No. S278481

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JOHN'S GRILL, INC. et al.,

Plaintiffs - Appellants - Respondents,

v.

THE HARTFORD FINANCIAL SERVICES GROUP, INC. et al.,

Defendants – Respondents - Petitioners.

After a Decision by the Court of Appeal
First Appellate District, Division Four,
Case No. A162709

APPLICATION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENTS JOHN'S GRILL, INC. AND JOHN KONSTIN

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rule of Court 8.520(f), United Policyholders ("UP") respectfully applies for this Court's permission to file the accompanying *amicus curiae* brief in support of Respondents John's Grill, Inc. and John Konstin (collectively, "John's Grill") in their pending appeal against Petitioners The Hartford Financial Services Group, Inc. and Sentinel Insurance Co., Ltd. (collectively, "Sentinel").

RULE 8.520(f)(4) DISCLOSURE

Consistent with California Rule of Court 8.520(f)(4), UP states that no party or any counsel for any party authored this *amicus curiae* brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than UP and its counsel made a monetary contribution to fund the preparation or submission of the brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

UP is a highly respected national non-profit section 501(c)(3) organization. Founded in 1991, UP has served as a voice for the interests of insurance consumers across the country for more than 30 years. UP is funded by donations and grants and does not sell insurance or accept money from insurance companies.

Individual policyholders routinely call upon UP for help in the wake of large-scale national disasters such as hurricanes in the Gulf of Mexico and across the Eastern Seaboard; floods and

windstorms in the Midwest; wildfires in the West; and, most recently, the COVID-19 pandemic.

Indeed, since the pandemic began in 2020, UP has assisted business owners whose operations have been affected by the COVID-19 virus, exposure concerns, and resulting civil authority orders. UP has educated policyholders on COVID-19 insurance issues and maintains a library of resources at uphelp.org/COVID. UP also routinely engages in nationwide efforts to educate the public, governmental agencies, legislators, and the courts on policyholders' insurance rights. Grants, donations, and volunteers support UP's work in three program areas: Roadmap to Recovery, Roadmap to Preparedness, and Advocacy and Action.

Public officials, state insurance regulators, academics, and journalists throughout the U.S. routinely seek UP's input on insurance and legal matters. A representative of 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 since 2009. In these roles, UP assists regulators in monitoring policy language and claim practices through presentations and collaboration, and the development of model laws and regulations.

Since 1991, UP has filed numerous *amicus curiae* briefs in federal and state appellate courts across the country that seek to uphold the indemnity function of insurance. The United States

Supreme Court, the California Supreme Court, and other state supreme courts have cited UP's *amicus curiae* briefs in their opinions. *See, e.g.*, *Humana Inc. v. Forsyth* (1999) 525 U.S. 299, 314 (favorably citing UP's *amicus* brief); *Pitzer Coll. v. Indian Harbor Ins. Co.* (2019) 8 Cal.5th 93, 104–105 (same); *Ass'n of Cal. Ins. Cos. v. Jones* (2017) 2 Cal.5th 376, 382–383 (favorably citing UP studies).[1]

UP'S *AMICUS CURIAE* BRIEF WILL ASSIST THIS COURT IN DECIDING THIS MATTER

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

UP seeks to fulfill the "classic role of amicus curiae by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wahl Co. v. Comm'r of Labor & Indus.* (9th Cir. 1982) 694 F.2d 203, 204. As commentators have stressed, an *amicus curiae* is often in a superior position "to focus the court's attention on the broad implications of various possible

[1] A list of *amicus curiae* briefs filed by UP can be found at https://www.uphelp.org/resources/amicus-briefs.

rulings." Robert L. Stern et al., Supreme Court Practice 570–571 (6th ed. 1986) (citation omitted).

UP is familiar with all the briefs that have been previously filed in this appeal. UP has experience with the issues presented by this appeal, and it believes its experience will make its proposed brief of assistance to this Court. UP has an interest in ensuring that all policyholders receive the benefits of the insurance they have purchased.

CONCLUSION

UP respectfully asks the Court to grant this application and permit UP to file the accompanying *amicus curiae* brief in support of Respondent John's Grill.

DATE: December 21, 2023

Respectfully submitted,

COVINGTON & BURLING LLP

By: */s/ David B. Goodwin*
David B. Goodwin

Attorneys for Amicus Curiae United Policyholders

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[PROPOSED] *AMICUS CURIAE* BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF RESPONDENTS JOHN'S GRILL, INC. AND JOHN KONSTIN

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INTRODUCTION

Nearly 70 years ago, this Court held that a contract provision that effectively renders the express promises made in the contract illusory is unenforceable. *See Cal. Lettuce Growers v. Union Sugar Co.* (1955) 45 Cal.2d 474, 481. Petitioners do not dispute that the rule in *California Lettuce Growers* and its progeny applies to insurance policies, where it is often referred to as the "illusory coverage doctrine." Nor could they, as this Court has applied the doctrine to contracts of insurance. *See, e.g., Safeco Ins. Co. of Am. v. Robert S.* (2001) 26 Cal.4th 758, 765; *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 756, 760.

The underlying issue that this appeal presents instead is *when* coverage under an insurance policy is rendered illusory: only when, by virtue of a limiting provision, the insurance policy provides no coverage at all to anyone under any realistic scenario, as the Petitioner Sentinel argues, *see* Opening Br. at 39–44, or when a limiting provision eliminates an express grant of coverage to *the insured that purchased the policy*, as Respondent John's Grill contends and the Court of Appeal held in this case, consistent with longstanding California appellate authority.

As *Amicus Curiae* United Policyholders explains, the Court of Appeal's ruling is consistent not only with California precedent but also with rulings in many out-of-state cases that find promises in insurance policies to be illusory when an express grant of coverage is unavailable under "reasonably expected" circumstances. These courts recognize that the promise of coverage can be illusory even if the insurance policy has

limitations that do not *completely* eliminate the possibility of payment of some benefits but do eliminate the coverage that a reasonable insured would expect to receive. That the insurer can posit far-fetched circumstances in which the policy's insuring agreement might respond does not allow the insurer to avoid the doctrine.

For the reasons set forth below and in John's Grill's Answering Brief, this Court should affirm the judgment below in full. To the extent this Court concludes instead that the Court of Appeal erred in applying the illusory coverage doctrine to the record at the pleading stage, this Court should at least remand the case to allow John's Grill to conduct discovery as to whether the coverage provided by Sentinel is "virtually illusory." *Julian*, 35 Cal.4th at 756.

ARGUMENT

John's Grill, a prominent San Francisco restaurant, submitted a claim to its property insurer, Sentinel, for business income losses resulting from the COVID-19 pandemic. John's Grill sought coverage under the Sentinel policy's "Limited Fungi, Bacteria or Virus Coverage" endorsement, which expressly covers "loss or damage" caused by a "virus." *John's Grill, Inc. v. Hartford Fin. Servs. Grp., Inc.* (2022) 86 Cal.App.5th 1195, 1201, 1203 ("*John's Grill*"). Sentinel refused to pay, however, invoking language in the endorsement that limits coverage to a "virus" that results from one of the following "specified causes of loss": "Fire; lightning; explosion, windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action;

falling objects; weight of snow, ice or sleet; water damage." *Id.* at 1201, 1213, 1222.

Because viruses do not result from volcanic action, the weight of snow, falling objects, or the like, the Court of Appeal closely questioned Sentinel's counsel about the "Specified Causes Clause," asking counsel to identify instances in which the specified causes could result in a virus; but counsel could only come up with "oddball scenarios" that would not apply to a restaurant in San Francisco. *Id.* at 1223. Unsatisfied, the Court of Appeal then requested Sentinel to identify "a *realistic prospect* of John's Grill ever benefiting from the Limited Virus Coverage," as otherwise the Specified Causes Clause would render illusory the express coverage for "virus" that Sentinel had endorsed onto the policy. *Id.* at. 1222–1224 (emphasis added). But again, Sentinel could not identify anything other than an "exceedingly rare, even freakish" scenario in which a virus could be the result of one of the enumerated perils, so the Court of Appeal found the Specified Causes Clause illusory and declined to enforce it. *Id.* at 1222. As is discussed below, the Court of Appeal's reasoning is consistent with prior case law and with common sense.

I. The Decision Below Is Consistent With Established Law Applying The Illusory Coverage Doctrine.

Sentinel contends that the illusory coverage doctrine applies only if the insurance policy provision at issue would, if enforced, lead to "no coverage at all under the policy." Opening Br. at 29. Sentinel therefore urges this Court to limit application of the illusory coverage doctrine to instances in which "the contracting party can receive *no* potential benefit," when "strict

enforcement would mean no coverage whatsoever," and where "the *entire policy* (not a specific endorsement) provides no realistic coverage." *See id.* at 39, 41 n.6 (emphasis in original). In its reply, Sentinel contends in the alternative that the doctrine is inapplicable if the Limited Virus Coverage could provide material coverage in other circumstances or to other insureds. Reply Br. at 25–26, 30–32.

The Court of Appeal rejected Sentinel's position. *See John's Grill,* 86 Cal.App.5th at 1224 (finding the Limited Virus Coverage illusory because "Sentinel has not proffered enough to demonstrate a *realistic prospect* of John's Grill ever benefitting from the Limited Virus Coverage based on events the parties might *reasonably have anticipated* during the Policy period") (emphasis added). This Court should affirm.

A. An Insurer Cannot Enforce Limitations On Coverage That Would Render Promises In The Policy Illusory.

California courts construe insurance policies "to protect the objectively reasonable expectations of the insured . . . ." *Yahoo Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.* (2022) 14 Cal.5th 58, 67 (citation omitted). The illusory coverage doctrine provides part of that protection. It applies when a limitation on coverage in an insurance policy would deprive a policyholder of the coverage that a reasonable insured would expect to receive. *See Safeco*, 26 Cal.4th at 761, 764 (refusing to construe an "illegal act" exclusion to preclude coverage because doing so "would be so broad as to render the policy's liability coverage practically meaningless"); *Julian*, 35 Cal.4th at 756 (California courts reject

insurers' attempts to enforce "language that would have rendered the policies' coverage terms virtually illusory"); *Steven v. Fid. & Cas. Co. of N.Y.* (1962) 58 Cal.2d 862, 872 (the policy's "provision for substitute transportation did not clearly overcome the normal expectation that coverage would extend to *any reasonable form of substitute conveyance*") (emphasis in original); *Maryland Cas. Co. v. Reeder* (1990) 221 Cal.App.3d 961, 978 (exclusion does not apply to one of several property owners because doing so "would likely render the policy illusory *as to him*") (emphasis added); *De Bruyn v. Superior Court* (2008) 158 Cal.App.4th 1213, 1222 ("[A]pplication of such broad language in an exclusion might render illusory provisions that purport to cover other perils[.]").

California is not alone in adopting the illusory coverage doctrine. For example, *Western Reserve Mutual Casualty Co. v. Holland* (Ind.Ct.App. 1996) 666 N.E.2d 966 has explained that public policy disfavors illusory coverage and that courts will decline to apply policy language contrary to an insured's reasonable expectation. *Id.* at 968. The insurance policy at issue in *Western Reserve* provided uninsured motorists coverage where "(1) the tortfeasor had coverage; (2) the coverage was *less* than $25,000.00; and (3) the coverage was *not less* than $25,000.00." *Id.* (emphasis added). Because the language of the policy made it such that the policyholder "could never recover uninsured motorist proceeds," the court concluded that the coverage was "illusory" and that the policyholder was entitled "to receive his reasonable expectation" of $25,000.00 of underinsurance coverage. *Id.* In so holding, the court stressed that courts "'will

enforce [a] provision to give effect to the reasonable expectation of the insured.'" *Id.* (citation omitted).

Likewise, in *O'Connor v. Proprietors Insurance Co.* (Colo. 1985) 696 P.2d 282, the Colorado Supreme Court recognized that an exclusionary clause in an aircraft insurance policy that would bar coverage if an accident occurred while the aircraft was in violation of any FAA regulation would be unenforceable because such a provision would effectively eliminate coverage for a crash (since it would be unlikely for a plane crash to occur without a violation of at least one FAA regulation). *Id.* at 284–285. The court explained that enforcing such a clause as written "would in effect allow the insurer to receive premiums when realistically it is not incurring any risk of liability." *Id.* at 285.

And in *Mine Safety Appliances Co. v. AIU Insurance Co.* (Del.Super.Ct. Jan 22, 2016, No. N10C-07-241 MMJ) 2016 WL 498848, the court rejected an interpretation of an insurance policy that would have defeated the reason for purchasing the policy in the first place. In that case, a manufacturer of mine safety respiratory equipment sought coverage for claims made by miners injured by inhalation of coal dust while wearing the manufacturer's equipment. *Id.* at *4. When the insurer invoked the policy's pollution exclusion, the court held that "coal dust is not a pollutant excluded by the policy language" because "[a]ny other interpretation would render the coverage illusory." *Id.* The court went on to explain that "[t]o permit the Insurers to deny coverage under these circumstances would mean there could

never be coverage for any alleged failure or defect in the respiratory safety equipment manufactured by" the insured. *Id.*

Many other courts across the country similarly hold that insurance policies cannot be construed in a way that renders coverage illusory.[2]

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[2] *See, e.g.*, *Bethel v. Darwin Select Ins. Co.* (8th Cir. 2013) 735 F.3d 1035, 1040–1041 (applying Minnesota law; insurance policies "should, if possible, be construed so as not to be a delusion to the insured") (citation omitted); *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy* (S.C. 2012) 730 S.E.2d 862, 867 ("the literal interpretation of policy language will be rejected where its application would lead to *unreasonable* results and the definitions as written would be so narrow as to make coverage merely 'illusory'") (emphasis added); *Ile v. Foremost Ins. Co.* (Mich.Ct.App. 2011) 809 N.W.2d 617, 622, *rev'd on other grounds* (Mich. 2012) 823 N.W.2d 426 ("The 'doctrine of illusory coverage' encompasses a rule requiring an insurance policy to be interpreted so that it is not merely a delusion to the insured."); *Cincinnati Ins. Co. v. Am. Hardware Mfrs. Ass'n*, (2008) 387 Ill.App.3d 85, 112 (finding policy illusory where it "purports to provide coverage for intentional tort claims, and on the other hand…denies coverage for those same claims") (quoting *Hurst-Rosche Eng'rs v. Com. Union Ins. Co.* (7th Cir. 1995) 51 F.3d 1336, 1345); *Quadrant Corp. v. Am. States Ins. Co.* (Wash. 2005) 110 P.3d 733, 743 ("contracts must be construed to avoid rendering contractual obligations illusory"); *O'Brien v. Progressive N. Ins. Co.* (Del. 2001) 785 A.2d 281, 287 ("Contracts are to be interpreted in a way that does not render any provisions illusory") (citations omitted); *Emps. Mut. Ins. Co. v. Pires* (R.I. 1999) 723 A.2d 295, 299 ("we will apply the exclusion as written unless doing so would render illusory the coverage provided"); *Purrelli v. State Farm Fire & Cas. Co.* (Fla.Dist.Ct.App. 1997) 698 So.2d 618, 620) ("When limitations or exclusions completely contradict the insuring provisions, insurance coverage becomes illusory"); *Fid. & Guar. Ins. Underwriters v. Everett I. Brown Co., L.P.* (7th Cir. 1994) 25 F.3d 484, 490 ("Where an otherwise unambiguous insurance clause provides only illusory coverage

B. An Insurance Policy Does Not Cease To Be Illusory If The Insurer Can Come Up With An Oddball Scenario In Which Coverage Might Be Available.

Apart from the decision below, no California case has addressed whether an insurer can defeat the illusory coverage doctrine at the pleading stage by identifying an unrealistic hypothetical in which coverage might apply.[3] However, courts in other states have had occasion to expressly address, and reject, Sentinel's narrow view of the illusory coverage doctrine.

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when construed within the insurance contract in its entirety, the courts of this state will enforce the provision so as to give effect to the reasonable expectations of the insured.") (Indiana law) (citations omitted); *Lincoln Nat'l Health & Cas. Ins. Co. v. Brown* (M.D.Ga.1992) 782 F.Supp. 110, 112–113 (an insurance policy that provides coverage for specifically enumerated torts, but only if they are committed unintentionally, is "complete nonsense"); *Chaffin v. Ky. Farm Bureau Ins. Cos.* (Ky. 1990) 789 S.W.2d 754, 757 (finding that where coverage "is given" but "then taken away" by an exclusion, that "[i]n each instance the coverage bought, paid for and *reasonably expected* is illusory") (emphasis added).

[3] *Maryland Casualty Co. v. Reeder*, 221 Cal.App.3d at 965, 978, found coverage to be illusory as to one of five named insureds and declined to enforce an exclusion as to that person only, but it did so without specifically addressing the argument that Sentinel makes here, that the illusory coverage doctrine does not apply if there is *any* conceivable scenario (however unlikely) in which the insurance policy (or the relevant policy provision) might pay a claim.

1. The Illusory Coverage Doctrine Protects The Insured's Reasonable Expectations That The Insurance Policy Will Provide Meaningful Coverage To The Insured.

Sentinel contends that a "core purpose of an insurance policy is to *protect against harms* that may be unusual or unexpected." Reply Br. at 34 (emphasis added). At the same time, Sentinel ignores the distinction between a harm that occurs rarely (*e.g.*, a lightning strike) and a harm *that is so rare that its existence cannot even be conceived of* by a reasonable insured (*e.g.*, "pigs caught in windstorms"). *See John's Grill*, 86 Cal.App.5th. at 1224. By failing to distinguish between these two kinds of harms, Sentinel fails to confront the key point that the court below and courts in other states rightly recognize as critical: that reasonable insureds enter insurance agreements for the purpose of protecting themselves against reasonably expected harms, not harms that only occur in "oddball scenarios." *Id.* at 1223; *see also* Black's Law Dictionary (11th ed. 2019) (defining the "doctrine of illusory coverage" as a "rule requiring an insurance policy to be interpreted so that it is not merely a delusion to the insured").

As the decisions of other courts reflect, insurance becomes illusory when a limiting provision eliminates coverage for the very risks insured against "under any ***reasonably expected*** set of circumstances." *Fid. & Guar. Ins. Underwriters, Inc. v. Everett I. Brown Co.* (7th Cir. 1994) 25 F.3d 484, 490 (Indiana law) (citation omitted) (emphasis added); *see also Chase v. State Farm Fire & Cas. Co.* (D.C. 2001) 780 A.2d 1123, 1131, (policy may be illusory even though it provides "de minimis" coverage); *Haag v. Castro* (Ind. 2012) 959 N.E.2d 819, 824 ("Coverage under an

insurance policy is not illusory unless the policy would not pay benefits under any reasonably expected set of circumstances.") (citation omitted); *Hanover Ins. Co. v. Vemma Int'l Holdings* (D.Ariz. July 29, 2016, No. CV-16-01071-PHX-JJT) 2016 WL 4059606, at *8 ("A policy interpretation that would result in no payment of benefits under any reasonably expected circumstances—or 'render coverage null'—is illusory.").

Numerous cases have applied the illusory coverage doctrine to uphold the reasonable expectations of the policyholder and reject provisions that do not support a realistic prospect of coverage. They include:

- *Martinez v. Idaho Cntys. Reciprocal Mgmt. Program* (Idaho 2000) 999 P.2d 902, 906: Upholding the policyholder's reasonable expectation that an uninsured/underinsured motorist policy issued to a city includes coverage for automobile accidents involving the city's employees.
- *Pressman v. Aetna Cas. & Sur. Co.* (R.I. 1990) 574 A.2d 757, 760: Upholding the policyholder's reasonable expectation that a power-interruption policy includes coverage for power outages caused by interruptions to an external power line.
- *Davidson v. Cincinnati Ins. Co.* (Ind.Ct.App. 1991) 572 N.E.2d 502, 508: Upholding the policyholder's reasonable expectation that express coverage for personal injury occurrences (including malicious

prosecution, libel, slander, and defamation) includes intentional malicious prosecution.[4]

- *Piper v. Nitschke's N. Resort Condo. Owner's Ass'n* (Wis.Ct.App. 2009) 777 N.W.2d 677, 680: Upholding the policyholder's reasonable expectation that a defective title insurance policy issued to a real estate developer includes coverage for units listed on the real estate developer's condominium declaration.

[4] *Downey Venture v. LMI Insurance Co.* (1998) 66 Cal.App.4th 478 also addressed an express grant of coverage for malicious prosecution, but the court did not address the illusory coverage doctrine. Instead, the insured argued in that case that the insurer should be estopped from denying coverage or had engaged in promissory fraud because the statutory exclusion in Insurance Code section 533 for "wilfull" injuries eliminated the express promise in the policy of coverage for "malicious prosecution" claims. The Court of Appeal rejected the argument, explaining that the coverage grant "for 'malicious prosecution' was hardly an empty or illusory promise" since the insurance policy would still (a) owe a duty to defend against malicious prosecution claims (section 533 only applies to the duty to indemnify) as well as (b) a duty to indemnify against (i) the insured's vicarious liability for malicious prosecution (section 533 does not apply to vicarious liability) and against (ii) malicious prosecution claims brought outside of California (where section 533 would not apply). *Id*. at 514–516. In contrast, the express coverage for "virus" in the policy that Sentinel issued to John's Grill would not apply under any reasonably conceivable circumstances.

2. The Illusory Coverage Doctrine Applies Even If Some Coverage Might Be Available.

Courts have likewise found that the illusory coverage doctrine can be triggered by policy limitations that do not *completely* eliminate the possibility that the policyholder might benefit from the insurance policy. That is because an objectively reasonable insured would expect to obtain coverage that the insuring agreements in the policy expressly promise to provide under realistic—not merely far-fetched—circumstances. For example:

- *Heller v. Pa. League of Cities & Municipalities* (Pa. 2011) 32 A.3d 1213, 1223: Finding that a motorist policy issued to a municipality triggers the illusory coverage doctrine despite providing coverage for convicted criminals being transported in police vehicles.
- *Casey v. Smith* (Wis. 2014) 846 N.W.2d 791, 800–801: Finding that a liability policy issued for an insured's semi-tractor triggers the illusory coverage doctrine despite providing coverage for the semi-tractor when stationary.
- *O'Connor*, 696 P.2d at 285: Explaining that an exclusionary clause in an aircraft insurance policy that would bar coverage if an accident occurred while the aircraft was in violation of any FAA regulation would be unenforceable; though it may theoretically be possible for an accident to occur without violating an FAA regulation, it would be "nearly impossible to have a

crash without a violation of at least one of those regulations."

- *Monticello Ins. Co. v. Mike's Speedway Lounge, Inc.* (S.D.Ind. 1996) 949 F.Supp. 694, 702: Finding that a general liability policy issued to an insured's tavern triggers the illusory coverage doctrine despite providing coverage for claims that are not connected to the manufacturing, selling, distributing, serving or furnishing of any alcoholic beverages.

- *Great N. Ins. Co. v. Greenwich Ins. Co.* (W.D. Pa. May 12, 2008, No. 05-635) 2008 WL 2048354, at *6–7: Finding that a "blowout *and* cratering" policy issued to an insured's oil well could trigger the illusory coverage doctrine with respect to blowout claims despite providing coverage for cratering. (Emphasis added.)[5]

These courts rightly recognized that an insurer cannot circumvent the illusory coverage doctrine by simply conceiving of a hypothetical situation in which coverage would apply. Rather, the reasonable expectations of the policyholder are what control the illusory coverage doctrine analysis, and the doctrine applies

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[5] *See also Am. Family Mut. Ins. Co., S.I. v. Buckley* (N.D.Ind. Mar. 29, 2022, No. 2:21-CV-123-JVB-JPK) 2022 WL 910546, at *3 (holding that "[a]ny conceivable hypothetical coverage for defamation under the terms of the policy as written is *sufficiently remote* that coverage for defamation is illusory") (emphasis added); *Thomas v. State Farm Fire & Cas. Co.* (Ky. 2021) 626 S.W.3d 504, 508 (holding that a policy is illusory "when an insurer's interpretation of a contract term would deny the insured 'most if not all of a promised benefit'") (citation omitted).

when the insurance policy does not provide the coverage that a reasonable insured would expect to receive.

C. Sentinel Cannot Provide A Plausible Scenario Where The Limited Virus Coverage Would Apply.

Whether any realistic prospect exists that a virus can result from a peril listed in the Specified Causes Clause was squarely before the Court of Appeal, as John's Grill focused on the issue in its briefing below. *See* Appellants' Opening Br. at 29–36, *John's Grill, Inc. v. The Hartford Fin. Servs. Grp., Inc.* (Cal.Ct.App. Aug. 5, 2021, No. A162709). John's Grill noted that, during the trial court proceedings, Sentinel "could only come up with a single [highly speculative] scenario in which the Limited Virus Coverage's specified cause of loss requirement *might* be satisfied," in spite of Sentinel's access to historical company records of claims paid out under the relevant policy. *Id.* at 32 (emphasis omitted).

Yet Sentinel was unable to provide a plausible scenario of coverage in response to the Court of Appeal's questions at oral argument. When pressed for concrete examples of coverage, Sentinel cited only to *Curtis O. Griess & Sons v. Farm Bureau Ins. Co.* (Neb. 1995) 528 N.W.2d 329, a case where a farmer in Nebraska claimed coverage for his pigs after the animals became sick and died when, due to a windstorm, a virus from a neighboring farm supposedly infected them. *See John's Grill*, 86 Cal.App.5th at 1223. Sentinel could come up with no other example. The Court of Appeal criticized Sentinel's failure to provide a realistic scenario of coverage under *John's Grill's*

insurance policy during oral argument, writing in its opinion that "[i]maginary exercises involving pigs caught in windstorms and cows encountering wild animals will not do" in satisfying the insured's *reasonable* expectations of coverage. *Id.* at 1224.[6]

Sentinel's reply attempts to provide two other scenarios under which a virus can be the "result" of a peril in the Specified Causes Clause: "water damage" and "an equipment breakdown." Reply Br. at 35. Sentinel claims that water damage "could cause viruses like Hepatitis A or norovirus to spread, causing loss or damage to property, such as contaminated food that must be discarded." *Id.* But Sentinel repeatedly tells the Court that its grant of coverage for property "loss or damage" caused by a virus is applicable only if the virus is the "result of" one of the specified causes under the Limited Virus Coverage. *John's Grill*, 86 Cal.App.5th at 1201–1202. As the Court of Appeal explained, "none of the listed causes has anything to do with the biological processes that actually cause a virus." *Id.* at 1221. Even if one were to assume that the phrase "result of" encompasses vectors of transmission, transmission of a virus by water does not appear to be the same as "water damage," which is harm that results from water being discharged into or entering unintended areas.[7]

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[6] *See also* footnote 12 *infra*, which explains that to the extent that Sentinel was citing to the facts of *Curtis O. Griess* for their truth—that a windstorm actually can transmit a virus that infects pigs—that is improper: a court cannot take judicial notice of the truth of facts recited in judicial opinions in other cases.

[7] *See, e.g., Penn-Am. Ins. Co. v. Mike's Tailoring* (2005) 125 Cal.App.4th 884, 888, 893 (addressing a policy defining "water

In sum, Sentinel resorts to farfetched hypotheticals in attempting to identify scenarios where a virus could result from a specified cause of loss under the policy. Sentinel does so because it cannot to provide this Court a single plausible scenario where the Limited Virus Coverage would apply to insureds like John's Grill.[8]

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damage" as "accidental discharge or leakage of water or steam as the direct result of the breaking or cracking of any part of a system or appliance containing water or steam"); *Doheny W. Homeowners' Ass'n v. Am. Guar. & Liab. Ins. Co.* (1997) 60 Cal.App.4th 400, 402 (addressing a policy defining "water damage" to mean "accidental discharge or leakage of water . . . as the direct result of the breaking or cracking of any part of a system or appliance containing water").

[8] Sentinel's reply raises two further arguments against the application of the illusory coverage doctrine to John's Grill's insurance policy—that the doctrine only applies to: (a) ambiguous policy language; and (b) to insurance policy conditions where performance of the condition is entirely within the insurer's control. Reply Br. at 12–18. Neither argument has merit.

As to the former argument, the parties in *Safeco* did *not* contend that the exclusion at issue was ambiguous as applied to that case, yet this Court declined to construe the exclusion literally as doing so would have rendered the policy's promise of coverage "meaningless." 26 Cal.4th at 763–765.

As to the latter argument, no California decision stands for the proposition that Sentinel advances, and its proposed limitation makes no sense. For example, assume that an old insurance policy required submission of notice of claim by telegram. If an insured argued that strict enforcement of that clause would render coverage illusory since notice no longer can be transmitted by telegram, and the clause therefore should not be enforced as written, it is highly unlikely that a California court would reject that argument on the ground that Western Union's decision to stop delivering telegrams was entirely outside of the insurer's control.

II. At Minimum, The Court Should Remand The Case To Allow John's Grill To Conduct Discovery To Support Its Illusory Coverage Argument.

Sentinel argues that this Court should reverse the judgment below if it determines that the Court of Appeal erroneously applied the illusory coverage doctrine, and otherwise affirm the judgment to the extent that it left in place the superior court's order sustaining Sentinel's demurrer without leave to amend. Opening Br. at 61. As explained above, the Court of Appeal correctly applied the doctrine, and its judgment should be affirmed in full. However, if this Court were to conclude that the record is insufficient to support the ruling below (since the only proceedings at the trial court level involved a demurrer), this Court should remand the case to permit John's Grill to conduct discovery as to whether the Limited Virus Coverage affords a sufficiently realistic prospect of protection to avoid the illusory coverage doctrine. Indeed, the superior court could have overruled Sentinel's demurrer on this basis alone, as John's Grill argued to the Court of Appeal,[9] since discovery may assist the lower courts in addressing coverage questions that are raised, as

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[9] *See* Appellant's Opening Br. at 34–35 *supra* ("whether the Limited Virus Coverage is or is not illusory turns on a **disputed question of fact** between the parties about whether a virus can be 'the result of' a 'specified cause of loss,'" making the issue "not suitable for resolution on a demurrer") (bolding in original); Appellants' Suppl. Br. at 11, *John's Grill, Inc. v. The Hartford Fin. Servs. Grp., Inc.* (Cal. Ct. App. Nov. 21, 2022, No. A162709) (whether a virus can result from a specified cause of loss or equipment breakdown accident is "a reasonably contested factual dispute that is inappropriate for resolution on a demurrer").

here, by "a well-pleaded illusory coverage argument." *John's Grill*, 86 Cal.App.5th at 1224.

A. Discovery May Be Relevant To Determining An Insured's Reasonable Expectations Of Coverage.

The illusory coverage doctrine exists to protect the objectively reasonable expectations of the insured, and these expectations are informed by the circumstances in which an insurance contract is entered into. *See* H. Walter Croskey et al., *Cal. Prac. Guide: Ins. Litig.* ¶¶ 4:29–4:29.2 (Rutter Group, rev. ed. Aug. 2023); *see also id.* ¶ 4:30 (an "insured's objectively reasonable expectations" must be considered "*in the context of the policy as a whole and the circumstances of the case*") (emphasis in original). Insurance policies are subject to "'the ordinary rules of contractual interpretation,'" and in California the "'fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.'" *State of Cal. v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 194–195 (citations omitted). In turn, courts are to interpret that mutual intention by analyzing contractual "language in context" and "in the circumstances of" the particular case. *Nissel v. Certain Underwriters at Lloyd's of London* (1998) 62 Cal.App.4th 1103, 1111 (quotation omitted).[10]

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[10] The principle that information about "surrounding circumstances" may always inform the meaning of a contract (including for insurance) is reinforced by traditional rules of contractual interpretation, such as that parties' usage of terms "in a technical or other special sense" governs over the terms' "ordinary and popular sense," *Haynes v. Farmers Ins. Exch.* (2004) 32 Cal.4th 1198, 1204, or that parties' "course of

Consequently, the objectively reasonable expectations of different insureds will often vary based on their surrounding circumstances. *See Transport Ins. Co. v. Superior Court* (2014) 222 Cal.App.4th 1216, 1219, 1225 ("When the party claiming coverage is an additional insured, it is the additional insured's objectively reasonable expectations of coverage that are relevant, and not the objectively reasonable expectations of the named insured.") Here, as the Court of Appeal emphasized, "the insured's actual business circumstances as underwritten by the insurer" will justifiably affect its reasonable coverage expectations, such that the expectations of a San Francisco restaurant like John's Grill will differ from those of "a dog kennel or a pet store." *John's Grill*, 86 Cal.App.5th at 1223–1224. Thus, "the test for illusory coverage must focus on objective reality and the insured's reasonable expectations of coverage." *Id.* at 1224 (citing *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.* (2000) 78 Cal.App.4th 847, 874). And consequently, facts relating

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performance" can modify the terms of a contract, *Emps.' Reinsurance Co. v. Superior Court* (2008) 161 Cal.App.4th 906, 920–921. Moreover, in determining whether contractual language is ambiguous, California courts may "consider not only the face of [an insurance] contract but also any extrinsic evidence that supports a reasonable interpretation." *Am. Alt. Ins. Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239, 1246; *see also* 11 Richard A. Lord, *Williston on Contracts* § 32:7 (4th ed. May 2023 Update) ("the circumstances surrounding the execution of a contract may always be shown and are relevant to a determination of what the parties intended by the words they chose").

to a particular insured's surrounding circumstances may be an appropriate subject for discovery.

Moreover, California courts have long emphasized "the prodiscovery policies" that govern civil litigation in the state. *Williams v. Superior Court* (2017) 3 Cal.5th 531, 540; *see also id.* at 540–541 (in California, "a civil litigant's right to discovery is broad" and courts "must construe the facts before [them] liberally in favor of discovery"). Under California law, information is discoverable not only where it may lead to admissible evidence, but where it "might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement." *Gonzalez v. Superior Court* (1995) 33 Cal.App.4th 1539, 1546 (quotation and emphasis omitted).

California's pro-discovery policies apply with particular force in insurance coverage litigation. As a result, "an insurer moving for a demurrer based on insurance policy language must establish conclusively that this language unambiguously negates [coverage] beyond reasonable controversy." *Palacin v. Allstate Ins. Co.* (2004) 119 Cal.App.4th 855, 862. Absent the insurer's showing "that the policy language supporting its position is so clear that [extrinsic] evidence would be inadmissible to refute it," "the court must overrule the demurrer and permit the parties to litigate the issue in a context that permits the development and presentation of a factual record, e.g., summary judgment or trial." *Id.*

B. Courts In California And Elsewhere Frequently Rely On A Record That Goes Beyond The Initial Pleadings To Decide Illusory Coverage Issues.

Numerous cases applying the illusory coverage doctrine reflect California's liberal policies favoring discovery and resolution of factual issues through evidence—not at the pleading stage. *See, e.g.*, *Safeco*, 26 Cal.4th at 762, 767 (at summary judgment, narrowly construing "illegal act" exclusion as not barring coverage for negligence, and holding that coverage applied where trial court found that underlying injury resulted from unintentional act); *Shade Foods*, 78 Cal.App.4th at 873–875 (plausible construction of policy language was supported by "objectively reasonable expectations of the insured," as developed at jury trial); *Reeder*, 221 Cal.App.3d at 977–978 (application of an exclusion to insured "would likely render the policy illusory as to him" based on "evidence in the record" at summary judgment regarding ownership of property); *see also Howell v. State Farm Fire & Cas. Co.* (1990) 218 Cal.App.3d 1446, 1452, 1459–1460 (insurer could not deny coverage where covered peril was the efficient proximate cause of the insured's loss even if an excluded peril was also necessary for the loss; reversing grant of summary judgment for insurer based on insured's expert testimony that covered peril was the efficient proximate cause, creating a triable issue of fact), *disapproved on other grounds*, *Reid v. Google, Inc.* (2010) 50 Cal.4th 512.

Even cases that have declined to find coverage illusory often do so only after discovery. In *Julian*, for example, this Court affirmed a summary judgment ruling in favor of the

insurer where a policy provided coverage for loss caused by weather conditions alone but not by weather conditions that combined with excluded perils, such as landslides. 35 Cal.4th at 750–751. The Court agreed with *amicus curiae* United Policyholders that applying the policy language in situations where loss caused by an excluded peril was *de minimis* "would suggest the provision of illusory insurance." *Id.* at 760. The Court nevertheless ruled in favor of the insurer based on record evidence that the insured's loss resulted from a more equal combination of covered and excluded perils, and so was not subject to the insured's reasonable expectations of coverage. *Id.*

Courts in other states likewise often resolve questions concerning the application of the illusory coverage doctrine by looking to a record developed in discovery. In *Great Northern*, the court vacated a grant of summary judgment for the insurer, holding that "genuine issues of material fact relating to whether" the insured's coverage for a well blowout would be illusory merited resolving the issue of illusory coverage at trial. *See* 2008 WL 2048354, at *7–8. In particular, there was a fact question as to whether certain forms of "property damage resulting from a blowout can fairly be said to constitute a 'reasonably expected set of circumstances' . . . as opposed to a set of circumstances in which the likelihood of coverage is 'sufficiently remote to be deemed illusory.'" *Id.* at *7 (citations omitted); *see also, e.g.*, *Casey*, 846 N.W.2d at 358, 374 (affirming grant of summary judgment for insured where insurer's interpretation of exclusion made it "unclear that [the] policy would ever apply," and well-

developed factual record showed that insured was otherwise entitled to coverage); *Pressman*, 574 A.2d at 759–760 (vacating grant of summary judgment for insurer and remanding for trial where insurer's reading of exclusion would "preclude coverage in almost any circumstance," insured's coverage expectations were not unreasonable, and insured testified to particular circumstances of loss from power outage); *Mike's Speedway Lounge*, 949 F.Supp. at 704 (denying insurer's summary judgment motion where insured's reasonable expectations of coverage were at issue, insured testified that he sought coverage for particular risks, and ruling for insurer based solely on policy language would render coverage illusory).

Here, discovery could clarify whether John's Grill ever had a "realistic prospect of benefitting from the Limited Virus Coverage." *John's Grill*, 86 Cal.App.5th at 1224 (cleaned up). For example, John's Grill has alleged throughout this litigation, on information and belief, that Sentinel has "never paid out a claim for loss or damage caused by virus under the Limited Virus Coverage" in the provision's fifteen years of existence, and "Sentinel has never disputed or responded" to that allegation. *See* Answering Br. at 20–21 & n.9. Evidence as to whether Sentinel has ever paid a claim under the Limited Virus Coverage could be probative of whether the promised coverage is, in fact, "virtually illusory" or "practically meaningless." *See Julian*, 35 Cal.4th at 756; *Safeco*, 26 Cal.4th at 764.[11]

[11] Throughout its briefing, Sentinel criticizes the Court of Appeal for purportedly adopting a rule that would force courts to

Discovery could also test whether there is any quantitative basis for Sentinel's continued reliance on the "oddball" scenario described in *Curtis O. Griess*: "a windstorm . . . spreading a virus from one livestock pen to another." *See* Opening Br. at 42, Reply Br. at 32–34.[12] If Sentinel is unable to produce evidence showing that this scenario occurs with any meaningful frequency—and Sentinel has not done so to date in this litigation—that failure would confirm that Sentinel's hypothetical amounts to nothing more than "a mere drafting fiction" that is insufficient to avoid an illusory coverage argument. *See John's Grill*, 86 Cal.App.5th at 1224 (quoting *Julian*, 35 Cal.4th at 760).

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undertake "a fact-specific analysis of the likelihood that each provision in a policy would benefit [each] individual insured." *See* Opening Br. at 13. But such an analysis would be unnecessary where, for example, an insurer *uniformly* denies coverage to its insureds under a particular policy or coverage provision.

[12] In its reply, Sentinel asserts that "the *Griess* scenario precludes an illusory finding because it shows the possibility that a virus could be transmitted by a specified cause of loss." Reply at 34–35. But a fact recited in one case is not part of the record in a different case, and such a fact does not become subject to judicial notice for its truth merely because it appears in a court opinion or record. *See, e.g.*, *O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, 1405 (refusing to take notice of the truth of facts recited in a judicial opinion); *Kilroy v. California* (2004) 119 Cal.App.4th 140, 145–148 (similar). Thus, Sentinel cannot rely on facts recited in other cases to prove the merits of a disputed fact question such as how viruses can be transmitted, as the record on a demurrer is confined to the facts pleaded in the complaint or facts that are *properly* the subject of judicial notice. *See, e.g.*, *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6; Code Civ. Proc., § 430.30.

CONCLUSION

For the reasons given above, this Court should affirm the court below and protect the reasonable expectations of insureds in California against illusory insurance policies.

DATE: December 21, 2023 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies, pursuant to California Rule of Court 8.520(c)(1), that the foregoing *Amicus Curiae* Brief of United Policyholders in Support of Respondent John's Grill, Inc. and John Konstin was produced using 13-point Century Schoolbook type and contains 6,408 words, including footnotes, which is less than the total number of words permitted by the Rules of Court. Counsel relies upon the word count of the computer program (Microsoft Word) used to prepare this brief.

DATE: December 21, 2023 Respectfully submitted,

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PROOF OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action. My business address is 415 Mission Street, Suite 5400, San Francisco, CA 94105. On December 21, 2023, I served the following document(s) described as:

- **APPLICATION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENTS JOHN'S GRILL, INC. AND JOHN KONSTIN**

- **[PROPOSED] *AMICUS CURIAE* BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF RESPONDENTS JOHN'S GRILL, INC. AND JOHN KONSTIN**

on the interested parties in this action as follows:

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[x] (BY TRUEFILING) By filing and serving the foregoing through TrueFiling such that the document will be sent electronically to the e-service list on December 21, 2023; and

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[x] (BY MAIL) By causing the document to be sealed in an envelope addressed to the recipient above, with postage thereon fully prepaid, and placed in the United States mail at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this proof of service is executed at San Francisco, California on December 21, 2023.

Dawn Halverson

_____

Dawn Halverson