Supreme Court of New Jersey

DOCKET NO. 087304

AC OCEAN WALK LLC,
Plaintiff-Petitioner,

—against—

AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, AIG SPECIALTY INSURANCE COMPANY, NATIONAL FIRE & MARINE INSURANCE COMPANY, and INTERSTATE FIRE AND CASUALTY COMPANY,
Defendants-Respondents.

CIVIL ACTION

ON PETITION FOR CERTIFICATION OF THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DOCKET NO. A 001824-21

SAT BELOW:
HONORABLE THOMAS W. SUMNERS, JR. J.A.D.; HONORABLE FRANCIS J. VERNOIA, J.A.D.; HONORABLE LISA A. FIRKO, J.A.D

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF THE PLAINTIFF-PETITIONER

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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. For instance, with grant funding from the Hurricane Sandy New Jersey Relief Fund, UP provided three years of services to Garden State homeowners whose properties had been damaged or destroyed and needed insurance guidance. In that role, UP worked with regulators, including the New Jersey Division of Banking and Insurance, on matters related to policy sales and claims and consumer rights. 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[1] it drafts (often called "drafting history").[2]

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.

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[1] The Restatement of the Law, Liability Insurance 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." American Law Institute, Restatement of the Law, Liability Insurance § 1(13) (2019) ("Restatement Liability Insurance").

[2] For a discussion of drafting history, see NAV-ITS, Inc. v. Selective Ins. Co. of Am., 183 N.J. 110 (2005); Morton Int'l, Inc. v. Gen. Accident Ins. Co. of Am., 134 N.J. 1, 33-35 (1993).

Insurers of course, draft-standardized insurance policy terms and impose them without negotiation of substantive terms on insureds.[3] The phrase "physical 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 AC Ocean Walk 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 Section I.A. & II. UP provides comments to insurance regulators on proposed changes to standard-form policy language and such changes might affect policyholders and ordinary consumers. UP also provides guidance on other challenges faced by insurance regulators, including those raised by data mining, artificial intelligence,

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[3] According to the Restatement Liability Insurance:

> 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 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.

Restatement Liability Insurance § 1, cmt. i.

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 advance.[4] 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.[5] UP presented evidence that insurers were not fully candid with regulators

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

[5] See NAIC Special Session One: COVID-19: Lessons Learned (Aug. 10, 2020), https://www.youtube.com/watch?v=J2QmaZqd9Vk&feature=youtu.be, and

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.[6] 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

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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 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.

[6] 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).

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 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 state supreme courts as well as the U.S. Supreme Court.[7]

UP here seeks to fulfill the classic role of amicus curiae in a case of general public interest, supplementing the efforts 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."[8]

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

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

PRELIMINARY STATEMENT

The ruling sought by the Defendants-Respondents' ("Insurers") here would curtail coverage for millions of New Jersey policyholders. UP respectfully submits that, for the reasons below, this Court should reverse the Appellate Division decision and remand this case for the development of a full evidentiary record to determine whether COVID-19 and its causative virus, SARS-CoV-2, caused physical loss or damage under New Jersey law.

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, 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, the Insurers' proposed interpretation of "physical damage," as requiring some "distinct, demonstrable, and physical alteration"[9] of property, is flat out contradicted by decades of precedent, including New Jersey precedent. The

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[9] Insurers' Opp'n Br. to Pet. at 1; Insurers' Suppl. Br. at 4-5.

Insurers' proposed interpretation relies on one section (§ 148.46) of Couch Third[10] (or out-of-state cases citing it),[11] which has been discredited and contradicted by another treatise and at least two other writings by its primary author, and by other well-respected treatises by other authors. More importantly, this section has never been adopted in New Jersey. For decades, the section misstated the standard applicable to "physical loss or damage" and, thus, mischaracterized the pre-pandemic majority rule. The Insurers have never substantively refuted the policyholder's arguments that § 148.46 misstates the majority rule—because they cannot.[12]

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[10] Steven Plitt, Daniel Maldonado, Joshua D. Rogers, & Jordan R. Plitt, Couch on Insurance 3d (1995, updated 2021) ("Couch Third"). In the supplemental brief filed in this Court, the Insurers continue to argue that "physical damage" to property typically means "a distinct, demonstrable, and physical alteration of [its] structure," the fallacious proposition stated in this Couch section. Insurers' Suppl. Br. at 19. Rather than quoting the Couch Third section itself, however, the Insurers quote from Wilson v. USI Insurance Service LLC, 57 F.4th 131, 142 (3d Cir. 2023), which quotes this Couch Third section with a parenthetical stating that the "internal quotation marks" from the Wilson case have been "omitted." Insurers' Suppl. Br. at 19.

[11] See, e.g., Boscov's Dep't Store, Inc. v. Am. Guarantee & Liab. Ins. Co., 546 F. Supp. 3d 354 (E.D. Pa. 2021); Conn. Dermatology Grp., PC v. Twin City Fire Ins. Co., 288 A.3d 187 (Conn. 2023); Cordish Cos. v. Affiliated FM Ins. Co., 573 F. Supp. 3d 977 (D. Md. 2021).

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

Third, New Jersey has never adopted the "sophisticated policyholder" exception advanced here by the Insurers. As shown by the Restatement of the Law, Liability Insurance, this exception is the minority rule; and well-accepted rules of policy interpretation, as applied to boilerplate insurance policy terms like those at issue, render any "sophistication" of the policyholder irrelevant in all events.[13] This purported exception also flies in the face of the reasonable expectations doctrine and other principles of policy interpretation applied for decades in New Jersey (and across the country). At a minimum, applying such an exception would raise questions of fact that should be directed to the finder of fact, on a well-developed record.

Fourth, 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 policy interpretation would somehow bankrupt the insurance industry. They have laid no foundation for such an argument, and cannot do so. This canard should be summarily rejected.

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[13] American Law Institute, Restatement of the Law, Liability Insurance § 4 cmt. h. 1(13) (2019) ("Restatement Liability Insurance"). See also generally id. §§ 2-4 & cmts. thereto.

ARGUMENT

I. The Insurance Industry's Pre-Pandemic Understanding of "Physical Loss or Damage" Proves That Coverage Is Triggered By The Presence of Covid-19 on Insured Property.

The insurance industry at-large understood, prior to 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. 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"[14]

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

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

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[14] Excerpting Covered Peril Number 60 (Cinemark Holdings, Inc.'s Amicus Curiae Brief, Ex. A, Tapestry, Inc. v. Factory Mut. Ins. Co. (Md. 2022) (Misc. No. 1)).

(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.[15] 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 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 coverage.

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[15] This is shown by testimony from insurer corporate representatives admitting in a federal court deposition that a virus can cause physical loss or damage to property. See, e.g., Cinemark Holdings, Inc. v. Factory Mut. Ins. Co., No. 4:21-CV-00011, 2021 U.S. Dist. LEXIS 140292 (E.D. Tex. July 28, 2021).

A. Prior To Covid-19, The Insurance Industry's Standard-Form Business Income Trigger Was Understood To Not Require That Property Suffer Physical Damage Or Alteration.

The historical evolution of standard-form property insurance clearly illustrates that tangible alteration of property is not necessary to trigger coverage. For almost 60 years, property and casualty insurers have sold standard-form property insurance policies containing coverage triggered by direct "physical loss" or "physical damage."[16] The first U.S. forms providing Business Income Coverage were "Use and Occupancy" forms, which were triggered by "damage" to or "destruction" of property.[17] This limited trigger was a function of the specified peril covered by these policies – fire – which inexorably causes "damage" or "destruction."[18] 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

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

17 See, e.g., Brecher Furniture Co. v. Firemen's Ins. Co. of Newark, N.J., 191 N.W. 912, 912 (Minn. 1923) (noting that Use and Occupancy policy was triggered when building was "destroyed or damaged" by fire); Chatfield v. Aetna Ins. Co., 71 A.D. 164, 165 (1st Dep't 1902) ("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)).

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

or cargo thereof) collapse, earthquake, water or the elements . . . ."[19] 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[20] which, unlike the specified and named peril Use and Occupancy policies, cover loss from all fortuitous causes unless expressly excluded.[21] 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,[22] so as to address all the ways a risk might affect property beyond those traditionally considered to be "damage" or "destruction."[23] In short, for decades,

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

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

21 See Parks Real Est. Purchasing Grp. v. St. Paul Fire & Marine Ins. Co., 472 F.3d 33, 41 (2d Cir. 2006) ("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)).

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

23 Miller, Lewis, & Kozak, supra note 6, at 682-85.

the insurance industry's standard forms 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, 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"),[24] 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 changes to that standard-form language with regulators where they desired to restrict coverage.

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[24] Upon information and belief, certain Insurers were, and are, members of ISO authorized in New Jersey to use certain ISO forms. Regardless, they use ISO-drafted standard-form terms in their policies.

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 other of the 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.[25]

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.[26] That is why insurance trade organizations like ISO exist: to prepare, draft, and

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[25] For discussion of the drafting process for standard-form insurance policy terms, see NAV-ITS, Inc. v. Selective Ins. Co. of Am., 183 N.J. 110 (2005); see Morton Int'l, Inc. v. Gen. Accident Ins. Co. of Am., 134 N.J. 1 (1993).

[26] See Morton, 134 N.J. at 31-40.

negotiate policy changes, on behalf of their members and the insurance industry in *general*, with the state regulators, who represent consumers.[27] At the very least, ISO's statements to regulators in New Jersey (and elsewhere) demonstrate an ambiguity that must be construed in favor of the insured and coverage.

B. Pre-Pandemic Questions to 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 (as discussed below) "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 policies. The Strathmore Insurance Company (a/k/a GNY) ("Strathmore"), an insurer with a broad constituent of hospitality-industry policyholders like AC Ocean Walk LLC, however, asked regulators for an exemption from a requirement that their 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.[28] In its memorandum to New York

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27 Id.

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

regulators, Strathmore acknowledged that coverage exists for "this type of loss ('pandemic')" in the absence of a virus exclusion.[29] It told regulators that viruses and pandemics could result in potentially covered losses in "Business Interruption/Time Element coverage segments."[30] Strathmore gave specific examples of diseases spreading in indoor, highly trafficked spaces, like restaurants or doctors' offices, that may create a covered loss.[31] It 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.[32]

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

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[29] Id.

[30] Id.

[31] Id.

[32] Id.

realm of possible fortuitous occurrences and should be covered should such an event arise."[33]

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

C. Evidence Adduced in Other Covid-19 Litigations Proves That Insurers Knew 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.'"[34] "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."[35] "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

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33 Id.

34 Id.

35 Id.

[of] some 60 covered perils, defining the peril as 'physical loss or damage resulting from . . . communicable disease and the associated business interruption . . . .'"[36]

Given that 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."[37] FM internal documents confirm:

- These statements show 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, the fact that 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 reveals a level of knowledge and expectation that certain diseases and, necessarily, their causative virus or disease-causing agent, could trigger multiple coverages.[38]

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[36] Id.

[37] Id. (citing Cinemark Holdings, Inc. v. Factory Mut. Ins. Co., No. 4:21-CV-00011, 2021 U.S. Dist. LEXIS 140292 (E.D. Tex. July 28, 2021)).

[38] Id.; Excerpting Covered Peril Number 60 (Cinemark Holdings, Inc.'s Amicus Curiae Brief, Ex. A, Tapestry, Inc. v. Factory Mut. Ins. Co. (Md. 2022) (Misc. No. 1)).

These pre-pandemic views are directly at odds with the self-serving post-pandemic positions of insurers and demonstrates an alternative and more expansive understanding of coverage underscoring that these post-hoc interpretations should be rejected.

D. Internal Communications of Insurance 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."[39] "Upon learning of the first [COVID-19] business income 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.'"[40] AIG's

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[39] 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/.

[40] Id.

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 Property: 'It's well-accepted that physical damage or loss is a "material change" which "degrades" or "impairs the function of the property."'"[41] 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."'"[42]

Similarly, internal communications from The Cincinnati Insurance Companies ("Cincinnati") Commercial Lines Product Director to its Vice President for Commercial Property on March 20, 2020, 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).[43]

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41 Id.

42 Id.

43 Id. (citing internal communications from The Cincinnati Insurance Companies used in the K.C. Hopps, Ltd. v. Cincinnati Ins. Co., No. 20-cv-00437-SRB, 2021 U.S. Dist. LEXIS 203904 (W.D. Mo. Oct. 22, 2021)).

As 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 Insurers' contention that AC Ocean Walk LLC's property must suffer some "distinct, demonstrable, physical alteration" derives from one section in one treatise, Couch Third § 148:46.[44] 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

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[44] 10A Couch Third § 148:46. This formulation does not appear in Couch First or Couch Second; 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/; 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").

opinion. The Couch Third formulation is itself infirm. It is also 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 formulation created in Couch Third, and applying a different (and correct) standard of law to the terms "physical loss or damage."[45]

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."[46] 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.[47] And § 148.46's reliance on **a single federal decision** predicting

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45 Couch Physical Alteration Fallacy, supra note, 41, at 632.

46 Id. at 624-25.

47 Id. at 624.

Oregon law, Ben Franklin, is infirm.[48] 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 [49] – rejected Ben Franklin three years later in Trutanich,[50] a case decided two years prior to publication of Couch Third. Couch Third, to this day, fails to mention Trutanich.[51]

Couch Third acknowledged that courts had read "physical loss or damage" not to require "physical alteration,"[52] but suggests that this standard is the minority rule.[53] That was wrong when Couch Third first was published – and it is wrong today. Rather, the rule adopted at the time (mid-1990's) by at least 13 courts was, and is, the majority rule.[54] This acknowledgement, however, concedes ambiguity.

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48 10A Couch Third § 148:46 n.6 (citing Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass'n, 793 F. Supp. 259 (D. Or. 1990), aff'd, 953 F.2d 1387 (9th Cir. 1992) ("Ben Franklin")); see also Couch Physical Alteration Fallacy, supra note 41, at 624-27.

49 See Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) ("Erie").

50 Farmers Ins. Co. v. Trutanich, 858 P.2d 1332, 1335 n.4 (Or. Ct. App. 1993) ("Trutanich") (rejecting Ben Franklin, 793 F. Supp. at 263).

51 See generally 10A Couch Third § 148.46.

52 10A Couch Third § 148:46 n.7.

53 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.

54 See Couch Physical Alteration Fallacy, supra note 41, 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

Updates of this section since 1995 generally have added cases that side with insurers or cite Couch Third's erroneous formulation,[55] 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 as the sole case supporting the pre-COVID-19 majority rule.[56] 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

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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.

[55] See generally 10A Couch Third § 148.46, including: Torgerson Props., Inc. v. Cont'l Cas. Co., 38 F.4th 4 (8th Cir. 2022); Dukes Clothing, LLC v. Cincinnati Ins. Co., 35 F.4th 1322 (11th Cir. 2022); Henry's La. Grill, Inc. v. Allied Ins. Co. of Am., 35 F.4th 1318 (11th Cir. 2022); United Talent Agency v. Vigilant Ins. Co., 77 Cal. App. 5th 821 (2022); Verveine Corp. v. Strathmore Ins. Co., 184 N.E.3d 1266 (Mass. 2022); Los Angeles Lakers, Inc. v. Fed. Ins. Co., No. CV 21-02281 TJH (MRWx), 2022 WL 831549 (C.D. Cal. Mar. 17, 2022); Dakota Girls, LLC v. Phila. Indem. Ins. Co., 524 F. Supp. 3d 762 (S.D. Ohio), aff'd, 17 F.4th 645 (6th Cir. 2021); Rankin v. USAA Cas. Ins. Co., 271 F. Supp. 3d 1218 (D. Colo. 2017); In re Chinese Manufactured Drywall Prod. Liab. Litig., 759 F. Supp. 2d 822 (E.D. La. 2010); Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co., 17 F. Supp. 3d 323 (S.D.N.Y. 2014); MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co., 115 Cal. Rptr. 3d 27 (2010). See also Couch Physical Alteration Fallacy, supra note 41, at 623-32.

[56] 10A Couch Third § 148:46 n.7 (citing W. Fire Ins. Co. v. First Presbyterian Church, 437 P.2d 52 (Colo. 1968), and failing to acknowledge the many other cases from the 1950s forward upholding coverage).

in Trutanich.[57] The current version of § 148.46 (November 2022) also ignores the numerous decisions supporting coverage for such claims.[58]

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.[59] Discussing then-recent case law, Mr. Plitt concluded that "courts are not looking for physical alteration, but for loss of use."[60] A few 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."[61] Finally, Mr. Plitt co-writes another treatise whose November 2021 update concludes, slightly more equivocally but still contrary to

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57 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."

58 See Couch Physical Alteration Fallacy, supra note 41, at 636.

59 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").

60 Id.

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

Couch Third § 148.46: "[i]t is difficult to distill a general rule" from the relevant cases.[62]

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."[63] Appleman's Insurance Law and Practice[64] 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 withdrawn warranty) are not "physical."[65] 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."[66]

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[62] 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).

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

[64] 5f-142f John Alan Appleman & Jean Appleman, Insurance Law and Practice 2d § 3092 (1970 & 2012 Supp.).

[65] 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).

[66] 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).

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 cited 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.

We submit that 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.

III. New Jersey's Long-Standing Rules Of Insurance Policy Interpretation Apply Uniformly No Matter The Sophistication Of The Insured.

New Jersey courts agree with courts generally around the country that insurance policies are a special kind of contract, subject to "special rules of interpretation."[67] This Court has explained, "[b]ecause of the complex terminology

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[67] Gibson v. Callaghan, 158 N.J. 662, 669 (1999) (citing Longobardi v. Chubb, 121 N.J. 530, 537 (1990)); Meier v. N.J. Mfrs. Life Ins. Co., 101 N.J. 597, 611-12 (1986)).

used in the policy and because the policy is in most cases prepared by the insurance company experts, we recognize that an insurance policy is a 'contract of adhesion between parties who are not equally situated.'"[68]

This Court has made no exception for the contracts insurers draft and sell to commercial policyholders. As this Court has stated, "[e]ven the most astute insured might find his or her 'bargaining power is necessarily limited.'"[69] This standardization of insurance policies allows for the marketing and underwriting of insurance across types of business and on a mass basis, and it is a reason for the highly regulated nature of the insurance business.[70] Indeed, as the court in Diamond Shamrock Chemicals Co. v. Aetna Casualty & Surety Co. noted:

> Despite Diamond's sophistication, the critical fact remains that the policy in question was a standard form policy prepared by [the insurer's] experts, with language selected by the insurer. The specific language contained in the exclusion was not negotiated. It appears in policies issued to big and small businesses throughout the country. The use of standard policy provisions is founded upon the premise that collaboration among casualty insurers is necessary to calculate and maintain reasonable rates. . . . It would seem that the benefits of this standardization would be lost if standard form language were given

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68 NAV-ITS, 183 N.J. at 118 (quoting Doto v. Russo, 140 N.J. 544, 555 (1995) (quoting Meier, 101 N.J. at 611)).

69 Doto, 140 N.J. at 555 (quoting Zuckerman v. Nat'l Union Fire Ins. Co., 100 N.J. 304, 320 (1985)); Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 175 (1992).

70 See, e.g., Morton, 134 N.J. at 30-43, 71-75, 77-80 (describing the insurance regulatory and approval process, the public policies underlying the court's decision enforcing coverage, and equating the effect of the court's regulatory-estoppel findings with the Reasonable Expectations Doctrine).

> different meanings for different insureds based upon individual degrees of sophistication and bargaining power.[71]

At issue here is whether presence of a virus can satisfy the meaning of "physical loss or damage" to property. That meaning does not change based on the size, or, as insurers would have it, "sophistication," of the policyholder. The Restatement Liability Insurance § 4 comment h., expressly recognizes the majority rule as rejecting any "sophisticated policyholder exception" to the rules of insurance-policy interpretation, explaining "[b]y placing the responsibility for residual ambiguity on the party that is most in control of the language of the policy, the *contra proferentem* rule provides an important incentive to draft terms clearly regardless of the sophistication of the policyholder." The Insurers' reliance on a "sophisticated insured" argument here is contradicted directly by New Jersey's unequivocal adoption of the reasonable expectations doctrine. In NAV-ITS, this Court specifically rejected the insurer's interpretation of the standard-form "absolute pollution exclusion" as "overly broad, unfair, and contrary to the objectively reasonable expectations of the New Jersey and other state regulatory authorities," using insurance regulators as a stand-in for the expectations of policyholders (there, a large company) given the representations that insurance-

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[71] 258 N.J. Super. 167, 209 (App. Div. 1992).

industry drafters made to regulators.[72] Even if this Court were to abandon its adherence to the majority rule (and it should not), the question arises how a policyholder's "sophistication" should be assessed.[73] Should courts look at the insured's size (and if so, by annual revenues, annual profit, market capitalization, number of employees, or some other measure)? Does the policyholder employ a full-time risk manager or use an insurance broker and, if so, what level of experience or skill of the risk manager or broker? These questions of fact should be decided by the trier of fact, on a full record, not as insurers would it here on some summary proceeding.

IV. The Court Should Reject Self-Serving Warnings About The Insurance Industry Which Is Enjoying Record Profits.

Finally, and underscoring each of points discussed by UP, 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

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72 183 N.J. at 123-24 (citing Morton, 134 N.J. at 30).

73 1 Law and Practice of Insurance Coverage Litigation § 1:12 (updated 2022).

COVID-19."[74] Travelers reported "fourth-quarter net income rose 2% to $1.333 billion . . . ."[75] 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."[76] From April-June 2020, property-insurance rates spiked 22%, despite a historically low rate of insurance claims in general.[77] Between July

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[74] 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.

[75] 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%3D.

[76] 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.

[77] 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.

and September 2020, insurers increased prices 24% for commercial property coverage,[78] and another 20% in Q4.[79]

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[80]), as seen from reports showing more than $1.3 billion in "incurred losses" as of November 2020 (more than 14 months ago).[81] If these sums are not paid out, insurers will reclassify them as assets for accounting purposes, adding further to the windfalls.[82]

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[78] 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.

[79] Matthew Lerner, Global Prices Rise 22% in Q4: Marsh, Bus. Ins., Feb. 4, 2021, https://www.businessinsurance.com/article/20210204/NEWS06/912339588?template=printart.

[80] 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/inlinefiles/COVID19%20BI%20Nat%27l%20Aggregates_2.pdf.

[81] 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/inlinefiles/COVID19%20BI%20Nat%27l%20Claims%20Aggregates_Nov.pdf. See also id. ("Case Incurred Loss means indemnity case reserves plus claim payments made to date.").

[82] See, e.g., FM Global, Annual Report 2020 5, https://fmglobalpublic.hartehanks.com/AssetDisplay?acc=11FM&itemCode=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.[83] This often is paired with a claim that their insurance policies were "never meant to cover that." The predicted collapses, however, have not arrived.[84]

CONCLUSION

Millions of New Jersey policyholders have, and 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 reverse the Appellate Division and decline the Insurers' invitation to simply "follow the herd."

This Court has held that, "[i]n protecting the rights of citizens of this State, [it] ha[s] never slavishly followed the popular trends in other jurisdictions, particularly when the majority approach is incompatible with the unique interests,

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

[83] 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.

[84] 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.

values, customs, and concerns of our people."[85] In "many areas of the law . . . this Court has charted a different path than the one followed by the federal courts and many other courts."[86] Several landmark decisions by this Court in insurance law demonstrate this iconoclastic approach. The first is this Court's trailblazing adoption in 1993 of regulatory estoppel in Morton,[87] rejecting the insurance industry's efforts to deny representation made to New Jersey insurance regulators on the "pollution exclusion." Second is the Court's unique system for allocating long-term insurance losses, as set forth in the iconic decisions, Owens-Illinois and Carter-Wallace.[88]

When it comes to precedent, New Jersey courts boldly lead to protect the interests and ideals of their citizens; they don't 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.

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[85] Lewis v. Harris, 188 N.J. 415, 456 (2006).

[86] State v. Scott, 229 N.J. 469, 500 (2017).

[87] 134 N.J. at 30-43, 71-75, 77-80.

[88] Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437, 479 (1994); Carter-Wallace, Inc. v. Admiral Ins. Co., 154 N.J. 312, 320-23 (1998).

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SUPREME COURT OF NEW JERSEY
APP. DIV. # A-001824-21
SUPREME COURT # 087304

CRIMINAL ACTION

AC Ocean Walk, LLC,
Plaintiff-Appellant,

v.

American Guarantee and Liability Insurance Company, AIG Specialty Insurance Company, and Interstate Fire and Casualty Company,
Defendants-Respondents,

and

National Fire & Marine Insurance Company,
Defendant.

CERTIFICATION OF SERVICE

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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

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