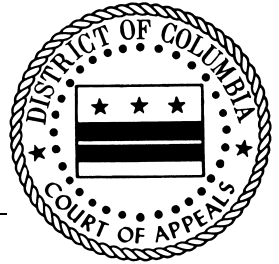


Appeal No. 22-cv-950



---

**DISTRICT OF COLUMBIA  
COURT OF APPEALS**

Clerk of the Court  
Received 05/25/2023 04:40 PM

---

CREATIVE CONSOLIDATION, LLC D/B/A MASSERIA RESTAURANT  
FLYING DONKEY, LLC D/B/A SER RESTAURANT  
JOSELITO, LLC D/B/A JOSELITO CASA DE COMIDAS  
MAXWELL PARK  
MAXWELL YARD D/B/A MAXWELL PARK  
NUSSBAR LLC D/B/A SHOUK  
OFFICINA CAFÉ LLC  
OFFICINA LLC D/B/A OFFICINA BY NICHOLAS STEFANELLI  
PAMPLONA, LLC and SLOPPY MAMA'S, LLC

Plaintiffs-Appellants,

v.

ERIE INSURANCE EXCHANGE,

Defendant-Appellee.

---

On Appeal from the Superior Court of the  
District of Columbia Civil Division  
Lower Court No. 2022 CA 1109 B  
(THE HONORABLE SHANA FROST MATINI)

---

***AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS***

---

DATE: 05/25/2023

RHONDA D. ORIN, ESQ.  
MARSHALL GILINSKY, ESQ.  
ANDERSON KILL P.C.  
1251 Avenue of the Americas  
New York, NY 10020  
(212) 278-1000  
mgilinsky@andersonkill.com  
rorin@andersonkill.com

*Counsel for Amicus Curiae United Policyholders*

**RULE 29(a)(4) DISCLOSURE STATEMENT**

United Policyholders is a nonprofit 501(c)(3) organized under the laws of the District of Columbia. It has no parent corporation or publicly held corporation that owns 10% or more of its stock.

## INDEX

	<b>Page</b>
RULE 29(a)(4) DISCLOSURE STATEMENT .....	i
STATEMENT OF INTEREST OF <i>AMICUS CURIAE</i> .....	1
PRELIMINARY STATEMENT .....	4
ARGUMENT .....	6
I.    The Court Should Not Be Distracted by Cries of “Wolf” from the Insurance Industry. ....	6
II.   The Insurance Industry Grossly Overstates the Cost of Honoring the Promises Made in Policies <i>Without</i> Virus Exclusions.....	10
CONCLUSION .....	14

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Allstate Prop. &amp; Cas. Ins. Co. v. Wolfe</i> , 105 A.3d 1181 (Pa. 2014) .....	3
<i>Brand Mgt., Inc. v. Maryland Cas. Co.</i> , No. 05-cv-02293, 2007 WL 1772063 (D. Colo. June 18, 2007).....	13
<i>Cont’l Ins. Co. v. Honeywell Int’l, Inc.</i> , 188 A.3d 297 (N.J. 2018) .....	3
<i>Cook v. Allstate Ins. Co.</i> , No. 48D02-0611-PL-01156, 2007 Ind. Super. LEXIS 32, slip op. (Ind. Super. Ct. Madison County Nov. 30, 2007) .....	12
<i>De Laurentis v. United Servs. Auto. Ass’n</i> , 162 S.W.3d 714 (Tex. App. Mar. 31, 2005).....	12
<i>Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.</i> , No. 2:12-cv-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) .....	13
<i>Humana Inc. v. Forsyth</i> , 525 U.S. 299 (1999) .....	3
<i>Julian v. Hartford Underwriters Ins. Co.</i> , 110 P.3d 903 (Cal. 2005) .....	3
<i>Motorists Mut. Ins. Co. v. Hardinger</i> , 131 F. App’x 823– 27 (3d Cir. 2005).....	12
<i>Oregon Shakespeare Festival Ass’n v. Great Am. Ins. Co.</i> , No. 1:15-cv-01932-CL, 2016 WL 3267247 (D. Or. June 7, 2016).....	13
<i>Rose’s I, LLC v. Erie Ins. Exch.</i> , 290 A.3d 52 (D.C. 2023) .....	3, 7, 10, 11
<i>Schlamm Stone &amp; Dolan, LLP v. Seneca Ins. Co.</i> , No. 603009/2002, 2005 WL 600021 (N.Y. Supr. Mar. 16, 2005) .....	12

<i>Sproull v. State Farm Fire &amp; Cas. Co.</i> , 2021 IL 126446 (Ill. Sep. 23, 2021) .....	3
<i>Stack Metallurgical Servs., Inc. v. Travelers Indem. Co.</i> , No. 05-1315, 2007 WL 464715 (D. Or. Feb. 7, 2007) .....	13
<b>Other Authorities</b>	
APCIA Releases Update to Business Interruption Analysis (Apr. 28, 2020), <a href="https://www.apci.org/media/news-releases/release/60522/">https://www.apci.org/media/news-releases/release/60522/</a> .....	11, 12
Angela Childers, <i>CNA Reports Higher Net Income Despite Cat Losses</i> , BUSINESS INSURANCE (Nov. 2, 2020), <a href="https://www.businessinsurance.com/article/20201102/NEWS06/912337508/CNA-reports-higher-net-income-despite-cat-losses">https://www.businessinsurance.com/article/20201102/NEWS06/912337508/CNA-reports-higher-net-income-despite-cat-losses</a> .....	8
Claire Wilkinson, Chubb reports gains in Q3 profit, net premium written, BUSINESS INSURANCE (Oct. 28, 2020), <a href="https://www.businessinsurance.com/article/20201028/NEWS06/912337411/Chubb-reports-gains-in-Q3-profit,-netpremium-Written">https://www.businessinsurance.com/article/20201028/NEWS06/912337411/Chubb-reports-gains-in-Q3-profit,-netpremium-Written</a> .....	7
Claire Wilkinson, <i>Insurance Prices Increased Sharply in Third Quarter</i> , BUSINESS INSURANCE (Nov. 5, 2020), <a href="https://www.businessinsurance.com/article/00010101/NEWS06/912337590/Insurance-prices-increased-sharply-in-thirdquarter-Marsh">https://www.businessinsurance.com/article/00010101/NEWS06/912337590/Insurance-prices-increased-sharply-in-thirdquarter-Marsh</a> .....	8, 9
Eli Flesch, “Trade Group Tells 1st Cir. Eateries Not Owed Virus Coverage” Law360.com (Sept. 15, 2021), <a href="https://www.law360.com/insuranceauthority/property/articles/1422231/trade-group-tells-1st-circ-eateries-not-owed-virus-coverage">https://www.law360.com/insuranceauthority/property/articles/1422231/trade-group-tells-1st-circ-eateries-not-owed-virus-coverage</a> .....	7
Gavin Souter, “Hotel Chain to get Payout for SARS-Related Losses”, BUSINESS INSURANCE (Nov. 2, 2003), <a href="https://www.businessinsurance.com/article/20031102/story/100013638/hotel-chain-to-get-payout-for-sars-related-losses">https://www.businessinsurance.com/article/20031102/story/100013638/hotel-chain-to-get-payout-for-sars-related-losses</a> .....	12
<i>Insurer Liability for Cleanup Costs of Hazardous Waste Sites</i> , No. 101-175 (101st Cong., 2d Sess., Sept. 27, 1990).....	6

J. Greenwald, *Berkley Reports 161% Jump in Profits*, BUSINESS INSURANCE (Jan. 26, 2021), <https://www.businessinsurance.com/article/00010101/NEWS06/912339367/Berkley-reports-161-jump-in-profits> .....8

J. Robert Hunter, THE INSURANCE INDUSTRY’S INCREDIBLE DISAPPEARING WEATHER CATASTROPHE RISK: HOW INSURERS HAVE SHIFTED RISK AND COSTS ASSOCIATED WITH WEATHER CATASTROPHES TO CONSUMERS AND TAXPAYERS (Consumer Federation of America, Feb. 17, 2012).....9

Judy Greenwald, Continued Rate Increases Expected: Willis, BUSINESS INSURANCE (Nov. 19, 2020), <https://www.businessinsurance.com/article/2020119/NEWS06/912337904/Continued-rate-increases-expected-Willis-Towers-Watson> .....9

Matthew Lerner, *Global Prices Rise 22% in Q4: Marsh*, BUSINESS INSURANCE (Feb. 4, 2021), <https://www.businessinsurance.com/article/20210204/NEWS06/912339588/Global-prices-rise-22-in-Q4-Marsh-Global-Insurance-Market-Index> .....9

Matthew Lerner, *Most Policyholders See Rate Hikes Across Multiple Lines*, BUSINESS INSURANCE (Oct. 26, 2020), [https://www.businessinsurance.com/article/20201026/NEWS06/912337341/Most-policyholders-see-rateshikes-across-multiple-lines-Arthur-J-Gallagher Re](https://www.businessinsurance.com/article/20201026/NEWS06/912337341/Most-policyholders-see-rateshikes-across-multiple-lines-Arthur-J-Gallagher-Re).....8

Matthew Lerner, *U.S. Commercial Property Pricing up 22% in Q2*, BUSINESS INSURANCE (Aug. 10, 2020), <https://www.businessinsurance.com/article/00010101/NEWS06/912336034/US-commercial-property-pricing-up-22-in-Q2>.....8

NAIC Special Session on COVID-19 Lessons Learned, [https://content.naic.org/sites/default/files/national\\_meeting/speakerbios\\_covid-19\\_lessons\\_learned\\_summer\\_nm\\_2020\\_0.pdf](https://content.naic.org/sites/default/files/national_meeting/speakerbios_covid-19_lessons_learned_summer_nm_2020_0.pdf).....2

NAIC Statement on Congressional Action Relating to COVID-19  
(Mar. 25, 2020), <https://www.campbell-bissell.com/wp-content/uploads/2020/04/NAIC-Statement-on-Congressional-Action-Relating-to-COVID-19.pdf> .....11

REUTERS BUSINESS NEWS (June 12, 2020),  
<https://www.reuters.com/article/us-health-coronavirus-insurance-claims-a/u-s-insurers-use-lofty-estimates-to-beat-back-coronavirus-claims -idUSKBN23J0T6>.....13

Richard Holober, *Progressive Insurance Hoards Covid-19 Windfall Profits*, Consumer Federation of California (Aug. 13, 2020),  
[https://uphelp.org/wpcontent/uploads/2021/02/cfc\\_progressive.pdf](https://uphelp.org/wpcontent/uploads/2021/02/cfc_progressive.pdf) .....7

Richard P. Lewis *et al.*, Here We Go Again: Virus Exclusion for COVID-19 and Insurers, NU PROP. CASUALTY 360 (Apr. 7, 2020), <https://www.propertycasualty360.com/2020/04/07/here-we-go-again-virus-exclusion-for-covid-19-and-insurers/?slreturn=20200927114442> .....2

## **STATEMENT OF INTEREST OF *AMICUS CURIAE***

United Policyholders (“UP”) is a highly respected non-profit 501(c)(3) organization. Since its founding in 1991, UP has been a dedicated advocate and information resource for individual and commercial insurance consumers. UP assists consumers purchasing a policy or pursuing a claim. UP hosts a library of publications and videos related to personal and commercial insurance products, coverage, and the claims process at [www.uphelp.org](http://www.uphelp.org).

Grants, donations, and volunteers support UP’s work, which is divided into three program areas: Roadmap to Recovery (disaster recovery and claim help), Roadmap to Preparedness (insurance and financial literacy and disaster preparedness), and Advocacy and Action (advancing pro-consumer laws and public policy). Public officials, state insurance regulators, academics and journalists routinely seek UP’s input on insurance and legal matters. UP’s Executive Director has been appointed to twelve consecutive terms as an official consumer representative to the National Association of Insurance Commissioners. In that role, UP works with regulators on matters related to policy sales, claims, and consumer rights. UP also serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and the Treasury Department.



On business interruption related to COVID-19, UP gave various National Association of Insurance Commissioners (“NAIC”) presentations in 2020.<sup>1</sup> UP called attention to the uniform pattern of coverage denials (even where policy language differed and policies contained no virus or pandemic exclusion) by insurance companies nationwide, coupled with unsupported assertions that paying claims would bankrupt the insurance industry. UP also presented evidence that insurance companies were not candid with regulators about the significance of virus and pandemic-related limitations and exclusions they added to their policies.<sup>2</sup> Although insurance companies had paid business interruption claims stemming from the SARS CoV-1 outbreak, some told regulators they had never paid virus-

---

<sup>1</sup> NAIC Special Session on COVID-19 Lessons Learned, [https://content.naic.org/sites/default/files/national\\_meeting/speakerbios\\_covid-19\\_lessons\\_learned\\_summer\\_nm\\_2020\\_0.pdf](https://content.naic.org/sites/default/files/national_meeting/speakerbios_covid-19_lessons_learned_summer_nm_2020_0.pdf); Testimony of Amy Bach on Business Interruption Policies and Claims, Summer National Meeting Property and Casualty Insurance (C) Committee August 12th, 2020, [https://3inbm04c0p4j2h1w132uyb5e-wpengine.netdna-ssl.com/wp-content/uploads/2020/10/8-1220\\_bach\\_c\\_committee\\_final\\_3.pdf](https://3inbm04c0p4j2h1w132uyb5e-wpengine.netdna-ssl.com/wp-content/uploads/2020/10/8-1220_bach_c_committee_final_3.pdf); Testimony of Amy Bach on COVID-19 Related Business Interruption Claims, Coverage Issues, Disputes and Litigation, Summer National Meeting, Consumer Liaison Committee, August 14th, 2020, [https://content.naic.org/sites/default/files/national\\_meeting/Version%20%20-%20Slideshow%20-%20Consumer%20Liaison%20Cmte%20-%2008.14.20.pdf](https://content.naic.org/sites/default/files/national_meeting/Version%20%20-%20Slideshow%20-%20Consumer%20Liaison%20Cmte%20-%2008.14.20.pdf).

<sup>2</sup> Richard P. Lewis *et al.*, Here We Go Again: Virus Exclusion for COVID-19 and Insurers, NU PROP. CASUALTY 360 (Apr. 7, 2020), <https://www.propertycasualty360.com/2020/04/07/here-we-go-again-virus-exclusion-for-covid-19-and-insurers/?slreturn=20200927114442>.

related losses to justify not reducing rates when they added virus exclusions after the outbreak.

UP chooses cases cautiously and appears as *amicus curiae* nationwide. UP's briefs provide a counterweight to the claims of the insurance industry and facilitate evenhanded development of the law. UP has filed *amicus* briefs in federal and state courts across 42 states and in over 450 cases. Its briefs have been cited in the opinions of multiple state supreme courts as well as the U.S. Supreme Court.<sup>3</sup> UP has weighed in on important insurance issues in matters before Courts in the District of Columbia.<sup>4</sup>

In this brief, UP seeks to fulfill the classic role of *amicus curiae*, supplementing the efforts of counsel and drawing the Court's attention to law that might otherwise escape consideration. Its commitment to advocating for policyholders during the pandemic has been vital. As commentators have stressed, an *amicus* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggman & S. Shapiro,

---

<sup>3</sup>See *Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Sproull v. State Farm Fire & Cas. Co.*, 2021 IL 126446 (Ill. Sep. 23, 2021); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 105 A.3d 1181, 1185-6 (Pa. 2014).

<sup>4</sup> See, e.g., *Nationwide Mutual Ins. v. Richardson*, Slip Op. No. 01-SP-1451 (D.C. June 12, 2003); *Rose's 1, LLC v. Erie Ins. Exch.*, 290 A.3d 52 (D.C. 2023).

*Supreme Court Practice*, 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).

### **PRELIMINARY STATEMENT**

*Amicus Curiae* UP respectfully submits this *amicus curiae* brief in support of Plaintiffs-Appellants Creative Consolidation, LLC et al. (the “Restaurants”).

The spread of SARS-CoV-2 throughout the District of Columbia and the Commonwealth of Virginia caused physical loss or damage to property that is covered by insurance. Businesses, such as the Restaurants, were habitable and safe for their ordinary and intended use before the pandemic, but became unsafe and unusable due to the infiltration of SARS-CoV-2, which results in the COVID-19 disease. The inability of the Restaurants to use their property as intended due to a physical infiltration outside of their control is the exact type of “physical loss or damage” to property that they purchased their “all-risk” insurance policies (the “Policies”) to address.

The Restaurants clearly alleged that they sustained significant business interruption losses due to physical loss or damage caused by SARS-CoV-2. Nevertheless, Erie denied the Restaurant’s claims, mainly on the grounds that SARS-CoV-2 and COVID-19 do not cause “physical loss or damage” as required to trigger coverage. UP makes submissions on two points to aid this Court in evaluating this important issue.

First, UP submits that this Court should not be swayed by the insurance industry's cries that paying claims for loss and damage from the presence of SARS-CoV-2 will wreck the insurance industry. Reversal does not threaten the stability of Erie or other insurance companies. In fact, the insurance industry historically has *profited* from crises like Superstorm Sandy, Hurricane Katrina and other large-scale events. It has made money off the pandemic already. Although insurance companies have enjoyed the benefit for years of the premiums that the Restaurants and other policyholders paid for their policies, they are using the pandemic to extract steep premium *increases* from their customers. And they are extracting these premium increases even as they refuse to pay pandemic-related claims. Insurance companies are crying "wolf" when they claim that they could go bankrupt if there is coverage for COVID-related losses under property policies sold without virus exclusions. This Court should not be cowed by such inaccuracies, which have no place in evaluating the terms of the insurance that Erie sold.

Second, UP submits that this Court should not be misled by the industry's lobbyists' gross overstatement of the cost of honoring the promises made to cover pandemic business interruption claims by purposely failing to distinguish those policies which contain virus exclusions from those that were sold *without* virus exclusions. This Court already has acknowledged the potential for coverage under policies without virus exclusions where the policyholder alleges that the SARS-

CoV-2 virus has infiltrated their properties. This is precisely the situation presented here.

UP respectfully urges this Court to achieve the interests of justice by reversing the ruling.

### **ARGUMENT**

#### **I. The Court Should Not Be Distracted by Cries of “Wolf” from the Insurance Industry.**

At times of crisis, insurance companies are quick to argue that they could be forced into bankruptcy if they have to pay claims. For thirty years, insurance companies skewed the analysis of environmental coverage by convincing courts to relieve them from their contractual obligations on such grounds. For example, insurance representatives alleged that the costs of clean-ups arising from the strict liability environmental statute, CERCLA, would be five times their total “surplus” and could ruin the industry. *See Insurer Liability for Cleanup Costs of Hazardous Waste Sites*, No. 101-175 (101st Cong., 2d Sess., Sept. 27, 1990) (Committee on Banking, Finance, and Urban Affairs), pp. 18-29 and 75-76. Although the industry was held accountable for many such clean-ups, the collapse never arrived.

In response to the pandemic, insurance companies are crying “wolf” again. Insurance industry trade associations repeatedly have asserted in *amicus* briefs in

COVID-19 cases that findings of coverage will bankrupt the industry.<sup>5</sup> Industry lobbyists waved these assertions before this Court in *Rose’s 1, LLC v. Erie Ins. Exch.*, 290 A.3d 52 (D.C. 2023) (“Rose’s 1”) and are likely to do so again in the present appeal.

Ironically, the reverse is true. The pandemic has proved very *profitable* for insurance companies – one of the few industries able to make such a claim. To the knowledge of UP, *not one* insurance company has entered insolvency due to the pandemic. Instead, insurance companies have enjoyed enormous windfalls. For example, in July 2020, Progressive Insurance Company “boasted about an 83% year over year increase in net income” which works out to about \$800 million per quarter.<sup>6</sup> Chubb Limited reported net income of \$1.19 billion in its third quarter, in 2020 – up 9.4%, or \$100 million, from the year before.<sup>7</sup> CNA Insurance

---

<sup>5</sup> See, e.g., Eli Flesch, “Trade Group Tells 1st Cir. Eateries Not Owed Virus Coverage” Law360.com (Sept. 15, 2021), <https://www.law360.com/insuranceauthority/property/articles/1422231/trade-group-tells-1st-circ-eateries-not-owed-virus-coverage>.

<sup>6</sup> Richard Holober, *Progressive Insurance Hoards Covid-19 Windfall Profits*, Consumer Federation of California (Aug. 13, 2020), [https://uphelp.org/wpcontent/uploads/2021/02/cfc\\_progressive.pdf](https://uphelp.org/wpcontent/uploads/2021/02/cfc_progressive.pdf).

<sup>7</sup> Claire Wilkinson, *Chubb reports gains in Q3 profit, net premium written*, BUSINESS INSURANCE (Oct. 28, 2020), <https://www.businessinsurance.com/article/20201028/NEWS06/912337411/Chubb-reports-gains-in-Q3-profit,-netpremium-Written>.

reported a \$106 million increase in net income in the same period.<sup>8</sup> W.R. Berkley Corporation reported a massive 161% increase in its fourth quarter, in 2020.<sup>9</sup>

Despite not paying any COVID-19 related business interruption claims, insurance companies significantly *increased* their rates in 2020 across all lines of business. One large broker reported that 89% of its clients saw a rate increase for their property insurance – the “highest number recorded since the early 2000s.”<sup>10</sup> From April through June 2020, property insurance rates spiked by 22%.<sup>11</sup> Insurance companies ratcheted up prices again between July and September, with a total increase of 24% for commercial property coverage.<sup>12</sup> From October to

---

<sup>8</sup> Angela Childers, *CNA Reports Higher Net Income Despite Cat Losses*, BUSINESS INSURANCE (Nov. 2, 2020), <https://www.businessinsurance.com/article/20201102/NEWS06/912337508/CNA-reports-higher-net-income-despite-cat-losses>.

<sup>9</sup> J. Greenwald, *Berkley Reports 161% Jump in Profits*, BUSINESS INSURANCE (Jan. 26, 2021), <https://www.businessinsurance.com/article/00010101/NEWS06/912339367/Berkley-reports-161-jump-in-profits>.

<sup>10</sup> Matthew Lerner, *Most Policyholders See Rate Hikes Across Multiple Lines*, BUSINESS INSURANCE (Oct. 26, 2020), <https://www.businessinsurance.com/article/20201026/NEWS06/912337341/Most-policyholders-see-rates-hikes-acrossmultiple-lines-Arthur-J-Gallagher-Re>.

<sup>11</sup> Matthew Lerner, *U.S. Commercial Property Pricing up 22% in Q2*, BUSINESS INSURANCE (Aug. 10, 2020), <https://www.businessinsurance.com/article/00010101/NEWS06/912336034/US-commercial-property-pricing-up-22-in-Q2>.

<sup>12</sup> Claire Wilkinson, *Insurance Prices Increased Sharply in Third Quarter*,  
(footnote continued)

December 2020, premiums increased another 20%.<sup>13</sup> In late 2020, property insurance companies told consumers to expect increases of 15% to 25% in 2021.<sup>14</sup> While the pandemic has been very profitable for the entire industry, insurance companies shamelessly wave the threat of bankruptcy as a reason for refusing to pay claims under policies sold without virus exclusions.

The practice of using catastrophes to increase profits has been a cornerstone of the insurance playbook for decades. *See* J. Robert Hunter, THE INSURANCE INDUSTRY’S INCREDIBLE DISAPPEARING WEATHER CATASTROPHE RISK: HOW INSURERS HAVE SHIFTED RISK AND COSTS ASSOCIATED WITH WEATHER CATASTROPHES TO CONSUMERS AND TAXPAYERS (Consumer Federation of America, Feb. 17, 2012), Exhibit 13, at p. 1 (“industry data demonstrates that insurers have significantly and methodically decreased their financial

---

BUSINESS INSURANCE (Nov. 5, 2020), <https://www.businessinsurance.com/article/00010101/NEWS06/912337590/Insurance-prices-increased-sharply-in-thirdquarter-Marsh>.

<sup>13</sup> Matthew Lerner, *Global Prices Rise 22% in Q4: Marsh*, BUSINESS INSURANCE (Feb. 4, 2021), <https://www.businessinsurance.com/article/20210204/NEWS06/912339588/Global-prices-rise-22-in-Q4-Marsh-Global-Insurance-Market-Index>.

<sup>14</sup> Judy Greenwald, *Continued Rate Increases Expected: Willis*, BUSINESS INSURANCE (Nov. 19, 2020), <https://www.businessinsurance.com/article/2020119/NEWS06/912337904/Continued-rate-increases-expected-Willis-Towers-Watson>.



responsibility for [catastrophic] events in recent years and shifted much of this risk to consumers and taxpayers. . . . most of these savings have been achieved by hollowing out the coverage in homeowners' insurance policies and raising rates”).

The enormous profits that insurance companies are reaping from the pandemic show that nothing has changed.

## **II. The Insurance Industry Grossly Overstates the Cost of Honoring the Promises Made in Policies *Without* Virus Exclusions.**

In addition to falsely and deceptively asserting that coverage of pandemic business interruption cases would bankrupt the industry, the industry trade associations have grossly overstated the cost of honoring the promises made in policies *without* virus exclusions. The industry has touted false and deceptive statistics regarding the potential costs of pandemic claims – while purposely omitting that 83% of policies contain virus exclusion that have been deemed to insulate insurance companies from any such obligations.

Importantly, this means that only 17.17% of policies – those *without* virus exclusions such as the Policies at issue here – sold by the insurance industry are even potentially accountable for paying pandemic claims. Notably, in *Rose's I*, this Court acknowledged of the possibility of coverage in cases where the policies at issue do *not* contain virus exclusion and the policyholder makes direct allegations of the presence of SARS-CoV-2 on the premises. *See Rose's I*, 290 A.D.3d at 63-64.

Significantly, the *amicus* efforts by the insurance industry in COVID-19 cases – such as in *Rose’s I* – gloss over the differences between policies with virus exclusion and those without. For example, insurance lobbyists quoted an NAIC press release stating that “[b]usiness interruption policies were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19.” See Br. of the American Property Casualty Insurance Association and National Association of Mutual Insurance Companies as Amicus Curiae, p. 7-8, *Rose’s I*, 290 A.3d 52 (D.C. 2023) (filed November 30, 2020) (hereinafter the “Insurance Industry Brief”). The quote inaccurately *excluded* the remainder of the sentence stating “. . . and therefore include exclusions for that risk” – which changes the meaning entirely. Compare *id.* with NAIC Statement on Congressional Action Relating to COVID-19 (Mar. 25, 2020), <https://www.campbell-bissell.com/wp-content/uploads/2020/04/NAIC-Statement-on-Congressional-Action-Relating-to-COVID-19.pdf> (stating “[b]usiness interruption policies were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19 *and therefore include exclusions for that risk.*”) (emphasis added).

Likewise, the American Property Casualty Insurance Association (“APCIA”) misleadingly cited an April 28, 2020 statement to support its assertion that it would be unaffordable for the insurance industry to cover small business

losses from the pandemic. That statement merely says that business interruption insurance policies “do not *typically* cover losses related to viruses.” *Compare* Insurance Industry Brief at p. 9 with APCIA Releases Update to Business Interruption Analysis (Apr. 28, 2020), <https://www.apci.org/media/news-releases/release/60522/> (emphasis added). It does not say that the 17% of policies *sold without virus exclusions* do not cover these losses (because they do).

Indeed, insurance companies paid claims for business interruption losses due to the Asian SARS-CoV-1 outbreak in 2003-2004 under policies that also promise coverage for “physical loss or damage” yet were sold before the advent of virus exclusions.<sup>15</sup> Payment of such losses was consistent with judicial decisions affirming coverage for losses involving property that was not permanently damaged but could not be used in a normal way because of perils such as smoke, ash, soot, charring, and pathogenic material.<sup>16</sup> While there often were disputes

---

<sup>15</sup> See Gavin Souter, “Hotel Chain to get Payout for SARS-Related Losses”, BUSINESS INSURANCE, Nov. 2, 2003, <https://www.businessinsurance.com/article/20031102/story/100013638/hotel-chain-to-get-payout-for-sars-related-losses>.

<sup>16</sup> In chronological order: *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App’x 823, 824, 826–27, 824–26 (3d Cir. 2005) (E. coli); *De Laurentis v. United Servs. Auto. Ass’n*, 162 S.W.3d 714, 722-23 (Tex. App. Mar. 31, 2005) (finding mold damage constituted “physical loss to property”); *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, No. 603009/2002, 2005 WL 600021, at \*4 (N.Y. Supr. Mar. 16, 2005) (finding that “the presence of noxious particles, both in the air and on surfaces of the plaintiff’s premises, would constitute property damage under the terms of the policy”); *Cook v. Allstate Ins. Co.*, No. 48D02-0611-PL-01156, 2007 Ind. Super.

(footnote continued)

over the method and cost of restoring the property via cleaning or other remediation and the length of time necessary for the return to normal, it was accepted that “physical loss or damage” had triggered coverage.

A June 2020 analysis by Reuters confirms that the enormous cost estimates touted by the APCIA and other insurance industry lobbyists are inflated. *See* Alwyn Scott and Suzanne Barlyn, “U.S. insurers use lofty estimates to beat back coronavirus claims” REUTERS BUSINESS NEWS (June 12, 2020) (available at [https://www.reuters.com/article/us-health-coronavirus-insurance-claims-a/u-s-insurers-use-lofty-estimates-to-beat-back-coronavirus-claims -idUSKBN23J0T6](https://www.reuters.com/article/us-health-coronavirus-insurance-claims-a/u-s-insurers-use-lofty-estimates-to-beat-back-coronavirus-claims-idUSKBN23J0T6)).

---

LEXIS 32, at \* slip op. at 9-10 (Ind. Super. Ct. Madison County Nov. 30, 2007) (finding that infestation of house with Brown Recluse Spiders constituted “sudden and accidental direct physical loss” to the house); *Brand Mgt., Inc. v. Maryland Cas. Co.*, No. 05-cv-02293, 2007 WL 1772063, at \*2 (D. Colo. June 18, 2007) (noting, where a sushi manufacturer which closed for 15 days to disinfect its premises after discovery of listeria contamination, the insurance company voluntarily paid the Business Income claim during that period); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co.*, No. 05-1315, 2007 WL 464715, at \*8 (D. Or. Feb. 7, 2007) (finding, where the policyholder’s heat treater for medical implants was contaminated by lead when a lead hammer was mistakenly left in it, this was “physical loss or damage”); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, No. 2:12-cv-04418, 2014 WL 6675934, at \*5-6 (D.N.J. Nov. 25, 2014) (concluding that “property can sustain physical loss or damage without experiencing structural alteration,” that “the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated,” and therefore that the ammonia discharge caused direct physical loss or damage to the plant); *Oregon Shakespeare Festival Ass’n v. Great Am. Ins. Co.*, No. 1:15-cv-01932-CL, 2016 WL 3267247, at \*5-6 (D. Or. June 7, 2016), vacated by joint stipulation, 2017 WL 1034203 (Mar. 6, 2017) (smoke from wildfires).

The statistics used by the insurance industry to persuade courts not to find coverage for pandemic losses are misleading. The threats they lob about the imminent breakdown of the entire industry if coverage is found are deceptive. As such, UP respectfully urges this Court to achieve the interests of justice by reversing the outcome-driven ruling and enforcing the insurance in accordance with its terms.

### **CONCLUSION**

For the reasons set forth above and in the Plaintiffs-Appellants' brief, UP respectfully requests that this Court reverse the Superior Court's decision.

Dated: May 25, 2023

Respectfully submitted,

**Rhonda D. Orin**  
**Anderson Kill LLP**  
1717 Pennsylvania Avenue N.W.  
Washington, D.C. 20006  
(202) 416-6549  
[Rorin@andersonkill.com](mailto:Rorin@andersonkill.com)

**Marshall Gilinsky**  
**Anderson Kill P.C.**  
1251 Avenue of the Americas  
New York, New York 10021  
(212) 278-1000  
[Mgilinsky@andersonkill.com](mailto:Mgilinsky@andersonkill.com)

*Counsel for Amicus Curiae  
United Policyholders*

## **CERTIFICATE OF COMPLIANCE**

In accordance with the Rules of the District of Columbia Court of Appeals, I certify that this brief: complies with all of the requirements of Rule 29, including the page limitation of 29(5) because it is fewer than 25 pages.

/s/ Marshall Gilinsky  
Marshall Gilinsky

## **CERTIFICATE OF SERVICE**

I certify that on May 25, 2023, the foregoing was filed using the Court's electronic filing system. All participants in the case are registered electronic filing users and will be served electronically via that system.

/s/ Marshall Gilinsky  
Marshall Gilinsky

# District of Columbia Court of Appeals

## REDACTION CERTIFICATE DISCLOSURE FORM

**Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a “CV” docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.**

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
  - An individual’s social-security number
  - Taxpayer-identification number
  - Driver’s license or non-driver’s’ license identification card number
  - Birth date
  - The name of an individual known to be a minor
  - Financial account numbers, except that a party or nonparty making the filing may include the following:
    - (1) the acronym “SS#” where the individual’s social-security number would have been included;
    - (2) the acronym “TID#” where the individual’s taxpayer-identification number would have been included;
    - (3) the acronym “DL#” or “NDL#” where the individual’s driver’s license or non-driver’s license identification card number would have been included;
    - (4) the year of the individual’s birth;
    - (5) the minor’s initials; and
    - (6) the last four digits of the financial-account number.



2. Any information revealing the identity of an individual receiving mental-health services.
3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.
4. Information about protection orders, restraining orders, and injunctions that “would be likely to publicly reveal the identity or location of the protected party,” 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining “protection order” to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).
5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.
6. Any other information required by law to be kept confidential or protected from public disclosure.



\_\_\_\_\_  
Signature

\_\_\_\_\_  
Marshall Gilinsky

Name

\_\_\_\_\_  
mgilinsky@andersonkill.com

Email Address

\_\_\_\_\_  
22-cv-950

Case Number(s)

\_\_\_\_\_  
05/25/2023

Date