No. S277893

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ANOTHER PLANET ENTERTAINMENT, LLC
Petitioner,
v.
VIGILANT INSURANCE COMPANY
Respondent.

Following Certification Order by the
United States Court of Appeals for the
Ninth Circuit, Case No. 21-16093

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF; *AMICUS CURIAE* BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF PETITIONER ANOTHER PLANET ENTERTAINMENT, LLC

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF UNITED POLICYHOLDERS

United Policyholders ("UP"), a non-profit entity that represents the interests of policyholders nationwide, respectfully applies for leave to file the accompanying *amicus curiae* brief under California Rules of Court, rule 8.520(f) in support of Petitioner Another Planet Entertainment, LLC ("Another Planet"). This brief is timely under California Rules of Court, rule 8.520(f)(2), as it is filed within 30 days after the last reply brief was filed.

UP has been granted leave to file *amicus curiae* briefs in more than 400 cases throughout the United States. UP's *amicus curiae* efforts recently assisted this Court in *Yahoo Inc. v. National Union Fire Insurance Company of Pittsburgh, Pa.* (2022) 14 Cal.5th 58, and the Montana Supreme Court in *National Indemnity Company v. State* (2021) 499 P.3d 516 (which cited UP's brief), and the Court favorably cited to UP's arguments in *Pitzer College* v. *Indian Harbor Ins. Co.* (2019) 8 Cal.5th 93, *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19, and *Vandenberg* v. *Superior Court* (1999) 21 Cal.4th 815.

UP is a non-profit organization based in California that serves as a voice and information resource for insurance consumers across the country. The organization is tax-exempt under Internal Revenue Code section 50l(c)(3). UP is funded by donations and grants and does not sell insurance

or accept money from insurance companies. UP's work is divided into three program areas: *Roadmap to Recovery*™ (disaster recovery and claim help for victims of wildfires, floods, and other disasters); *Roadmap to Preparedness* (insurance and financial literacy and disaster preparedness); and *Advocacy and Action* (advancing pro-consumer laws and public policy). UP hosts a library of tips, sample forms, and articles on commercial and personal lines insurance products, coverage, and the claims process at www.uphelp.org.

UP monitors the insurance sales, claims, and law sectors, and conducts surveys and hears from a diverse range of individual and business policyholders throughout California on a regular basis. The organization interfaces with state regulators in its capacity as an official consumer representative in the National Association of Insurance Commissioners. UP provides topical information to courts via the submission of *amicus curiae* briefs in cases involving insurance principles that matter to policyholders, both individuals and businesses.

UP seeks to fulfill the "classic role of amicus curiae by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co., Inc. v. Commissioner of Labor and Industry State of Mont.* (9th Cir. 1982) 694 F.2d 203, 204. This is an appropriate role for *amici curiae.* As commentators have stressed, an *amicus curiae* is often "in

a superior position to inform the court of interests other than those represented by the parties, and to focus the court's attention on the broader implication of various possible rulings...." Shapiro, et al., Supreme Court Practice (11th ed. 2019) The Briefs on the Merits § 13.14, p. 13-45 (quotation omitted.) Given UP's role in representing and advocating for policyholders, having UP's voice in the consideration of this key issue of coverage which affects whether policyholders can enforce their homeowners, auto and other property coverages would be particularly important here.

UP is familiar with the briefs that have been filed in this case. UP has experience with the legal issues of this case and believes its experience will make its proposed brief of assistance to this Court in deciding the important certified question on which the Ninth Circuit sought guidance from this Court. UP believes that its explanation of insurance principles will assist the Court in its resolution of the certified question. UP can also certify, under California Rules of Court, Rule 8.520(f)(4), that no person or entity authored the proposed amicus brief nor made a monetary contribution toward its preparation or submission, other than *amicus curiae* UP and its counsel.

UP therefore respectfully requests leave to file the attached *amicus curiae* brief presenting additional authorities and discussion in support of Petitioner's arguments.

Dated: August 2, 2023

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STATEMENT OF INTEREST REGARDING AMICUS CURIAE

United Policyholders ("UP") is a highly respected national nonprofit 501(c)(3) organization. Founded in 1991, UP has operated for more than 30 years as a dedicated advocate and information resource for individual and commercial insurance consumers in the United States. UP assists purchasers of insurance who are seeking insurance or pursuing a claim for loss reimbursement. UP is routinely called upon to help policyholders in the wake of large-scale national disasters such as floods, windstorms, and other catastrophic loss events. Since March 2020, UP has been engaged in the critical effort to assist business owners around the country whose operations have been impacted by COVID-19 and public safety orders. In addition, UP is presenting analysis and commentary to courts and regulators on the special rules of contract construction that are unique to insurance; and on the insurance industry's own historical interpretations of the standard-form insurance policy terms it drafts (often called "drafting history").[1]

[1] The Restatement of the Law, Liability Insurance § 1(13) (2019) defines "standard-form term" as "a term that appears in, or is taken from, an insurance policy form (including an endorsement) that an insurer makes available for a non-predetermined number of transactions in the insurance market." ("Restatement Liability Insurance"). For a discussion of drafting history, see *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 670-671; *MacKinnon v. Truck Ins. Exch.* (2003) 31 Cal.4th 635, 653-654.

The interpretation and application of insurance contracts require special judicial handling. Commerce, government, and society benefit when losses are indemnified through insurance purchased by individuals and businesses. The insurance system is woven into the fabric of our economy through mandatory purchase requirements, prudent personal and business risk management, and the pricing of goods and services. Each state regulates insurance contracts and transactions through its own set of laws and regulations; yet, most insurers operate in multiple states. Most insurers serve three different masters when carrying out their important purpose, and the conflicts that arise often compel judicial balancing, such as the instant case. Insurers must meet their own revenue objectives *and* the reasonable expectations of policyholders *and* the demands of their investors and shareholders. Judicial oversight is essential to maintain the purpose and value of insurance purchases by individuals and businesses in this complex system.

Insurers draft standardized insurance policy terms and impose them on insureds without negotiation of substantive terms.[2] The phrase "physical

[2] Restatement Liability Insurance § 1, cmt. i. provides:

> A term contained in an insurance policy form approved for use by an insurance regulatory authority for any insurer is a standard-form term, unless the circumstances clearly indicate the contrary. Similarly, a term that is a standard-form term in one insurance policy is a standard-form term in another policy. An insurance policy term created by an insurance

loss or damage" is a quintessential example of such standardized wording. Given the boilerplate nature of this language, it is not controversial to say that at no time did Petitioner Another Planet Entertainment, LLC have input into this language. Nor has the insurance industry varied this standard-form language over many decades, despite scores of pre-pandemic judicial interpretations finding that language in the same and similar iterations to be unclear, confusing, or outright ambiguous. See *infra* Sections I.B.1, II.

UP provides comments to insurance regulators on proposed changes to standard-form policy language which can affect policyholders and ordinary consumers. UP also provides guidance on other challenges faced by insurance regulators, including those raised by data mining, artificial intelligence, computerized risk modeling, and similar issues that sometimes make it difficult, if not impossible, to give every new policy form or term the scrutiny it deserves.

Effectuating indemnification in cases of loss despite these factors remains a fundamental economic and social objective that courts can

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broker or other entity may become a standard-form term through such sufficiently regular use in the market that the term is treated by market participants as one of the standard options available for use in the market. A term does not have to be contained in the forms of multiple insurers for it to be a standard-form term.

advance.[3] UP respectfully seeks to assist this Court in fulfilling these important roles.

Public officials, state insurance regulators, academics, and journalists throughout the U.S. routinely seek UP's input on insurance and legal matters. UP serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and, in turn, the U.S. Treasury Department. UP's Executive Director has been an official consumer representative to the National Association of Insurance Commissioners ("NAIC") since 2009. In that role, UP assists regulators in monitoring policy language and claim practices through presentations, collaboration, and input in development of model laws and regulations.

UP gave presentations to NAIC in 2020 on the topic of insurance coverage and claims for business interruption loss related to COVID-19 and public-safety orders.[4] UP presented evidence that insurers were not fully

[3] Restatement Liability Insurance § 2, cmt. c. defines the "objectives" of insurance to include "effecting the dominant protective purpose of insurance . . . ."

[4] See *NAIC Special Session One: COVID-19: Lessons Learned* (Aug. 10, 2020), https://www.youtube.com/watch?v=J2QmaZqd9Vk&feature=youtu.be, and https://content.naic.org/sites/default/files/national_meeting/speakerbios_covid-19_ lessons_learned_summer_nm_2020_0.pdf (speakers' biographies); Amy Bach, Co- Founder & Exec. Dir., UP, Business Interruption Policies and Claims, Presentation at NAIC Summer Nat'l Mtg. of Prop. & Cas. Ins. Comm. (Aug. 12, 2020), https://uphelp.org/wp-content/uploads/2021/01/up_business_interruption_policies_and_claims.pdf; Amy Bach, COVID-19 Related Business Interruption Claims, Coverage

candid with regulators about the significance of boilerplate virus- and pandemic-related limitations and exclusions they earlier had added to their policies. Although insurers had paid business-interruption losses from hotel-reservation and event cancellations due to SARS, when they added limitations and exclusions to their standard-form policies after that event in the early 2000s, some insurers told regulators, incorrectly, that they had *never* paid virus-related losses. Using that as a rationale, insurers also argued (successfully) that therefore no rate decrease associated with the policy language change was appropriate. While insurers in most places did not decrease rates, they also gave no clear nationwide notice to policyholders that virus- and pandemic-related losses could be excluded.[5] Therefore few policyholders were aware until the pandemic arose in 2020 of their insurers' efforts to reduce, drastically, business-interruption loss protection. Because policyholders had no notice of this potentially very substantial hole in their insurance, they had no opportunity to cure the gap. UP submits that those omissions underscore the need for special judicial

Issues, Disputes and Litigation, NAIC Summer Nat'l Mtg. of Consumer Liaison Comm. (Aug. 14, 2020), https://uphelp.org/wp-content/uploads/2021/01/8-14-20_bach_consumer_liaison_3_1.pdf.

[5] Charles M. Miller, Richard P. Lewis, & Chris Kozak, *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. 675, 682-85 (2022).

handling and careful scrutiny of insurer policy language and conduct in this case.

Since 1991, UP has filed *amicus curiae* briefs in federal and state appellate courts across the country. *Amicus* briefs filed by UP have been expressly cited in the opinions of the California Supreme Court and other state supreme courts, as well as the U.S. Supreme Court.[6]

UP here seeks to fulfill the classic role of amicus curiae in a case of general public interest, supplementing the efforts of the parties, and drawing the Court's attention to law that escaped consideration. This is an appropriate role for an *amicus curiae*. As commentators have often stressed, an *amicus* is often in a superior position to "focus the court's attention on the broad[] implications of various possible rulings."[7]

[6] *See, e.g., Humana Inc. v. Forsyth* (1999) 525 U.S. 299, 314; *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 760-61; *Sproull v. State Farm Fire & Cas. Co.* (Ill. 2021) 184 N.E.3d 203, 220-21; *Nat'l Indem. Co. v. State* (Mont. 2021) 499 P.3d 516, 543; *Cont'l Ins. Co. v. Honeywell Int'l, Inc.* (2018) 234 N.J. 23, 64; *Allstate Prop. & Cas. Ins. Co. v. Wolfe* (Pa. 2014) 105 A.3d 1181, 1185-86.

[7] Robert L. Stern, Eugene Greggman, & Stephen M. Shapiro, *Supreme Court Practice: For Practice in the Supreme Court of the United States*, at 570-71 (1986) (quoting Bruce J. Ennis, *Effective Amicus Briefs*, 33 Cath. U. L. Rev. 603, 608 (1984)).

PRELIMINARY STATEMENT

On its face, the question certified by this Court affects the availability of insurance coverage for property loss or damage associated with COVID-19. The question states:

> Can the actual or potential presence of the COVID-19 virus on an insured's premises constitute "direct physical loss or damage to property" for purposes of coverage under a commercial property insurance policy?

In certifying this question to the California Supreme Court, the Ninth Circuit framed the question using the term "constitute." The Ninth Circuit was clear, however, that it did "not intend [its] framing of this question to restrict the California Supreme Court's consideration of any issues that it determines are relevant." In other words, the term and the question reasonably encompass issues raised therein. One such issue that UP raises is that the question may be more accurately framed as whether the virus "may cause" (and not blanketly "constitute") direct physical loss or damage. While there may be instances where the issue may be whether actual or potential presence alone "constitutes" physical loss or damage, the issue in other cases may be whether the actual or potential presence, under the facts of the particular case, "caused" physical loss or damage. It would be beneficial to consider both options to ensure that all aspects of the issue are being fully addressed. In either case, the issues are both satisfied.

As important as this certified question is to California policyholders in the COVID-19 context, it is certainly not limited to COVID-19. It raises quintessential questions of what may cause physical loss or damage under California law and whether courts are prepared to abandon 60 years of California precedent. And, even more broadly, it asks whether California courts intend to cast aside the long-standing principle that juries determine fact questions.

First, historically, in addition to the outright theft or disappearance of property, courts have found that, when the condition of property changes from usable for an insured purpose to unusable for *that* purpose due to an actual or perceived danger, whether from circumstances like the presence of fumes, overhanging rocks, odors or otherwise, the resulting inability to use the property likewise satisfies "physical loss or damage" under the standard-form language drafted by the insurance industry. It is only now, in the context of COVID-19 losses, that insurers have contradicted themselves in suggesting that such loss of use is not covered.

Second, Insurer's proposed interpretation of "physical damage," as requiring some "distinct, demonstrable alteration"[8] of property, is contradicted by decades of precedent, from California and elsewhere, and based on an inapposite California appellate decision, *MRI Healthcare Ctr.*

[8] Insurer's Answer Brief on the Merits ("Answer Brief") at 23-26.

Of Glendale, Inc. v. State Farm Gen. Ins. Co. (2010) 187 Cal.App.4th 766, 771, 779 involving an MRI machine that did not turn on after it was turned off, and involved different policy wording ("accidental direct physical loss") as contrasted to "physical loss or damage" required in most commercial general liability policies like the one at issue here.

Beyond this inapposite decision, Insurer's proposed interpretation relies on one section (§ 148.46) of *Couch Third* [9] (or cases citing it), which has been discredited and contradicted by another treatise, by at least two other writings by its primary author, and by other well-respected treatises by other authors. (See *infra* at pages 30-32). For decades, the section has misstated the standard applicable to "physical loss or damage" and, thus, it mischaracterizes the pre-pandemic majority rule. No one, no insurer, no academic, no judge has substantively refuted the policyholder's arguments that § 148.46 misstates the majority rule—because they cannot.[10]

Even if physical alteration were to be required, it is a scientific fact that the presence of noxious substances in on-site air changes the physical

[9] Steven Plitt, Daniel Maldonado, Joshua D. Rogers, & Jordan R. Plitt, *Couch on Insurance 3d* (1995, updated 2021) ("*Couch Third*").

[10] *Wainwright v. Sykes* (1977) 433 U.S. 72, 99 n.1 (Brennan, J. & Marshall, J., dissenting) ("[T]he entire edifice is a mere house of cards whose foundation has escaped any systematic inspection.").

composition of the air. This may turn safe air into unsafe air, rendering the property unable to be used as well as damaged.[11]

Third, the facts belie insurer arguments that interpreting the policy language at issue here consistent with insurance-industry intent, the pre-pandemic majority rule, and well-accepted rules of insurance-policy interpretation would somehow bankrupt the insurance industry. They provide no support—whether evidentiary or otherwise—for such an argument, and cannot do so. This canard should be summarily rejected.[12]

Fourth, the policy requirement that the "physical loss or damage" be "direct" does not alter California law on causation. See, e.g., *Sabella v. Wisler* (1963) 59 Cal.2d 21, 31-33. Long-standing precedent establishes that causation is a fact issue for the trier of fact. Yet for some reason, in the

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[11] See, e.g., *Oregon Shakespeare Festival Assn. v. Great American Ins. Co.* (D.Or., June 7, 2016, No. 1:15-cv-01932-CL) 2016 WL 3267247, vacated by agreement (D.Or., Mar. 6, 2017, No. 1:15-cv-01932-CL) 2017 WL 1034203 (smoke); *Matzner v. Seaco Ins. Co.* (Mass.Super.Ct., Aug. 12, 1998), No. CIV. A. 96-0498-B, 1998 WL 566658 (carbon monoxide); *Gregory Packaging, Inc. v. Travelers Property Cas. Co. of America* (D.N.J., Nov. 25, 2014), No. 2:12-cv-04418, 2014, WL 6675934 (ammonia), *Farmers Ins. Co. of Oregon v. Trutanich* (Or.Ct.App. 1993) 858 P.2d 1332, 1335 ("*Trutanich*") (methamphetamine); *Mellin v. Northern Security Ins. Co., Inc.* (N.H. 2015) 115 A.3d 799, 805 (cat urine). While *The Inns by the Sea v. California Mutual Ins. Co.* (2021) 71 Cal.App.5th 688 discussed these cases, it did not need to reach the physical loss or damage issue because of its causation conclusion which was based on the pleading in that case. (See discussion *infra* at 33-34).

[12] Restatement Liability Insurance § 4 cmt. h. 1(13). See also generally §§ 2-4 & cmts. thereto.

COVID-19 context, many courts—in California and elsewhere—have been deciding causation as a matter of law, determining on the one hand that COVID-19 caused everything that followed and was therefore excluded by a virus exclusion in some insurance policies (see, e.g., *Mudpie, Inc. v. Travelers Cas. Ins. Co. of America* (9th Cir. 2021) 15 F.4th 885), or on the other hand, that the orders caused the loss, and the requisite direct physical loss or damage was lacking. See, e.g., *The Inns by the Sea*, 71 Cal.App.5th 688. Basically, heads insurers win, and tails policyholder loses. Apart from the policyholder being deprived of coverage in both instances, these outcomes are fundamentally inconsistent. And they are both wrong under California law. See, e.g., *Garvey v. State Farm Fire & Cas. Co.* (1989) 48 Cal.3d 395, 412; California Civil Jury Instruction 2306. Either one or the other was the cause and the issue of which is for the trier of fact.

ARGUMENT

I. THE REASONABLENESS OF POLICYHOLDER'S POSITION THAT THE PRESENCE OF COVID-19 ON INSURED PROPERTY MAY CAUSE "DIRECT PHYSICAL LOSS OR DAMAGE" IS SUPPORTED BY THE INSURANCE INDUSTRY'S PRE-PANDEMIC UNDERSTANDING OF THIS TERM.

As explained in Petitioner's briefs, 60+ years of California precedent establishes that the presence of noxious agents in on-site air or otherwise on insured property may cause physical loss or damage to insured property. Whether it be smoke, gasoline or, as relevant here COVID-19, air which

had been safe was rendered unsafe, rendering the property unusable and constituting "physical loss" as well as "physical damage." As a California appellate court observed in *Shade Foods v. Innovative Products Sales & Mktg., Inc.* (2000) 78 Cal.App.4th 847, 862, the presence of unwanted substances (wood splinters) mixed with otherwise undamaged goods (almonds) made the product unsafe to eat. This is no different than mixing COVID-19 molecules with otherwise safe air, altering its chemical (and thus physical) composition.

Nor can insurers credibly maintain that they intended something other than what is provided in the case law. The insurance industry at-large has been well aware of and, in fact, intended this basic coverage concept. It understood, long before the COVID-19 pandemic, that the presence of a virus (or any dangerous substance) or the imminent risk of its presence at insured property was capable of satisfying their own understood meaning of "physical loss or damage" to property. As discussed in this section, this understanding is evidenced by:

(i) the insurance industry's use for more than 40 years of standard-form business income trigger language containing no requirement of any damage to or alteration of insured property prior to COVID;

(ii) insurer claim manuals explicitly describing the peril of communicable disease, among more than 50 other covered

causes of loss, to include "physical loss or damage . . . and the associated business interruption";[13]

(iii) insurers' pre-pandemic questions posed to regulators regarding virus exclusions;

(iv) insurers' pre-pandemic marketing and instructional materials;

(v) internal e-mails produced during litigation at the beginning of the pandemic acknowledging that a loss in functionality satisfies the "physical loss or damage" trigger; and

(vi) insurer "Talking Points" drafted to guide the handling of COVID-19 claims, which state only that viruses "typically" do not damage property, a statement conceded under oath to mean that a virus *may* damage property. This was also the understanding of policyholders who reasonably expected that their COVID-19-related business-interruption claims would be covered in circumstances like those presented in the instant appeal.

Post-pandemic, insurers have pivoted and argued instead, through lawyer-crafted pleadings and briefs (which, as explained, are contradicted

[13] See Mar. 4, 2020 e-mail from Jason Wing at FM to Richard Sunny, produced as FMGLOBAL_C_00030210, produced in *Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.*, No. 4:21- CV-00011, (E.D. Tex. 2021) provided to the court in Cinemark Holdings, Inc.'s Amicus Curiae Brief, Ex. A, *Tapestry, Inc. v. Factory Mut. Ins. Co.* 286 A.3d 1044 (Md. 2022).

by pre-pandemic *evidence* and sworn insurer testimony), that a property's loss of use or function due to the presence of a dangerous substance cannot trigger coverage or that a virus can never cause physical loss or damage. Evidence of the insurance industry's pre-pandemic positions, at the very least, demonstrates that the trigger language is ambiguous, and requires this Court to construe this language in favor of coverage.

A. California Courts Consider Evidence in Determining Whether Terms Are Ambiguous and if so, Their Reasonable Meaning.

At the heart of virtually any insurance coverage dispute is the court's role of interpreting the language in the policy. The inquiry starts by looking at the plain meaning of the wording. *Waller v. Truck Ins. Exch., Inc*. (1995) 11 Cal.4th 1, 18. In doing so, the court typically first resorts to dictionary definitions as a means to interpret the language. *Scott v. Cont'l Ins. Co*. (1996) 44 Cal.App.4th 24, 29. The plain meaning of the language at issue here favors Another Planet.

California courts are not limited to dictionaries in determining plain meaning—they are permitted to look at extrinsic evidence and to consider the drafting intent—both in determining plain meaning and in determining whether words are reasonably susceptible to the meaning urged by the policyholder. Another Planet has argued this evidence and the purpose of this section is to simply to provide additional support. The following will

summarize such evidence that is not in this record, but could be provided in further proceedings in the trial court.

As a threshold matter, Insurer argues that extrinsic evidence cannot be considered in determining reasonable meanings of an insurance term, that a court should ignore whatever insurers may have said or thought in the past. That insurers are free to say what they wish in securing permission to write insurance and then write on a blank slate when it comes to pay on claims. Answer Brief at 54-55. This certainly is not the law in California.

Long-established California precedent provides that courts consider many factors and sources of evidence in determining reasonable meanings of policy language. As the California Supreme Court has explained:

> The history and purpose of [policy wording] may properly be used by courts as an aid to discern the meaning of disputed policy language.

MacKinnon, 31 Cal.4th at 653-54 (citing *Montrose*, 10 Cal.4th at 670-671).

In *MacKinnon*, the Court considered the meaning of an exclusionary clause in a comprehensive general liability policy that purported to exclude injuries caused by the "discharge, dispersal, release or escape of pollutants." 31 Cal.4th at 639. The Court found that the pollution exclusion was limited to environmental pollution and that the insurance industry did not intend the exclusion to bar coverage for ordinary acts of negligence involving harmful substances, such as the spraying of pesticides. *Id*. at 653-54. In reaching this conclusion, the Court considered the fact that "the

pollution exclusion was [largely] adopted to address the . . . potential liability resulting from anti-pollution laws enacted between 1966 and 1980." *Id*. at 653. Specifically, "[t]he drafters' utilization of law terms of art ('discharge,' 'dispersal,' … 'release,' or 'escape' of pollutants) reflects the exclusion's historical objective – avoidance of liability for environmental catastrophes related to intentional industrial pollution." *Id*. (citation omitted).

Similarly, *GGIS Insurance Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493, 1507, held that "[i]n determining whether policy language is ambiguous, [courts are to] consider not only the face of the contract but also any extrinsic evidence that supports a reasonable interpretation." Even apparently clear policy language may be ambiguous when read in the context of the policy and the facts of the case. *American Alternative Ins. Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239, 1246 likewise, held that, in determining the existence of ambiguity, "the disputed policy language must be examined in context with regard to its function in the policy." (citation omitted). "This requires a consideration of the policy as [a] whole, the circumstances of the case in which the claim arises and 'common sense.'" *Id*. (citation omitted).

In short, under California law, courts properly consider extrinsic evidence in deciding whether policy wording is reasonably susceptible to the meaning that policyholder proffers.

B. The Evidence Would Show That Tangible Alteration Is Not Required.

As a fallback, Insurer argues that even if considered, extrinsic evidence does not support the reasonableness of policyholder constructions. Answer Brief at 55. While this is not so as respects evidence proffered by the policyholder, the fact is that the policyholder provided a sampling of the abundant evidence that actually exists. The following discussion summarizes evidence that is not in this record, but could be provided in further proceedings in the trial court.

In California and elsewhere, insurers have sought dismissal of COVID-19 insurance cases at the earliest stages of litigation, frequently arguing that the "direct physical loss or damage" wording is not reasonably susceptible to the meaning that policyholders urge. In addition to being wrong for reasons discussed by others, this argument flies in the face of an abundant record of insurers' intent in drafting the pertinent language as well as how they themselves actually construe it. In this section, UP reviews the sort of evidence that exists, evidence which under California law is properly considered in determining the reasonable meaning of policy terms.

1. Prior to COVID-19, It Was Understood That the Insurance Industry's Standard-Form Business Income Trigger Did Not Require That Property Suffer Physical Damage or Tangible Alteration.

Standard-form property insurance policies do not require property to be "tangibly altered" in order to trigger coverage. Instead, what policies issued over the last 60 years have required is coverage triggered by direct "physical loss" or "physical damage."[14]

The first U.S. forms providing Business Income Coverage were "Use and Occupancy" forms, which were triggered by "damage" to or "destruction" of property.[15] This limited trigger was a function of the specified peril covered by these policies—fire—which inexorably causes "damage" or "destruction."[16] In the middle of the last century, Use and Occupancy coverage was increasingly triggered by damage or destruction by additional named perils, including "lightning, strikers, riot, explosion, falling aircraft, (including part, parts or cargo thereof) collapse, earthquake,

[14] This language has been used in property insurance forms for almost 60 years, and in business-income insurance forms for almost 40 years.

[15] See, e.g., *Brecher Furniture Co. v. Firemen's Ins. Co. of Newark, N.J.* (Minn. 1923) 191 N.W. 912, 912 (noting that Use and Occupancy policy was triggered when building was "destroyed or damaged" by fire); *Chatfield v. Aetna Ins. Co.* (1902) 71 A.D. 164, 165 ("It is a condition of this contract that, if said buildings, or any part thereof, shall be destroyed or so damaged by fire" (citation omitted)).

[16] See, e.g., *Fidelity-Phenix Fire Ins. Co. of N.Y. v. Benedict Coal Corp.* (4th Cir. 1933) 64 F.2d 347, 349-50; *Grand Pac. Hotel Co. v. Mich. Com. Ins. Co.* (Ill. 1909) 90 N.E. 244, 244-45.

water or the elements.[17] "Again, given that these named perils all wreak "damage" or "destruction," there was no need to employ a broader Business Income trigger.

In the 1960s and 1970s, however, insurance companies began to add Business Income Coverage to "all risks" forms[18] which, unlike the specified and named peril Use and Occupancy policies, cover loss from all fortuitous causes unless expressly excluded.[19] As a general matter, because the insurance industry expanded coverage beyond certain named perils to all risks, it also had to expand the Business Income trigger from "damage" or "destruction" of property to "loss" or "damage" to property,[20] so as to address all the ways a risk might affect property beyond those traditionally considered to be "damage" or "destruction."[21] In short, for decades, the

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[17] See, e.g., *Nat'l Children's Expositions Corp. v. Anchor Ins. Co.* (2d Cir. 1960) 279 F.2d 428, 429 n.1.

[18] See, e.g., *Datatab, Inc. v. St. Paul Fire & Marine Ins. Co.* (S.D.N.Y. 1972) 347 F. Supp. 36, 37; *Burdett Oxygen Co. of Cleveland, Inc. v. Emps. Surplus Lines Ins. Co.* (6th Cir. 1969) 419 F.2d 247, 249.

[19] See *Parks Real Est. Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.* (2d Cir. 2006) 472 F.3d 33, 41 ("Commercial property insurance generally is offered in the form of either an 'all risk' policy or a 'named perils' policy. Under an all-risk policy, 'losses caused by *any* fortuitous peril not specifically excluded under the policy will be covered.'. . . 'By contrast a "named perils" policy covers only losses suffered from an enumerated peril.'" (citations omitted)).

[20] See, e.g., *Great N. Oil Co. v. St. Paul Fire & Marine Ins. Co.* (Minn. 1975) 227 N.W.2d 789, 792.

[21] Miller, Lewis, & Kozak, *supra* note 5, at 682-85.

insurance industry's standard-form terms have expressly covered Business Income from "loss of" (and not simply "damage to") property, and it is for this reason that the industry's standard-form terms contained no requirement that property suffer damage or alteration.

Throughout this period, in high-profile cases, courts gave a broad legal construction of those terms, finding that coverage was triggered in contexts essentially identical to those here. Thus, the insurance industry has understood, and marketed, property-insurance coverage to apply, where property is infused or threatened with dangerous substances like ammonia, smoke, bacteria, mold spores, or even poisonous spiders—without requiring any "physical" damage to or alteration of the property. Property insurance companies and their drafting organizations, including the Insurance Services Office, Inc. ("ISO"),[22] were well aware of this interpretation because it was their business to know it: they monitored the legal construction courts gave the standard-form terms they chose for their policies. They also knew it because this construction established the meaning of that language for millions of policies, and they negotiated

[22] As this Court observed in *Montrose,* 10 Cal.4th at 670-673, n. 13, insurers rely on ISO to draft policy forms and standard-form policy terms, and adopt ISO representations as to the meaning and effect of those terms. The "direct physical loss or damage" wording typically at issue finds its genesis in ISO-drafted standard-form terms.

changes to that standard-form language with regulators where they desired to restrict coverage.

Moreover, during this decades-long pre-COVID-19 period, the insurance industry negotiated *limited* changes. However, critically, the insurance industry never sought to revise the broad trigger for Business Income Coverage to require (only) physical damage or alteration, or any of the other words of limitation the insurance industry now seeks to impose in the COVID-19 context. Instead, when ISO sought to exclude certain claims for direct physical loss or damage from a particular substance under its broad coverage trigger, it surgically crafted exclusions for use by member insurance companies to exclude loss or damage from that substance. In this way, the insurance industry developed exclusions for, among other things, radiation, asbestos, silica, mold, bacteria, and, most important in this case, viruses. Recognizing that each of these substances may cause physical damage to property, whether they did or did not was immaterial. Insurers, through ISO, saw fit to exclude coverage for such risks wholesale. See generally *Montrose,* 10 Cal.4th 645.

Given that insurers use ISO forms and standard-form policy terms, and adopt ISO representations as to the meaning and effect of those terms, ISO's statements to regulators are legally and factually the equivalent of statements by Insurers. See *id.* at 670-673, n.13. That is why insurance trade organizations like ISO exist: to prepare, draft, and negotiate policy

changes, on behalf of their members and the insurance industry in *general*, with the state regulators, who represent consumers. *Id*. At the very least, ISO's statements to regulators demonstrates an ambiguity that must be construed in favor of the insured and coverage.

2. Pre-Pandemic Questions to Insurance Regulators Demonstrate That Insurers Knew a Virus Could Trigger Coverage.

Prior to the pandemic, the insurance industry understood that the omission of an express "virus exclusion" would result in "broader coverage" for policyholders. In New York, for example, ISO sought on behalf of insurance-industry members regulatory approval to make its proposed virus exclusion mandatory in property insurance policies. The Strathmore Insurance Company (a/k/a GNY) ("Strathmore"), an insurer with a broad constituent of hospitality-industry policyholders, however, asked regulators for an exemption from a requirement that its policies include a virus exclusion because use of the exclusion would reduce coverage. Strathmore asked regulators if it could omit the virus exclusion, making it "optional" rather than "mandatory," in order to offer their customers broader coverage.[23] In its memorandum to New York insurance regulators, Strathmore acknowledged that coverage exists for "this type of

[23] See Strathmore's April 30, 2020 Explanatory Memorandum – Response to Objection 1, attached as Ex. B to Second Amended Complaint, *Legal Sea Foods, LLC v. Strathmore Ins. Co*., 523 F.Supp.3d 147 (D. Mass. 2021) (No. 1:20-cv-10850-NMG)).

loss ('pandemic')" in the absence of a virus exclusion. It told regulators that viruses and pandemics could result in potentially covered losses in "Business Interruption/Time Element coverage segments." Strathmore gave specific examples of diseases spreading in indoor, highly trafficked spaces, like restaurants or doctors' offices, that may create a covered loss. Strathmore also acknowledged that a "pandemic" loss from "contagious disease" could involve a wide variety of vectors, including losses "transmitted to third parties via ingestion," "direct contact to an insured's products," or "spread through a HVAC system" in a building. Crucially, Strathmore admitted what all property insurers knew: policyholders reasonably expect this coverage and would never willingly part with it. Strathmore said:

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

Strathmore's objections to a mandatory virus exclusion reflect the insurance industry's pre-COVID understanding that a virus-caused pandemic would trigger Business Interruption Coverage.

3. Evidence Adduced in Other Covid-19 Litigation Where Discovery Was Permitted to Proceed Reflects Insurers Understanding That a Virus Could Cause Physical Damage.

Years before the pandemic, FM Global Group ("FM"), one of the most sophisticated property insurers in the world, "instructed claim adjusters and clients (policyholders) through policy workshop slide decks that "physical damage" means an "actual substantive change" that "reduces worth or usefulness" of property or "prevents [it] from being used as designed or intended."[24] FM also knew that a virus could meet that meaning and that its broad all-risk/all-peril insurance products specifically included coverage for such damage. In fact, the company included "communicable disease," defined in FM's insurance policies as "one that is transmissible from one person to another," in its claim procedures manual as one [of] some 60 covered perils, defining the peril as "physical loss or damage resulting from . . . communicable disease and the associated business interruption."

[24] See FM's Policy Workshop Presentation, including the PowerPoint slide at FMGLOBAL_C_00057356, produced in *Cinemark*. As stated above, the documents discussed herein are being offered as a proffer to demonstrate the kinds of documents that could be submitted at the trial court in any future proceedings. *See generally*, discussion in Greg Gotwald & Michael S. Levine, *The Insurance Industry's COVID Sin*, ALM Law.com, Dec. 14, 2022, https://www.law.com/insurance-coverage-law-center/2022/12/14/the-insurance-industrys-covid-sin/.

Given that insurance industry-leader's documented acknowledgment that a disease-causing virus may cause physical loss or damage to property, it was no surprise that FM's corporate representative admitted in a federal court deposition that "a virus can cause physical loss or damage to property."[25] FM internal documents confirm:

- FM knew, well before the pandemic, that a loss of functional use caused by the presence of a dangerous substance meets both the insurer's and the commonly understood meaning of "physical loss or damage."
- Moreover, FM specifically defined both the types of diseases that its policies would cover and the peril to which the resulting loss would be assigned for internal coding. This reveals a level of knowledge and expectation by FM that certain diseases and, necessarily, their causative virus or disease-causing agent, could trigger multiple coverages.[26]

These pre-pandemic views of property insurers heavily involved in COVID-19 insurance litigation are directly at odds with their self-serving

[25] Deposition of Jeffrey Casillas, Vol. I, pp. 297-301, Apr. 21, 2022, taken in *Cinemark*. While the insurer's motion for summary judgment was granted in *Cinemark*, the court was precluded from considering extrinsic evidence under Texas law; this is counter to California law that permits the use of extrinsic evidence to interpret insurance policy language.

[26] *See generally* discussion in Gotwald & Levine, *supra* note 24.

post-pandemic positions. They also demonstrate an alternative and more expansive understanding of coverage which underscores that these post-hoc interpretations should be rejected.

4. Internal Communications of Insurance Company Executives at the Start of the Pandemic Demonstrate That Loss of Use or Functionality Because of Dangerous Conditions Satisfies the "Physical Loss or Damage" Trigger.

The admissions are not confined to FM. Internal emails—not marked confidential—produced at the start of the pandemic during discovery in *Trustees of Purdue University v. American Home Assurance Co.*, No. 02D02-2108-PL-327 (Ind. Commercial Ct.), show American International Group, Inc. ("AIG"), perhaps the largest U.S. insurer, "understood that a loss in functionality satisfies the 'physical loss or damage' trigger."[27] "Upon learning of the first [COVID-19] business-income coverage lawsuit in March 2020, AIG's Head of Retail Property, North America General Insurance, stated in an email exchange with top AIG officers and executives [that it is a] 'very thorny question as to whether or not the threat or presence of COVID-19 contamination is considered physical damage.'" AIG's Head of Property and Energy Claims responded to the group that he "'[a]greed' and then stated to the Head of Retail Property and the Chief Underwriting Officer of North America

[27] *See generally* discussion in Gotwald & Levine, *supra* note 24..

Property: 'It's well-accepted that physical damage or loss is a "material change" which "degrades" or "impairs the function of the property.'" In addition, "[t]he Retail Property Chief Underwriting Officer repeated this maxim to the Regional Property Underwriting Manager and the South Zone Property Executive: 'What is physical loss or damage — It's well-accepted that physical damage or loss is a "material change" which "degrades" or "impairs the function of the property.'"

Similarly, internal communications from The Cincinnati Insurance Companies ("Cincinnati") Commercial Lines Product Director to its Vice President for Commercial Property on March 20, 2020, which were proffered at trial in *K.C. Hopps, Ltd. v. The Cincinnati Ins. Co.*, No. 20-cv-00437-SRB, 2021 U.S. Dist. LEXIS 203904 (W.D. Mo. Oct. 22, 2021). stated:

> Once someone who is a carrier [of COVID-19] is on premises, then I think, and Tore [Swanson, Cincinnati's Assistance Vice President and Property Claims Manager] agreed, that constitutes some type of property damage and Tore thought we would at least pay for clean-up/disinfectant costs (e.g., a student is diagnosed with the disease and we pay to disinfect the dorm room).

This admission shows that Cincinnati believed the presence of the virus at the property could trigger coverage and is yet another example of insurance-industry knowledge that coverage could be triggered in this case.

Insurers knew the state of the law when the pandemic started and recognized, both before and after the pandemic began, that the presence of

the virus was capable of satisfying even their own understood meaning of "physical loss or damage," as well as the reasonable expectations of their insureds. The insurance industry's own understood meaning of "physical loss or damage" clearly demonstrates, at the very least, an ambiguity that must be construed in favor of the insured and coverage.

II. SECTION 148.46 OF *COUCH THIRD* IS IN ERROR, AND RELIANCE ON IT MISPLACED.

The Insurer repeatedly contends that the policyholder's property must suffer some "distinct, demonstrable, physical alteration" based on one section in one treatise, *Couch Third* § 148:46.[28] The question of whether COVID-19, in fact, caused a "distinct, demonstrable, physical alteration" of property is a quintessential factual issue requiring this case to be remanded for discovery, including expert opinion. The *Couch Third* formulation is itself infirm. It is directly contradicted by, among other things:

- Sixty years of precedent existing before *Couch Third* first introduced this formulation in 1995;
- Almost three decades of precedent since *Couch Third* first stated that formulation in the mid-1990s; and
- A treatise and not one, but two, articles by the lead *Couch Third* author, published nearly two decades after he endorsed the

[28] See Answer Brief at 24-25, 48-49. This formulation does not appear in *Couch First* or *Couch Second*.

formulation created in *Couch Third,* and applying a different (and correct) standard of law to the terms "physical loss or damage."[29]

In 1995, *Couch Third* added a new section, § 148:46, titled "Generally; 'Physical' loss or damage." Purportedly based on a dictionary definition of "physical," it stated a new formulation it called a "widely held" "requirement"—that the policyholder must show "a distinct, demonstrable, physical alteration of the property."[30] However, in doing so, the *Couch Third* authors ignored the case law and property-insurance drafting history above. To be clear, **no decision** prior to 1995 said this.[31] And § 148.46's reliance on **a single federal decision** predicting Oregon law, *Ben Franklin,* also is infirm.[32] The Oregon state appellate court—a better arbiter of Oregon law than a federal judge ostensibly bound to follow Oregon law under the *Erie* Doctrine[33]—rejected *Ben Franklin* three years

[29] Richard P. Lewis, Lorelie S. Masters, Scott D. Greenspan, & Chris Kozak, *Couch's Physical Alteration Fallacy: Its Origin and Consequences*, 56 Tort, Trial & Ins. Prac. L.J. 621, 636 (2021) ("*Couch Physical Alteration Fallacy*"), at 632.

[30] *Id.* at 624-25.

[31] *Id*. at 624.

[32] 10A *Couch Third* § 148:46 n.6 (citing *Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass'n* (D. Or. 1990) 793 F.Supp. 259, *aff'd*, (9th Cir. 1992) 953 F.2d 1387 ("*Ben Franklin*")); see also *Couch Physical Alteration Fallacy*, *supra* note 29, at 624-27.

[33] *See Erie R. Co. v. Tompkins* (1938) 304 U.S. 64, 78 ("*Erie*").

later in *Trutanich*,[34] a case decided two years prior to publication of *Couch Third*. *Couch Third*, to this day, fails to mention *Trutanich*.[35]

Couch Third acknowledged that courts had read "physical loss or damage" not to require "physical alteration,"[36] but suggests that this standard is the minority rule.[37] That was wrong when *Couch Third* first was published – and it is wrong today. Rather, the rule adopted at the time (mid-1990s) by at least 13 courts was, and is, the majority rule.[38] This acknowledgement by *Couch Third*, however, concedes ambiguity.

Updates of this section since 1995 generally have added cases that side with insurers or cite *Couch Third*'s erroneous formulation, not cases that rely on the majority view supporting coverage for loss of use. For example, the *Couch Third* November 2022 update still cites *Western Fire*

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[34] *Trutanich*, 858 P.2d at 1335 n.4 (rejecting *Ben Franklin*, 793 F.Supp. at 263).

[35] See generally 10A *Couch Third* § 148.46.

[36] 10A *Couch Third* § 148:46 n.7.

[37] *Id.* n.6. Notably, courts have interpreted "physical loss or damage" in multiple ways – something *Couch Third* expressly acknowledges, showing the term is ambiguous. See, e.g., *NAV-ITS*, 183 N.J. at 119.

[38] See *Couch Physical Alteration Fallacy*, *supra* note 29, at 624-27. As of 1995 when *Couch Third* first was published, there were 250 time-element coverage cases, total, on the books. Richard P. Lewis & Nicholas M. Insua, *Business Income Insurance Disputes* (2d ed. 2020 & Supp. 2022) (Table of Cases). This erroneous standard has continued to be repeated in the updates of *Couch Third* up through the November 2022 update of the treatise. Given this manageable number of cases, it is then all the more surprising to see this error continue for almost three decades in a treatise touted as comprehensive.

as the sole case supporting the pre-COVID-19 majority rule.[39] The November 2022 update also continues to cite *Ben Franklin* as one of the cases supporting § 148:46's "distinct, demonstrable, physical alteration" formulation, without noting that the Oregon Court of Appeals rejected it in *Trutanich*.[40] The current version of § 148.46 (November 2022) also ignores the numerous decisions supporting coverage for such claims.[41]

Even more revealing of the section's infirmity, the lead author of *Couch Third*, Steven Plitt, contradicted his own § 148.46 formulation in two 2013 articles, and in another treatise he authored. The title of one of the articles makes the point plain: *Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alteration*.[42] Discussing then-recent case law, Mr. Plitt concluded that "courts are not looking for physical alteration, but for loss of use."[43] A few

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[39] 10A *Couch Third* § 148:46 n.7 (citing *Western Fire Ins. Co. v. First Presbyterian Church* (Colo. 1968) 437 P.2d 52, and failing to acknowledge the many other cases from the 1950s forward upholding coverage).

[40] *Trutanich*, 858 P.2d at 1335 n.4 (disregarding *Ben Franklin*). Under *Erie*, this state appellate decision governs over a federal court's "*Erie* guess."

[41] See *Couch Physical Alteration Fallacy*, *supra* note 29, at 636.

[42] Steven Plitt, *Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alteration*, Claims J., Apr. 15, 2013, https://amp.claimsjournal.com/magazines/ideaexchange/2013/04/15/226666.htm ("*Modern Trend*").

[43] *Id.*

months later, Mr. Plitt reiterated in another article, "[i]t is well recognized by courts that physical loss exists without destruction to tangible property" such as "serious impairment of a building's function" which "may render the property useless."[44] Finally, Mr. Plitt co-writes another treatise whose November 2021 update concludes, slightly more equivocally but still contrary to *Couch Third* § 148.46: "[i]t is difficult to distill a general rule" from the relevant cases.[45]

Couch Third's formulation also conflicts with other major insurance treatises. *Insurance Claims & Disputes* states: "[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."[46] Appleman's *Insurance Law and Practice*[47] concludes that "[t]he courts have construed the scope of what constitutes 'physical loss or damage' liberally," while still recognizing that some losses (such as a

[44] Steven Plitt, *All-Risk Coverage for Stigma Claims Involving Real Property*, 35 Ins. Litig. Rep., No. 9, 2013 ("*Stigma Claims*").

[45] John K. DiMugno, Steven Plitt, & Dennis J. Wall, *Catastrophe Claims: Insurance Coverage for Natural and Man-Made Disasters* § 8:6 (2014, updated Nov. 2021) (citations omitted).

[46] Allan D. Windt, *Insurance Claims & Disputes* § 11:41 (6th ed. 2013, updated 2021). Windt cites cases *Couch Third* ignores.

[47] 5f-142f John Alan Appleman & Jean Appleman, *Insurance Law and Practice 2d* § 3092 (1970 & 2012 Supp.).

withdrawn warranty) are not "physical."[48] The 2022 update to another treatise reaches the same conclusion. It summarized the law, concluding that such disputes "generally have been resolved in favor of coverage."[49]

Despite the consistency among other learned insurance treatises, including the primary *Couch Third* author's most recent writings, courts rejecting coverage for COVID-19, like the Appellate Division, below, still base their decisions on *Couch Third*'s erroneous formulation, either citing it directly, or citing decisions by other courts that cite it, or simply by stating the erroneous formulation as if it were a common understanding. These decisions have multiplied the error stated in § 148.46.

It is simply not possible to square the hundreds and hundreds of decisions reflexively adopting Mr. Plitt's 1995 "widely held" rule in § 148:46 with his views stated, without equivocation, in his *Modern Trend* and *Stigma Claims* articles and *Catastrophe Claims* treatise. The fact remains, however, that the *Couch Third* formulation is wrong, and at the least shows that the insurers' policy language is ambiguous.

[48] *Id*. That treatise was discontinued in 2012 and proceeded as *New Appleman on Insurance*. Jeffrey E. Thomas & John Allan Appleman, *New Appleman on Insurance, Law Library Edition* (2013).

[49] Peter J. Kalis, Thomas M. Reiter, James R. Segerdahl, & Lucas J. Tanglen, *Policyholder's Guide to the Law of Insurance Coverage* § 13.04 (2012 & Supp. 2022).

III. CAUSATION IS PROPERLY DECIDED BY A TRIER OF FACT, NOT THE COURT.

If multiple events or forces—occurring either sequentially or independently—lead to a loss, all risk property policies provide coverage when the cause is a covered peril. *Sabella*, 59 Cal.2d at 31-33. This is so even if other, specifically excluded perils, contribute to the loss. *Id*.; see also Ins. Code § 530; *Garvey*, 48 Cal.3d 395. Identifying the cause is the jury's role. *See Garvey*, 48 Cal.3d at 412; *see also* California Civil Jury Instruction 2306.

Despite the codified and deeply entrenched nature of the determination of causation and the jury's role within it, courts such as the *Inns* court and the *Mudpie* court believed they could make causation decisions at the pleading stage. Courts that have allowed insureds to pursue their cases recognize the inappropriateness of this approach. *Shusha, Inc. v. Century-Nat'l Ins. Co.* (2022) 87 Cal.App.5th 250. *Shusha* held that, when an insured restaurant alleged it had to shut down its business and modify its operations, "due to the COVID-19 virus and government orders, it is a question of fact for a summary judgment motion or trial whether the restaurant closure and modifications resulted from damage caused by the COVID-19 virus or the government orders." *Id*. at 266.

Of course, causation issues are not limited to the COVID-19 pandemic. They apply to any catastrophic event (or peril), including

wildfires. Wildfires can devastate homes and businesses, and often lead to generally-applicable evacuation orders. Under the Fourth District's reasoning in *Inns*, if an order causes widespread suspension of business operations, the order—and not any potential fire damage—would be the cause of the uncovered suspension. This result would give insurers yet another pretext to deny claims. Under *Mudpie*, the wildfire would be the suspension's cause. In either case, a trial court should not be making these factual causation determinations at the pleading stage.

IV. THE COURT SHOULD REJECT SELF-SERVING WARNINGS ABOUT THE INSURANCE INDUSTRY WHICH IS ENJOYING RECORD PROFITS.

Insurer suggests that "there are innumerable ways in which the financial health of a large insurance company like Chubb could be impacted by the pandemic…" Answer Brief at 57. But any suggestion that the pandemic damaged insurers' bottom line is simply contrary to the record. To UP's knowledge, no insurance company has entered insolvency because of the pandemic. To the contrary, insurers enjoyed record earnings while many of their policyholders' businesses failed or faltered. The precipitous drop in claims (and claim payments) in the last two years has led to enormous windfalls for insurers. For instance, Zurich boasts that it "deliver[ed] one of the best results in its history[,]" with property and casualty operating profit up 50%—driven in part by "an improved net

impact from COVID-19."[50] Travelers reported "fourth-quarter net income rose 2% to $1.333 billion . . . ."[51] Other insurers have made similar claims. Rather than pay COVID-19 claims, insurers have been hoarding their surpluses.

Virtually all insurers **increased rates** on consumers in 2020 and 2021, across all their lines of business. One large insurance broker reported that 89% of its clients saw rate increases for their property insurance—the "highest number recorded since the early 2000s."[52] From April-June 2020, property-insurance rates spiked 22%, despite a historically low rate of insurance claims in general.[53] Between July and September 2020, insurers

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[50] Press Release, Zurich, Zurich Delivers One of the Best Results in Its History; Expects To Meet Or Exceed All 2022 Targets (Feb. 10, 2022), https://www.zurich.com/en/media/news-releases/2022/2022-0210-01.

[51] Matthew Lerner, *Strong Commercial Results Boost Travelers' Profit*, Bus. Ins., Jan. 20, 2022, https://www.businessinsurance.com/article/20220120/NEWS06/912347346/Strong-commercial-results-boost-Travelers-Cos-Inc-profit,-Alan-Schnitzer?utm_campaign=BI20220120DailyBriefing&utm_medium=email&utm_source=ActiveCampaign&vgo_ee=xspXV8B0Zl75RlrqoDCBdkzkASpiHornD%2Fz2wZTd1jg%3D&utm_campaign=BI20220120DailyBriefing&utm_medium=email&utm_source=ActiveCampaign&vgo_ee=xspXV8B0Zl75RlrqoDCBdkzkASpiHornD%2Fz2wZTd1jg%.

[52] Matthew Lerner, *Most Policyholders See Rates Hikes Across Multiple Lines: Report*, Bus. Ins., Oct. 26, 2020, https://www.businessinsurance.com/article/20201026/NEWS06/912337341?template=printart.

[53] Matthew Lerner, *U.S. Commercial Property Pricing Up 22% in Q2*, Bus. Ins., Aug. 10, 2020, https://www.businessinsurance.com/article/20200810/NEWS06/912336034?template=printart.

increased prices 24% for commercial property coverage,[54] and another 20% in Q4.[55]

What is more, insurers' record profits and increased rates come despite insurers setting aside billions of dollars in reserves to pay COVID-19 business-interruption claims (particularly, under the 17% of policies without an express virus exclusion[56]), as seen from reports showing more than $1.3 billion in "incurred losses" as of November 2020 (more than 14 months ago).[57] If these sums are not paid out, insurers will reclassify them as assets for accounting purposes, adding further to the windfalls.[58]

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[54] Claire Wilkinson, *Insurance Prices Increased Sharply in Third Quarter: Marsh*, Bus. Ins., Nov. 5, 2020, https://www.businessinsurance.com /article/20201105/NEWS06/912337590?template=printart.

[55] Matthew Lerner, *Global Prices Rise 22% in Q4: Marsh*, Bus. Ins., Feb. 4, 2021, https://www.businessinsurance.com/article/20210204/NE WS06/912339588?template=printart.

[56] See NAIC, Covid-19 Property & Casualty Insurance Business Interruption Data Call, Part 1 | Premiums And Policy Information (June 2020), https://content.naic.org/sites/default/files/inline-files/COVID-19%20BI%20Nat%27l%20Aggregates_0.pdf.

[57] See NAIC, Covid-19 Property & Casualty Insurance Business Interruption Data Call Part 2 | Claim And Loss Information (Nov. 2020), https://content.naic.org/sites/default/files/inline-files/COVID-19%20BI%20Nat%27l%20Claims%20Aggregates_Nov.pdf. See also *id.* ("Case Incurred Loss means indemnity case reserves plus claim payments made to date.").

[58] See, e.g., FM Global, Annual Report 2020 5, https://fmglobalpublic.hartehanks.com/AssetDisplay?acc=11FM&itemCod e=W186258 (touting billions in increased profits); Samuel Casey, *Allianz Q3 Profits Up 11% to EUR3.2bn Despite EUR659mn Cat Claims*, Ins. Insider, Nov. 10, 2021,

Too often, when insurers have faced a significant new loss, they have "cried wolf," sounding a false alarm of industry-wide insolvency.[59] This often is paired with a claim that their insurance policies were "never meant to cover that." The predicted collapses, however, have not arrived.[60]

CONCLUSION

Millions of California policyholders have relied, and do rely for protection on, property insurance that uses terms at issue in this cases. For that reason, and all the reasons discussed here and elsewhere in support of coverage, this Court should decline the Insurer's invitation to simply "follow the herd."

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https://www.insuranceinsider.com/article/29au3jdu73ih6iyfktreo/allianz-q3-profits-up-11-to-eur3-2bn-despite-eur659mn-cat-claims.

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

[60] See J. Robert Hunter, Consumer Fed'n of Am., The Insurance Industry's Incredible Disappearing Weather Catastrophe Risk: How Insurers Have Shifted Risk and Costs Associated with Weather Catastrophes to Consumers and Taxpayers 1 (Feb. 17, 2012), https://uphelp.org/wp-content/uploads/2021/02/cfa_insuance_industry_disappearing_weather_cat_risk_0.pdf.

When it comes to precedent, California courts boldly lead to protect the interests and ideals of their citizens; they do not simply follow the pack. This Court should resist the temptation to deviate here; it should follow tradition and principle and hold in favor of the policyholder.

Dated: August 2, 2023 Respectfully submitted,

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Pursuant to California Rules of Court, rules 8.204 and 8.520, I certify that this *Amicus Curiae* Brief of United Policyholders is proportionately spaced, has a typeface of 13-point, proportionally-spaced font, and consists of 8,664 words, not including the cover sheet, the Application, the Tables of Contents, the Table of Authorities, the Certificate of Service, or this Certificate, as counted by the Microsoft Word computer program used to generate this Brief.

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