ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appeal No. 23-7056

LINCOLN HOLDINGS LLC, *et al.*,

Plaintiffs-Appellants,

v.

FACTORY MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia, Case No. 21-cv-01971-RJL
(The Honorable Richard J. Leon)

[PROPOSED] BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLANTS AND REVERSAL

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CORRECTED [PROPOSED] BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLANTS AND REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The parties appearing before the District Court included Lincoln Holdings LLC, Lincoln Hockey LLC, Lincoln Mystics LLC, Washington Bullets L.P., DC Arena L.P., and Factory Mutual Insurance Company. No *amicus* appeared before the District Court.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellants.

C. Related Cases

This case was not before this Court or any other court. *Amicus curiae* United Policyholders is not aware of any related cases.

RULE 26.1 DISCLOSURE STATEMENT

Amicus curiae United policyholders is a private 501(c)(3) non-profit organization with no parent corporation, and no publicly held corporation owns any of its stock.

RULE 29(A)(4)(E) DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(E), a*micus curiae* United Policyholders states that no party or counsel for any party authored any portion of the accompanying *amicus curiae* brief, or made a monetary contribution intended to

fund the preparation or submission of the brief. No person or entity other than United Policyholders and its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

Date: September 13, 2023

/s/ Daniel Z. Herbst

/s/ John S. Vishneski III

Counsel for *Amicus Curiae*
United Policyholders

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INTRODUCTION

United Policyholders ("UP") submits this *amicus curiae* brief in support of Appellants. UP has a special interest in this litigation and can offer a unique perspective to the Court as it considers the issues raised by this case.

The nature of the arguments raised by Appellee Factory Mutual Insurance Company are sweeping in scope, and touch issues ubiquitous in similar litigation. Insurers, including Factory Mutual, have taken the improper position that because COVID-19 and SARS-Co-V-2 can be cleaned up, they cannot cause physical loss or damage. This is incorrect. That is especially true in this case, and many others where insurers including Factory Mutual have taken this untenable position, because the policies at issue explicitly provide property damage coverages for communicable diseases, including cleaning them up. The Memorandum Opinion (JA413–424) ignores long-standing precedent that harmful or noxious substances that are capable of being cleaned up can and do cause physical loss or damage. These cases, involving substances such as smoke, chemicals, asbestos and viruses, recognize that a building contaminated with an obnoxious, harmful, or deadly substance has been physically altered such that it is useless or at least less useful in serving the purpose for which it was built and designed. Proper application of these cases leads to the conclusion that Appellants sufficiently alleged physical loss or damage.

UNITED POLICYHOLDERS' INTEREST IN THIS CASE

The application of insurance contracts requires special judicial handling. Not only are insurance contracts adhesive in nature, which compels judicial balancing, but effectuating indemnification in case of loss is a fundamental economic and social objective that courts can advance. UP respectfully seeks to assist this Court in fulfilling these important roles.

UP is a non-profit, tax-exempt, charitable organization founded in 1991 that provides valuable information and assistance to the public on insurers' duties and policyholders' rights.

UP monitors developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in sales and claim practices. Grants, donations and volunteers support the organization's work. UP does not accept funding from insurance companies.

UP's work is divided into three program areas: Roadmap to Recovery™ (disaster recovery and claim help), Roadmap to Preparedness (disaster preparedness through insurance education), and Advocacy and Action (advancing pro-consumer laws and public policy through submission of amicus curiae). UP hosts a library of informational publications and videos related to personal and commercial insurance products, coverage and the claims process at www.uphelp.org.

State insurance regulators, academics, and journalists throughout the U.S. routinely engage with UP on issues impacting policyholders. UP's Executive Director, Amy Bach, Esq., has served as an official consumer representative to the National Association of Insurance Commissioners since 2009.

In furtherance of its mission, UP regularly appears as *amicus curiae* in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. UP's amicus brief was cited in the U.S. Supreme Court's opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999).

UP has been actively involved as *amicus curiae* in the District of Columbia since 2003 and submitted briefs in recent cases, including: *Creative Consolidation, et. al v. Erie Insurance Company*, 22-cv-950 (D.C. May 5, 2023); *Rose's 1, et al., v. Erie Insurance Exchange*, No. 20-cv-0535 (D.C. App. Ct. Nov. 3, 2020); *Nationwide Mutual Insurance Co. v. Antoinette Richardson*, NO. 01-SP-1451 (D.C. Ct of Appeals October 29, 2003).

UP seeks to fulfill the classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the Court's attention to law that may have escaped consideration. *Youming Jin v. Ministry of State Security*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008); *U.S. v. Philip Morris USA INC.*, 2005 U.S. Dist. LEXIS 64375, *22 (D.D.C. Sept. 1, 2005). As commentators stress, 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, *Supreme Court Practice*, 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 608 (1984)).

ARGUMENT

I. The Memorandum Opinion Contains Incorrect Statements About the Availability of Coverage for Property and Business Interruption Claims Where the Property Can Be Restored through Cleaning or Similar Measures

The Memorandum Opinion notes that the Amended Complaint included allegations about the "millions" Monumental Sports paid "to limit or reduce the spread of COVID-19 including installing (by installing Plexiglass barriers, modifying HVAC systems, etc.)" (JA415.) Citing another trial court case in the District of Columbia, the Court noted that another court had held that, because COVID-19 is a virus that "can be cleaned," it does not "plausibly cause[] long-lasting damage" that is needed to establish "physical loss or damage." (JA421) (quoting *The George Washington Univ. v. Factory Mut. Ins. Co*., 2022 WL 4078942, at *5-6 (D.D.C. Sept. 6, 2022). Citing another case, this time from the District of Connecticut, the opinion states it agrees that "virus particles lingering in the air and on interior surfaces can be sanitized with household cleaners, attachment of the particle does not constitute "physical loss or damage." (*Id.*) (citing *ITT Inc. v. Factory Mut. Ins. Co.*, 2022 WL 1471245, at *11 (D. Conn. May 10, 2022). Even if

these statements are correct, that does not eliminate coverage for "physical loss or damage" as discussed below.

A. The Ruling Ignores that Coverage Exists, Even Where Harm Can Be Remediated Through Cleaning or Similar Measures

Before the COVID-19 pandemic, policyholders routinely submitted uncontested claims seeking coverage for expenses and lost business income where cleaning or other measures were the only repairs but where the property had been neither lost nor destroyed. In these instances, the insurers acknowledged that the peril can cause physical loss or damage to property despite only needing to be wiped off, cleaned, or in some other way remediated and the insurers disputed only the method and cost of removing the peril from the property and the appropriate period of restoration.

Insurance companies typically pay without issue claims involving simple remedial measures like "sanitiz[ing] with household cleaners" – for instance storm damage claims frequently involve basic cleaning measures like sand and mud removal. Where water has been contaminated, insurers commonly pay the costs of running that water through filtration systems. *See, e.g., Cooper & Olive Indus. v. Travelers Indem. Co.*, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002) (policyholder could claim business income and losses from *E. coli* contamination of well).

Insurers also regularly pay for claims involving smoke, volcanic ash, asbestos, mold, and the like. For instance, Maryland Casualty Company voluntarily paid a sushi manufacturer's Business Income claim for the entire fifteen-day period it had to shut down to decontaminate its premises following discovery of listeria contamination. *Brand Mgt., Inc. v. Maryland Cas. Co*., 2007 WL 1772063, at *2 (D. Colo. June 18, 2007).

Where insurers do not pay voluntarily, courts routinely find coverage. Residue from manufacturing methamphetamine can be cleaned, but courts find it causes physical loss or damage. In *Western Fire Insurance Company v. First Presbyterian Church*, the Colorado Supreme Court awarded the insured the costs to remediate infiltration and contamination when a gasoline release in the soil beneath the church infiltrated the building. 437 P.2d 52, 55 (Colo. 1968). In *Farmers Insurance Company v. Trutanich*, the court rejected the insurance company's argument the cost of removing an offensive odor was not a "direct physical loss," stating "[t]here is evidence that the house was physically damaged by the odor that persisted in it," "the odor produced by the methamphetamine lab had infiltrated the house," and "[t]he cost of removing that odor was a direct rectification of the problem." 858 P.2d 1332, 1335 (Ore. App. 1993).

Similarly, courts routinely find that asbestos fibers and lead—both of which can be cleaned up—cause property loss or damage. For example, in *Board of*

Education of Township High School District No. 211 v. International Insurance Company, the court found that property infiltrated by asbestos fibers had sustained a direct physical loss and "had been contaminated to the point where corrective action . . . [had] to be taken." 720 N.E.2d 622, 601-02 (Ill. Ct. App. 1999). *See also, e.g. Port Authority of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (finding that property sustained a direct physical loss because it was rendered uninhabitable by the presence of asbestos fibers); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co*., 563 N.W.2d 296, 298–00 (Minn. Ct. App. 1997) (finding a direct physical loss, and thus coverage, for apartment buildings that had been rendered uninhabitable by asbestos fibers within the buildings); *Yale Univ. v. CIGNA Ins. Co*., 224 F. Supp. 2d 402 (D. Conn. 2002) (asbestos and lead contamination constituted direct physical loss).

Many other cases confirm that harmful substances which can be "cleaned up," remediated or otherwise removed cause physical loss or damage. *See, e.g., Am. All. Ins. Co. v. Keleket X-Ray Corp*., 248 F.2d 920, 925 (6th Cir. 1957) (contamination of property with radioactive dust and radon gas caused physical loss and damage); *Port Auth. v. Affiliated FM Ins. Co*., 311 F.3d 226, 236 (3d Cir. 2002) (release of asbestos-containing materials causes physical loss or damage); *In re Chinese Manufactured Drywall Prod. Liab. Litig.*, 759 F. Supp. 2d 822, 831 (E.D. La. 2010) ("the presence of Chinese-manufactured drywall in a home constitutes a physical

loss"); *Arbeiter v. Cambridge Mut. Fire Ins. Co*., 1996 Mass. Super. LEXIS 661 (Mass. Super. Ct., Mar. 15, 1996) (presence of oil fumes in a building constituted a "physical loss" to the building); *Mellin v. Northern Sec. Ins. Co*., 115 A.3d 799, 806 (N.H. 2015) (pervasive odor of cat urine was "physical loss" to condominium); *Essex Ins. Co. v. Bloomsouth Flooring Corp*., 562 F.3d 399, 406 (1st Cir. 2009) (pervasive odor from installed carpet "can constitute physical injury to property"); *Columbiaknit v. Affiliated FM Ins. Co.*, 1999 U.S. Dist. LEXIS 11873, *16-19 (D. Or. 1999) ("direct physical loss" found where there was a strong, pervasive, noxious odor caused by mold); *Matzner v. Seacoast Ins. Co*., 1998 WL 566658 (Mass. Super. Ct. August 12, 1998) (building with unsafe levels of carbon monoxide from a chimney blockage by an old galvanized pipe sustained a direct physical loss).

The common conclusion of these cases is that the presence of harmful, noxious or irritating substances like odors, smoke, asbestos or viruses, constitutes physical loss or damage because the presence of these substances physically renders the property dangerous to use unless and until the harmful physical particles are removed from the premises. Some courts focus on whether a particular surface will be physically altered by COVID and conclude that no physical damage has occurred where the surface is undamaged after cleaning. This is to miss the forest for the trees. The forest here is that the presence of noxious physical particles makes the whole structure physically dangerous to use. The fact that such particles may (or may not)

be easily cleaned is of no matter – they must be cleaned to be safe to use, and that cost plus the time the structure cannot be used is the measure of the loss. That it is easy or inexpensive to repair damaged property does not mean that the property has not suffered physical loss or damage; indeed, the need to clean or disinfect evinces the existence of physical loss or damage.

B. The Ruling Ignores that Coverage Exists, Even Where Harm Can Be Remediated Through Natural Measures, Even Without Being "Cleaned Up"

Judicial decisions are not limited to occasions when the policyholder must do something to remediate. In fact, even where no cleaning is needed, but the noxious substance dissipates on its own and clears by natural action, courts have routinely found coverage. Smoke can cause property damage even when it does not need to be cleaned up.

In *Oregon Shakespeare Festival Association v. Great American Insurance Company*, the court held that an open-air theater that cancelled performances due to smoke particulates in the air from a nearby forest fire that posed a health risk to actors and audience had sustained a "physical" loss even though only the air had been affected and the theater itself was undamaged and only had to suspend performances until the smoke dissipated. 2016 U.S. Dist. LEXIS 74450, at *13-15 (D. Or. June 7, 2016), *vacated as a condition of settlement*, 2017 U.S. Dist. LEXIS 33208 (D. Or. 2017).

Similarly, in *Schlamm Stone & Dolan, LLP v. Seneca Insurance Company.*, the policyholder alleged that dust, soot and smoke following the 9/11 attacks affected its operations for the rest of September. 2005 WL 600021 (N.Y. Supr. Mar. 16, 2005). The court held that noxious particles inside insured premises – in the air and on surfaces – constituted property damage. 2005 WL 600021, at *4-5.

In another case, *Gregory Packaging, Inc. v. Travelers Property Casualty Company*, a plant was evacuated for a week following a large ammonia release. 2014 WL 6675934, at *5-6 (D.N.J. Nov. 25, 2014). The court concluded 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. 2014 WL 6675934, at *5-6 (D.N.J. Nov. 25, 2014). This holding was necessitated by the court's finding that until the ammonia dissipated the plant was "physically unfit for normal human occupancy and continued use." 2014 WL 6675934, at *2–*3.

In *In re Chinese Manufactured Drywall Products Liability Litigation*, Chinese drywall was emitted sulfur gases causing foul odors. 759 F. Supp. 2d 822 (E.D. La. 2010). The court found that there "exists a covered physical loss" where "potentially injurious material" is "activated, for example by releases gases or fibers." 759 F. Supp. 2d at 831. The court concluded "that the presence of Chinese-manufactured

drywall in a home constitutes a physical loss." *Id.* at 831. (citing *Travco Ins. Co. v. Ward*, 2010 WL 2222255, at *8-*9 (E.D. Va. June 3, 2010)).

All these cases – those requiring clean-up and those not requiring clean-up – lead to one inevitable conclusion: the mere fact that a noxious or dangerous substance can be remediated or cleaned (even easily – though that is highly disputable regarding COVID-19) does not and cannot mean it does not cause covered physical loss or damage.

C. The Ruling Ignores That the Communicable Disease Coverage Explicitly Recognizes that Communicable Disease Can (and Does) Cause Physical Loss or Damage, and that Clean-Up Is a Covered Cost

Factory Mutual's Policies in this case include Communicable Disease, Communicable Disease Response and Interruption by Communicable Disease coverages (JA414, JA 416.) The District Court's conclusion that *because* the novel coronavirus can be cleaned up it *cannot* cause physical loss or damage" is wholly at odds with policies, like Factory Mutual's, explicitly recognizing that communicable diseases like COVID-19 ***do*** cause property damage and that the insurer will pay the costs of cleaning up such damage. Indeed, these coverages appear in the "Property Damage" section of the policies, and are frequently described as providing "additional Coverage[] for insured ***physical loss or damage***" and states that the carrier will pay for "***cleanup***, removal and disposal" in the event that Communicable

Disease is present at an insured location. (JA416–417; *see also* JA100, JA106, JA188, JA194.)

The policy's explicit recognition that Communicable Disease coverage ***is*** coverage for physical loss or damage and that the carrier will pay for the "cleanup" of such physical loss or damage dooms this argument.[1] Nowhere does the policy at issue here—or in fact any policy UP is aware of—provide that damage must be permanent or incapable of being cleaned up in order to constitute property damage. In fact, this policy provides quite the opposite, explicitly providing a form of "Property Damage" coverage for cleanup of Communicable Diseases, like COVID-19.

CONCLUSION

Factory Mutual's policy language and cases before the pandemic confirm that the physical loss and damage caused by COVID-19 and SARS-Co-V-2, even though it is capable of being "cleaned up" is covered. The district court overlooked the policy language that explicitly recognizes that something that can be cleaned up can

[1] Even did the policy at issue here not provide express Communicable Disease coverage, insurer arguments based on the ability to remediate SARS-CoV-2 essentially must concede that it causes physical loss or damage. In fact, what they are contesting is the scale of the repair costs and the length of the Period of Restoration. If a claim truly is minor, it will fall within the deductible, self-insured retention or the policy's waiting period. Even if the costs of repair are small and the Period of Restoration is short, Business Income coverage is triggered by physical loss or damage.

and does cause physical loss or damage and large body of case law holding that things that can be cleaned up (and even things that will dissipate on their own without any action by the policyholder) are covered as causing physical loss or damage. This skewed its construction toward an incorrect conclusion that it used to deny coverage. Had it properly considered the language and case law, then it would have found that the allegations here were sufficient to state a claim for coverage.

September 14, 2023,

Respectfully submitted,

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/s/ John S. Vishneski III
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B) and D.C. Circuit Rule 29 (a)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 2,878 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Date: September 14, 2023

/s/ Daniel Z. Herbst

/s/ John S. Vishneski III

Counsel for *Amicus Curiae* United Policyholders

CERTIFICATE OF SERVICE

I, Daniel Z. Herbst, an attorney, hereby certify that, pursuant to Fed. R. App. P. 25(d) and Cir. R. 25(a), on September 14, 2023, I caused the Corrected Proposed Brief of Amicus Curiae United Policyholders to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

/s/ Daniel Z. Herbst

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September 13, 2023