a factual question—does the virus detrimentally alter physical property—without a factual record, without evidence, and without expert opinions. United Policyholders submits that the correct response is to explain under what circumstances damage and loss occur and to leave it to the referring court to permit the parties to engage in discovery to determine whether those criteria are met. *See, e.g.*, *Singleton v. Roman*, 195 Md. 241, 246 (1950) ("[I]t is the province of the jury to determine the facts of the case from the evidence [and it] is the policy of the law to protect the province of the jury from invasion by the court."); Corbin on Contracts § 534 at 9 (2d ed. 1960) ("the construction of a contract starts with the interpretation of its language but does not end with it").

Resolving disputed factual questions by simply adopting one party's characterization of the facts—before any evidence is admitted or considered—does not serve that important judicial end.

Nor should the insurance industry be heard to argue that the issue is one of pure policy interpretation. The certified question asks "**[w]hen a first-party, all-risk property insurance policy covers** '**all risks of physical loss or damage**' to insured property from any cause unless excluded, **is coverage triggered when** a toxic, noxious, or hazardous substance—such as **Coronavirus** or COVID-19—that is physically present in the indoor

air of that property **damages the property** or causes loss … of the functional use of that property?" As the boldfaced text demonstrates the question is either circulate (is a policy that insures against damage triggered by damage) or factual—can viruses, as a matter of fact, cause property to sustain the types of changes that constitute "damage" (or "loss")?

II. THE CUSTOMARY MEANING OF "DAMAGE" AND "LOSS" REQUIRE ONLY MINIMAL IMPAIRMENT BY EXTERNAL FORCE.

A. THIS COURT'S ROLE IS TO CONSTRUE THE MEANING OF THE CONTRACT TERM "PHYSICAL LOSS OR DAMAGE."

This Court is tasked to interpret the instant insurance policies. The policies at issue nowhere define the phrase "physical loss or damage," or their constituent terms. Undefined words in a contract are given their "ordinary and accepted meanings," i.e., the understanding of a "reasonably prudent layperson." *Pac. Indem. Co. v. Interstate Fire & Cas. Co.*, 488 A.2d 486, 488-89 (Md. 1985). In assessing the meaning that a "reasonably prudent layperson would attach to [a disputed] term," courts routinely consider the reasonable expectations of the "average purchaser" of that insurance. *Sheets v. Brethren Mut. Ins. Co.*, 342 Md. 634, 652-53 (1996) (quotations and citation omitted). A court must construe a contract "in its entirety." *Connors v. Gov't Emps. Ins. Co.*, 442 Md. 466, 480 (2015) (citation omitted). "No word … should be rejected as mere surplusage ...." *Orkin v. Jacobson*, 274 Md. 124, 130 (1975).

If a term is ambiguous, courts look to extrinsic evidence. *See Credible Behav. Health, Inc. v. Johnson*, 466 Md. 380, 394 (2019). A term is ambiguous if susceptible of more than one meaning. *See IMPAC Mortg. Holdings, Inc. v. Timm*, 474 Md. 495, 507 (2020). "If a contract provision is ambiguous … the court may consider extrinsic evidence

to ascertain the mutual intent of the parties." *Id*. "In that effort, the court is to consider admissible evidence that illuminates the intentions of the parties at the time the contract was formed," *id.*, including "the contract's character, purpose, and the facts and circumstances of the parties at … execution."[12] *Credible Behav. Health,* 466 Md. at 394 (quotations and citation omitted).

B. POLICYHOLDERS MUST BE ALLOWED TO DISCOVER AND PRESENT EVIDENCE OF CUSTOM AND PRACTICE AND OF LATENT AMBIGUITY.

"Traditionally, to supply contractual language with its 'ordinary and accepted meanings," *id.* at 394-95 (quotation and citation omitted), Maryland courts consult "extrinsic sources," like dictionaries. *W.F. Gebhardt & Co., Inc. v. Am. European Ins. Co.*, 250 Md. App. 652, 668 (2021). Dictionaries, however, are the beginning—not the end—of insurance policy interpretation, as they do not always capture the customary, ordinary, and accepted meaning of words in every context. Lay people often say "literally" for emphasis when speaking figuratively and use "inflammable" to mean nonflammable.

Courts have recognized these limitations in the insurance context, and look beyond dictionaries to other "extrinsic sources," such as the policyholder's reasonable expectations, custom and practice, and the purpose of the insurance contract. *See Sheets*, 342 Md. at 652-53 (considering reasonable expectations); *Cole v. State Farm Mut. Ins. Co.*, 359 Md. 298, 305 (2000) (considering "an interpretation of the term employed by one of

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[12] Indeed, some courts have estopped insurers from taking positions contrary to their representations to regulators about the meaning and operation of policy language. *See Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1189, 1192-93 (Pa. 2001); *Morton Intern., Inc. v. General Acc. Ins. Co. of America*, 629 A.2d 831, 848 (N.J. 1993).

the parties before the dispute arose"); *Credible Behav. Health*, 466 Md. at 394 (considering contractual purpose). "In disputes over the meaning of a contract, context is essential." *W.F. Gebhardt*, 250 Md. App. at 672. The Court of Special Appeals has explained that language may be ambiguous in two respects "(1) it may be intrinsically unclear … or (2) its intrinsic meaning may be… clear, but its application to … particular … circumstance[s] … uncertain." *Bernhardt v. Hartford Fire Ins. Co.*, 102 Md. App. 45, 54-55 (1994). "My son won the race," appears clear on its face, but its application uncertain if the speaker has two boys.

In *Mateer v. Reliance Insurance Co.*, 247 Md. 643, 648 (1967), this Court construed the meaning of the word "flood," which was there undefined. The Court noted that "[w]hile originally the word 'flood' had a riparian [meaning], through centuries of change and urbanization, it has come to have a less restricted meaning." *Id.* Going beyond typical dictionary definitions, the Court explained, "[t]oday we commonly speak of a cellar or basement being 'flooded' without regard to whether the water comes from the overflow of a stream, from a hard downpour, or from the bursting of pipes." *Id.* Although the dictionary offered a restricted meaning, this Court held that the lower court erred in refusing evidence of customary, lay usage supporting coverage. *See id.*

Similarly, in *Cole*, although this Court noted that "accident" is defined under Maryland law, the Court found the dictionary provided "incomplete guidance." 359 Md. at 307. The Court proceeded to survey how other courts have construed the term, and also noted that: "[the insurer] appears to have argued contrary to the position it now defends." *Id.* at 318. Relying on evidence of the insurer's prior inconsistent position, this Court

rejected the insurer's interpretation due to its "apparent practice of offering whatever definitional perspective … serves its purpose *du jour*." *Id.*

Interpretation of the phrase "physical loss or damage" must follow, not precede, discovery of evidence from these various sources. That is particularly important here given the number of coverage claims implicated by this Court's decision, and the importance of making decisions based on evidence rather than assumptions.

First, Tapestry has proffered evidence, *inter alia*, of Factory Mutual Insurance Company's ("FM") prior inconsistent positions, the insurance industry's varied use and interpretation of the phrase "physical loss or damage," and the custom and practice of property insurers. App. 143-144, 626[13]; Tapestry's Brief ("Tap. Br.") 16-17, 22-23. Namely, FM has an internal classification code for "[p]hysical loss or damage which results from the actual presence of a communicable disease," a classification that would make little sense if viruses could not cause such damage or loss. *See Cordish Cos., Inc. v. Affiliated FM Ins. Co.*, No. 21-2055, ECF 29-2, 3 (4th Cir. March 21, 2022) (Affiliated FM Loss Code 60 stating: "*Physical loss or damage* which results from the *actual presence of a communicable disease* and the associated business interruption as defined in the policy." (emphasis added)).

Second, a forthcoming law review article details the copious evidence that the insurance industry, including FM intended "loss" and "damage" to have distinct meanings.

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[13] "App." refers to the appendix to appellant's brief. *See* Rule 8-503.

Charles M. Miller, et al., *COVID-19 and Business Income Insurance: The History of 'Physical Loss' and What Insurers Intended It to Mean*, 57 TORT, TRIAL & INS. PRAC. L.J.__, 4 (forthcoming 2022). Specifically, "loss" was never intended to "require some sort of 'alteration' of property." *Id.* That evidence includes regulatory submissions, drafting history, prior inconsistent positions, marketing materials, correspondence, payment for past claims (including in relation to SARS-CoV-**1** in 2002-04), and knowledge that the majority of courts, pre-COVID-19, construed "physical loss" to include situations similar to that here. *Id.* at 33. Because the industry understood "loss" to encompass viral impairment, "80-83% of property policies in effect when the pandemic struck incorporated the ISO Virus or Bacteria exclusion," an exclusion that would have been surplusage if viruses cannot damage property or result in its loss. *Id.; see also Connors*, 442 Md. at 480 (policy terms should not be treated as mere surplusage). FM's decision to continue using "physical loss" despite this, without including a virus or pandemic exclusion, is nothing less than "a conscious underwriting choice." *Id.* Relieving FM of this choice will result in a windfall for insurers: "they will have charged premiums for broader coverage only to have the courts narrow it based on readings that insurers know are incorrect." *Id.* at 3.

III. "PHYSICAL LOSS OR DAMAGE" MEANS ANY DETRIMENTAL ALTERATION, DISPOSSESSION, OR LOSS OF FUNCTIONALITY.

A. "LOSS" AND "DAMAGE" HAVE DISTINCT MEANINGS.

A reasonably prudent person would not understand "physical loss or damage" to *only* mean structural alteration. The dictionary defines "physical" to mean "of or relating

to matter or the material world." *Physical*, Oxford English Dictionary Online.[14] The dictionary defines "loss" to mean "being deprived of." *Loss*, Oxford English Dictionary Online; *see also Loss*, Merriam-Webster Online (the "absence of a physical capability or function").[15] And it defines "damage" to mean "[i]njury" to something that "impairs its value or usefulness." *Damage*, Oxford English Dictionary Online.[16] Taken together, the phrase encompasses not just a fire or explosion that impairs property but also physical perils that prevent the insured from using property for its intended function.

Treating "loss" or "damage" as only meaning structural alteration would treat the word "loss" and the disjunctive "or" as surplusage, violating settled principles of contract interpretation. *See* above at 8.

Equally, pretending "loss" and "damage" have the same meaning ignores industry custom and practice: insurers for decades[17] have treated "cleaning" as covered even if "cleaning" is the only remediation required because the property itself has not been changed or altered, but it cannot be used without being cleaned. *See below* at 15; s*ee also* Steven Plitt, *Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not*

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[14] Available, https://www.oed.com/search?searchType=dictionary&q=physical&_searchBtn=Search.

[15] Available, https://www.oed.com/search?searchType=dictionary&q=loss&_searchBtn=Search; https://www.merriam-webster.com/dictionary/loss.

[16] Available, https://www.oed.com/search?searchType=dictionary&q=damage&_searchBtn=Search.

[17] *See also* Richard P. Lewis, et al., *Couch's "Physical Alteration" Fallacy: Its Origins and Consequences*, 56 Tort, Trial & Ins. Prac. L.J. 621, 624-30 (2021) (citing dozens of pre-pandemic cases).

Require Specific Physical Damage, Alteration, Claims J. (Apr. 15, 2013). Here the policies specifically enumerate "cleanup" as a covered element of remediation, which would make little sense if "damage and loss" meant only structural change. Tap. Br. 5.

Property policies, including the instant ones, typically have many exclusions for perils that do not alter property, language that would have no purpose if the "loss" and "damage" taken together mean only alteration. *See, e.g., Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 506 F. Supp. 3d 360, 378 (E.D. Va. 2020) (holding that exclusions for fungi, operation of law or ordinance, and similar terms would have no purpose if "loss" did not extend beyond damage and alteration). Here, Tapestry has elaborated on such exclusions. *See* Tap. Br. 22-24. The industry's use of these terms informs reasonable policyholder expectations that "loss" and "damage" have distinct meanings, and that "loss" does not require alteration.

It is axiomatic that "damage" and "loss" cannot have the same meaning. Courts have long rejected contractual interpretation that render some contract terms mere surplusage. *See Simkins Indus., Inc. v. Lexington Ins. Co.*, 42 Md. App. 396, 404 (1979). As this Court taught in *Plank v. Cherneski*, 231 A.3d 436, 478 (Md. 2020), the "disjunctive word 'or'" means each word it disjoins has "separate[], independent[], and alternative[]" meanings and applications. Treating *Plank* as more than a shibboleth requires interpreting "loss" and "damage" as having distinct meanings and applications in different circumstances.

FM itself treats "damage" and "loss" as having different meanings in the ordinary course, arguing before the pandemic, that "physical loss or damage" include loss of functionality under an insuring agreement identical to that here. *See, e.g.*, *Factory Mut. Ins.*

Co. v. Fed. Ins. Co., No. 1:17-cv-00760 (D.N.M. Nov. 19, 2019). FM's prior inconsistent positions constitute an "extrinsic source[]" and cannot be ignored. *Cole*, 359 Md. at 307 (rejecting insurer's preferred interpretation due to prior inconsistent positions). Certainly its statements to a judicial tribunal inform the policyholder's reasonable expectations. *See, e.g.*, *Reliance Ins. Co. v. Keystone Shipping Co.*, 102 F. Supp. 2d 181, 194 (S.D.N.Y. 2000) ("Precedent can assist the court in determining the 'reasonable expectations' the [in]sured had about a policy's coverage." (quotations and citation omitted)), *aff'd*, 7 F. App'x 111 (2d Cir. 2001); *Andy Warhol Found. for Visual Arts, Inc. v. Fed. Ins. Co.*, 189 F.3d 208, 215 (2d Cir. 1999) (pre-existing case law informs reasonable understanding of key terms).

B. "DAMAGE" OCCURS WHEN THERE IS *ANY* DETRIMENTAL ALTERATION, EVEN IF IT IS TEMPORARY OR CAN BE CLEANED.

1. Under an "all-risk" policy, "damage" is not limited to that observable with the naked eye.

Prior to the pandemic, insurers paid millions under property and business interruption policies for losses caused by the SARS-CoV-**1** outbreak of 2002-04.[18] Miller et al. at 20-23. The policyholder here should be given an opportunity to obtain discovery of that evidence so that final determination of the meaning of this contractual term is based on all the evidence.

The insurers' acknowledgment by those payments that viruses cause insured "physical loss or damage" to property accords with decades of case law holding that a wide

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[18] *See* Todd C. Frankel, *Insurers Knew the Damage a Viral Pandemic Could Wreak on Businesses. So They Excluded Coverage*, Washington Post (Apr. 2, 2020, 1:25 PM), https://wapo.st/3yqU4ry.

range of physical perils can cause "physical damage," even where the perils do not structurally or even visibly alter the property. Such evidence of the custom and practice of the industry is likewise relevant to this Court's construction of the phrase "physical loss or damage." *W.F. Gebhardt*, 250 Md. App. at 672 ("In disputes over the meaning of a contract, context is essential." (citing *Credible Behav. Health*, 466 Md. at 394)).

For decades, courts have held that perils, including noxious substances and odors that rendered real property uninhabitable or unusable caused "physical loss or damage" to property.[19] The COVID-19 virus is in practical terms no different from these other perils that have been found to trigger coverage—smoke, ammonia, or asbestos. Indeed one state supreme court held that even the mere smell of urine was sufficient. *See Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 805 (N.H. 2015). Because the virus contaminates the air and surfaces of properties through unseen but indisputably physical processes, converting the properties' air and surfaces into potentially deadly instruments of disease transmission, it too falls within the paradigm of covered damage.

Certainly, insurance industry custom and practice has for decades defined "property damage" to include even the most trivial, microscopic changes. Insures routinely treat

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[19] *See, e.g.*, *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (gasoline fumes); *Farmers Ins. Co. of Or. v. Trutanich*, 858 P.2d 1332, 1338 (Or. Ct. App. 1993) (methamphetamine odor); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014) (ammonia discharge); *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (asbestos); *Matzner v. Seaco Ins. Co.*, 1998 WL 566658, at *4 (Mass. Super. Ct. Aug. 12, 1998) (carbon monoxide); *Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *5 (D. Or. June 7, 2016) (wildfire smoke) (vacated by stipulation).

environmental contamination as "property damage."[20] Insurers cover the costs necessary to respond to contaminant levels in the parts per million or parts per *billion* range—levels imperceptible to the naked eye (or other human sense). Those tiny changes in the composition of soil and water constitute "property damage." Tapestry's brief demonstrates that viral alterations to property are much greater. Tap. Br. 6-9.

While the insurance industry likes to tell courts that there can be no "damage" absent "repair" or "replacement," they fail to mention that they themselves routinely cover environmental response costs even though no one describes those costs as "repairs" or "replacement." Rather, those are costs of, *e.g.*, *cleaning* water by using charcoal filters. Said otherwise, insurance industry custom and practice, a relevant factor in policy interpretation, has long recognized and treated as "damage" detrimental physical alteration even if that alteration takes place at a microscopic level that is invisible to the naked eye. And that custom and practice informs reasonable policyholder expectations, an equally relevant factor in policy interpretation.

2. Property Insurance Policies Customarily Cover Damage or Loss, Even Where Problem Is Temporary Or Can Be Cleaned.

The word "cleaning" does not appear in the policies at issue. That is because the parties chose to draw the line about whether the "damage" was *de minimis* or material using

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[20] Courts nationwide have so held. *See, e.g., Harford Cnty. v. Harford Mut. Ins. Co.*, 327 Md. 418, 436 (1992); *Maryland Cas. Co. v. Armco, Inc.*, 643 F. Supp. 430, 433 (D. Md. 1986), *aff'd*, 822 F.2d 1348 (4th Cir. 1987); *Azalea, Ltd. v. American States Ins. Co.*, 656 So. 2d 600 (Fl. App. Ct. 1995); *Continental Ins. Cos. v. Northeastern Pharma. & Chem. Co.*, 842 F.2d 977, 983 (8th Cir. 1988); *Port of Portland v. Water Quality Ins. Synd.*, 796 F.2d 1188, 1195-96 (9th Cir. 1986).

a different gauge—the deductible. Loss that falls below the deductible is not covered. But loss—including cleaning—that exceeds the deductible is. Courts should not rewrite that bargain.

This Court should be wary of scientific pronouncements from the bench that the virus does not cause loss or damage because it "may be wiped off surfaces using ordinary cleaning materials." *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 335 (7th Cir. 2021). *First*, such judicial supposition contradicts the scientific evidence. Numerous studies have found that diligent cleaning by trained medical workers using approved sanitization equipment cannot fully remove the virus.[21] The industry itself has

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[21] *See, e.g.*: Zarina Brune, et al., *supra* note 9 (disinfection does not eliminate viral contamination); Isaac D. Amoah, et al., *Detection of SARS-CoV-2 RNA on Contact Surfaces Within Shared Sanitation Facilities*, Int'l J. Hygiene & Env't Health 236 (July 2021), https://pubmed.ncbi.nlm.nih.gov/34265632/ (same); Po Ying Chia, et al., *Detection of Air and Surface Contamination by SARS-CoV-2 in Hospital Rooms of Infected Patients*, 11(1) Nature Commc'ns 2800 (2020), https://europepmc.org/backend/ptpmcrender.fcgi?accid=PMC7260225&blobtype=pdf (routine cleaning by trained professionals does not eliminate viral contamination); Zhen-Dong Guo, et al., *Aerosol and Surface Distribution of Severe Acute Respiratory Syndrome Coronavirus 2 in Hospital Wards, Wuhan China*, 2020, 26(7) Emerging Infectious Diseases 1583-1591 (2020), https://europepmc.org/backend/ptpmcrender.fcgi?accid=PMC7323510&blobtype=pdf (finding significant surfaces remained impaired in hospital and ICU despite twice-daily decontamination efforts by hospital staff); Joshua L. Santarpia, et al., *Aerosol and Surface Contamination of SARS-CoV-2 Observed in Quarantine and Isolation Care*, 10(1) Sci. Reps. 12732 (2020), https://pubmed.ncbi.nlm.nih.gov/32728118/ (same); Jie Zhou, et al., *Investigating Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) Surface and Air Contamination in Acute Healthcare Setting During the Peak of the Coronavirus Disease 2019 (COVID-19) Pandemic in London*, 73(7) Clinical Infectious Diseases (Oct. 2020), https://academic.oup.com/cid/article/73/7/e1870/5868534 (finding virus on a range of high-touch surfaces, despite rigorous twice-daily cleaning).

acknowledged this, saying that cleaning may *decrease* the number of germs on a surface but *cannot eliminate them*.[22] Medical authorities tell us to wipe tables because doing so *reduces* the number of viral particles, lowering the risk of transmission; but cleaning is no panacea. Doctors and public health authorities deal in risk levels among very large populations; cleaning lowers risk but is not a magic bullet. Treating it as such—without ever permitting policyholders to present evidence on this point—replaces evidence with judicial guesswork. Courts should hesitate before resting judicial decisions, which affect the viability of numerous Maryland businesses, large and small, on such unrebutted and unproven junk "*science*."[23]

Second and more importantly, *insurance industry custom and practice has always been to pay for "mere" cleaning*. Consider mold. We remove mold by, for example, scrubbing walls and other surfaces with bleach, a process commonly referred to as "cleaning." FM, and the insurance industry in general, routinely use mold exclusions to eliminate coverage for that cleaning, an exclusion that would be unnecessary if "damage" did not include detrimental change that required only cleaning. *Connors*, 442 Md. at 480. Consider mud and sand. Insurers routinely cover cleaning muddy basements after floods at commercial properties and removing sand from pools at hotels after hurricanes—*i.e.*,

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22 Zarina Brune, et al., *supra* note 9 (same).

23 *See* Amicus Brief of New Hampshire Medical Society filed in *Scleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co.*, No. 217-2020-CV-0039 (N.H. June 23, 2022), available at https://www.nhms.org/News/ArtMID/123811/ArticleID/1519/NH-Medical-Society-Denounces-Insurers-COVID-19-Science.

cleaning basements and pools. Consider water. As noted above, industry custom and practice has been to treat environmental contamination as property damage, to cover it, and to pay for remediation. Remediation of contaminated water often involves little more than running the water through filtration systems: cleaning the water.

As to water, insurance companies routinely cover and pay for drying out commercial properties, *e.g.*, hotels, after major storms. Doing so involves nothing more than installing fans to blow air over soaked carpets and sofas. Water, of course, will dry if left alone. That the industry routinely pays for fans to accelerate that drying process makes clear that industry custom and practice is to cover and pay for temporary, ephemeral problems. The many cases that the insurers and their *amici* cite as holding that property damage does not include temporary problems or cleaning costs were decided on motions to dismiss—before courts had an opportunity to consider evidence of these long standing practices. Those decisions illustrate the danger of resolving coverage disputes *before* considering documents, experts and testimony.

C. "LOSS" OCCURS WHEN PROPERTY CANNOT BE USED FOR ITS INTENDED PURPOSE.

Courts have found physical loss or damage in a wide range of circumstances involving perils that deprive property of its use without also altering that property. That is why these policies cover theft—"loss"—without "damage." *See, e.g.*, Allan D. Windt, 3 Insurance Claims and Disputes § 11:41 (6th ed. Mar. 2022) ("[W]hen 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.").

Because "loss" and "damage" must mean different things,[24] courts have found that "loss" can mean "'loss of use' or 'loss of function,' such that it renders property [less valuable or] useless to the policyholder (*i.e*. if you lost the useful use of the property, it is as if you lost it, even though it did not physically go away)." Erik S. Knusten & Jeffrey W. Stempel, *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 185 Conn. Ins. L.J. 186, 247 (2020), https://cilj.law.uconn.edu/wp-content/uploads/sites/2520/2021/04/CILJ-Vol.-27.1-Stempel-and-Knutsen-Article-FINAL.pdf. This is what insurers intended when they first began including "physical loss" in business income coverage forms. Miller et al. at 11-15. To account for coverages that insure against "only the loss of property and not its damage or destruction," such as looting, burglary, and robbery, insurers as a matter of custom and practice include "loss" as a trigger of coverage, rather than just "damage" or "destruction." *Id.* With such coverages, there was no requirement that property be "damaged" or "destroyed;" only that "the insured lost the use of the property." *Id.* at 12-13. In short, property policies developed to cover claims arising from *both* "damage" (i.e., fire) *and* "loss" (i.e., theft).

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[24] *See* above at 14 (discussing Maryland law disfavoring treating policy terms as surplusage).

"Loss," like "damage," applies to any and all insured property, not just personal property. While a building cannot be stolen, it can lose its functionality; which is why business interruption coverages were developed in conjunction with the inclusion of "loss" as a coverage trigger. *Id.* at 15-16. And of course such custom and practice informs the reasonable expectations of those buying FM's policies.

Maryland law interprets the word "loss" to mean loss of functionality, distinct from "damage," i.e., detrimental alteration. In *National Ink and Stitch, LLC v. State Auto Property and Casualty Insurance Co.*, 435 F. Supp. 3d 679, 685 (D. Md. 2020), the court held that a computer virus caused a "physical loss" even though there was no proof of a permanent loss in the ability to function or detrimental alteration. *Id.* at 686 (citing *Ashland Hosp. Corp. v. Affiliated FM Ins. Co.*, 2013 WL 4400516, at *6 (E.D. Ky. Aug. 14, 2013)).

Other courts have also refused to imply any requirement that property be rendered permanently unusable. *See Mellin*, 115 A.3d at 805 ("Evidence that a change rendered the insured property *temporarily* or permanently unusable or uninhabitable may support a finding that" insured sustained a physical loss. (emphasis added)); *see also Port Authority of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (finding physical loss where "presence of … asbestos" made building "*unusable*" (emphasis added)); *Intermetal Mexicana, S.A. v. Ins. Co. of N. Am.*, 866 F.2d 71, 75-76 (3d Cir. 1989) (insured's coverage began when it lost possession and control of insured equipment even though the equipment was at the time intact); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54-55 (Colo. 1968) (physical loss occurred where gasoline vapors made use of church dangerous). These cases accord with industry custom because, as noted above,

insurers customarily pay for temporary problems. They cover, for example, business interruption losses at hotels where the only problem is a temporary loss of functionality because the hotel needs time to dry out after a hurricane. Those courts reached sound conclusions because they were—unlike the cases the insurers cite—decided on a *full* record, after receiving documents and testimony, and after hearing from experts.

D. POLICYHOLDERS MUST BE ALLOWED AN OPPORTUNITY TO PROVE THAT THE FACTS, AS ALLEGED, QUALIFY AS "DAMAGE" OR "LOSS."

Disposition of the issues attendant to the certified question turn on factual disputes, and the parties have *not* yet taken discovery or had the chance to submit evidence.

This Court should reject industry attempts to sidestep discovery into industry custom and practice, as well as the impact of both on policyholders' reasonable expectations, by relying on cases decided without any factual record. *See, e.g.*, *Cordish Cos., Inc. v. Affiliated FM Ins. Co.*, No. ELH-20-2419, 2021 WL 5448740 (D. Md. Nov. 22, 2021) (refusing any scientific testimony); *1 S.A.N.T., Inc. v. Berkshire Hathaway, Inc.*, 513 F. Supp. 3d 623, 630 (W.D. Penn. 2021) (failing to consider evidence of custom, practice, or reasonable expectations); *Bel Air Auto Auction, Inc. v. Great N. Ins. Co.*, 534 F. Supp. 3d 492, 509 (D. Md. 2021) (factual conclusions without any supporting scientific evidence).

As with custom, practice, and reasonable expectations, the parties dispute whether COVID-19 can cause "physical loss or damage," however it is ultimately defined. These disputes include whether *this* virus can alter surfaces and air and the steps necessary to respond to viral contamination of property. These issues cannot be resolved by judicial fiat

untethered from scientific expertise. *See Murphy v. Liberty Mut. Ins. Co.*, 478 Md. 333, 367 (2022) ("In responding to a certification from another court, this Court resolves only issues of Maryland law, not questions of fact.").

CONCLUSION

Under Maryland law, "physical loss or damage" cannot mean *only* structural alteration. Issues of fact, including those of custom, practice, and prior positions on policy interpretation, must be subject to discovery. Resolving such issues after discovery is particularly important here. The policy terms at issue appear in numerous policies, and as demonstrated above, industry practice has been to give them broad meaning *outside* the pandemic coverage arena. Judicial interpretation of those terms that narrows their application will be seized on by the insurance industry to narrow coverage promises *outside* in other areas, placing the scope of coverage for floods, fires, and hurricanes in question. That would undermine the reasonable expectations of policyholders in many other contexts, and it would rewrite settled bargains to the benefit of one group (insurers) and to the detriment of Maryland businesses (their policyholders). The better course is to adopt the broad, customary meaning of the policy terms discussed above and return the question for full factual discovery.

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CERTIFICATE OF COMPLIANCE

1. This Brief contains 6,429 words, excluding the parts exempted from the word count by Rule 8-503.

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2022, the foregoing Amicus Curiae Brief was electronically filed and served via the Court's MDEC system. Additionally, two true copies were mailed via Express Mail to:

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