

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203</p>			
<p>CERTIORARI TO THE COLORADO COURT OF APPEALS Case No. 24CA34 Opinion for the Court by Judge Schutz (Kuhn, J., concurring) Opinion concurring in part and dissenting in part by Judge Welling</p>			
<p>CITY AND COUNTY OF DENVER DISTRICT COURT Case No. 2021CV30695 Honorable Martin F. Egelhoff, Judge Honorable Jon J. Olafson, Judge</p>			
<p>Petitioners: SPECTRUM RETIREMENT COMMUNITIES, LLC, et al.,</p> <p>v.</p> <p>Respondent: CONTINENTAL CASUALTY COMPANY</p>	<p>▲ COURT USE ONLY ▲</p> <p>Case Number: 2025SC433</p>		
<p>ATTORNEYS FOR <i>AMICUS CURIAE</i> UNITED POLICYHOLDER</p> <table border="0" data-bbox="178 1197 1161 1596"> <tr> <td data-bbox="178 1197 673 1554"> <p>Allan B. Moore (<i>Of Counsel</i>) Jad H. Khazem (<i>Of Counsel</i>) COVINGTON & BURLING LLP One CityCenter 850 Tenth Street, NW Washington, DC 20001-4956 Telephone: (202) 662-5458 abmoore@cov.com jkhazem@cov.com</p> </td> <td data-bbox="698 1197 1161 1596"> <p>Stephen B. Shapiro, No. 13464 Garth A. Gersten, No. 51855 OTTESON SHAPIRO LLP 7979 E. Tufts Avenue, Suite 1600 Denver, Colorado 80237 Telephone: (720) 488-0220 Facsimile: (720) 488-7711 sbs@os.law garth@os.law</p> </td> </tr> </table>	<p>Allan B. Moore (<i>Of Counsel</i>) Jad H. Khazem (<i>Of Counsel</i>) COVINGTON & BURLING LLP One CityCenter 850 Tenth Street, NW Washington, DC 20001-4956 Telephone: (202) 662-5458 abmoore@cov.com jkhazem@cov.com</p>	<p>Stephen B. Shapiro, No. 13464 Garth A. Gersten, No. 51855 OTTESON SHAPIRO LLP 7979 E. Tufts Avenue, Suite 1600 Denver, Colorado 80237 Telephone: (720) 488-0220 Facsimile: (720) 488-7711 sbs@os.law garth@os.law</p>	
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<p align="center">BRIEF OF <i>AMICUS CURIAE</i> UNITED POLICYHOLDERS IN SUPPORT OF PETITIONERS</p>			

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 29 and 32, including all formatting requirements set forth in those rules. Specifically, the undersigned counsel certifies that:

The brief complies with the applicable word limits set by C.A.R. 29(d) because it contains 4,742 words (no more than 4,750).

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ Garth A. Gersten

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INTERESTS OF *AMICUS CURIAE*

United Policyholders (“UP”), a national non-profit advocate for policyholder rights, submits this *amicus* brief in support of Petitioners Spectrum Retirement Communities, LLC, et al. UP’s interests and reasons for submitting this brief are detailed in UP’s accompanying motion for leave.

SUMMARY OF ARGUMENT

Spectrum purchased a standard-form, commercial property insurance policy from Respondent Continental Casualty Company promising coverage for “direct physical loss of or damage to” property (and ensuing business interruption loss) by all risks not clearly and expressly excluded. CF, p.1829. This Court has long interpreted such “all risk” policies to cover physical “loss of” or “damage to” insured property, even where only *part* of the insured property is lost or damaged. Such was the case in *Western Fire*, where the Court found covered “direct physical loss” as a matter of law where noxious airborne toxins (there, gasoline vapors) from in and around one of four insured church buildings and related fire-department orders forced the closure of the one impacted structure. *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 53-55 (Colo. 1968).

Spectrum suffered just such a loss here. On-site contamination by the noxious coronavirus, and related safety-driven government orders, forced Spectrum to close key sections of its senior living facilities and severely restrict their operations during the COVID-19 pandemic.

Dining halls and communal areas were completely closed, housing units sat empty as new move-ins were suspended, and social programming was severely limited as residents sheltered in place. Yet when Spectrum sought coverage for such losses, a majority of the Division rejected Spectrum’s insurance claim based on new, judicially created barriers to coverage. The majority’s ruling exhibits two errors that, if allowed to stand, will sharply narrow the long-understood scope of “all risk” insurance protection in Colorado.

First, the Division majority announced a requirement—found nowhere in the policy’s broadly written, standard-form language—that a policyholder must prove *complete* loss of use (i.e., “complete[] uninhabitab[ility]”) of insured property to obtain coverage. *Spectrum Retirement Comms., LLC v. Continental Cas. Co.*, 2025 COA 57, ¶¶18-19, 36-37. The majority then found that Spectrum could not meet this novel requirement, because, as a senior living facility, Spectrum was legally required to stay partially open as an “essential business” (albeit under substantial restrictions) during the pandemic.

This judge-made barrier to coverage cannot be reconciled with

either the policy text or this Court’s ruling in *Western Fire*, which all three judges of the Division rightly agreed sets out the controlling legal framework. Further, it departs from the nationally recognized (and commonsense) understanding that physical loss or damage need not be “complete” to be covered. Moreover, it guts insurance protection for businesses, like Spectrum, that provide essential services and thus cannot *completely* close their doors during times of crisis.

Second, the majority below compounded its substantive error by indulging a procedural one. Rather than accepting the complaint’s well-pled allegations as true and construing them in Spectrum’s favor—as long-settled Colorado law on a Rule 12(c) motion requires—the trial court declared, without evidence, and in derogation of the complaint, that “COVID-19 does not physically injure or harm property as a matter of law.” *Spectrum*, 2023 WL 12128966, at *4 (Colo. Dist. Nov. 20, 2023).¹ The trial court thus determined that a dangerous airborne toxin

¹ The trial court had previously denied Continental’s motion to dismiss, finding Spectrum’s allegations sufficient to state a claim under the broad “all-risk” insuring agreement and *Western Fire*, see *Spectrum*, 2022 WL 22961794, at *6-8 (Colo. Dist. July 13, 2022), but following a docket rotation, the trial court reversed course and concluded that Spectrum could not state a claim as a matter of law.

that attaches to surfaces and contaminates the air—and thereby renders property unusable in substantial part—does not, in fact, have the physical attributes, behavior, or effects on property plainly alleged.

On appeal, the Division majority affirmed without disturbing the trial court’s determination, concluding that Spectrum could not establish “physical damage” even if factual issues concerning COVID-19’s effects on property existed because it could not show complete uninhabitability. *Spectrum*, 2025 COA 57, ¶¶48-51.

This Court should reject both of these novel, judicially fashioned barriers to coverage. And it should make clear that—consistent with the policy language and longstanding Colorado law—(i) there is no complete-loss requirement to establish “direct physical loss of or damage to” property under a standard-form property insurance policy and (ii) a trial court cannot make unsupported factual findings or second-guess a plaintiff’s allegations on complex scientific issues at the pleading stage. The decision below should be reversed.

ARGUMENT

I. The Majority Below Erred In Holding That “Complete Uninhabitability” Is Required for Coverage of “Direct Physical Loss of or Damage to” Property Under a Standard, All-Risk Commercial Property Insurance Policy.

“All risks” commercial property insurance policies, like the Spectrum policy here, promise policyholders coverage for fortuitous “direct physical loss of or damage” to insured property *however caused*, unless the cause of loss or damage is specifically and expressly excluded. 10A COUCH ON INS. § 148:50 (Dec. 2025). In its seminal *Western Fire* decision, this Court articulated a standard for what constitutes covered “direct physical loss” under such policies that has governed Colorado property insurance claims for nearly 60 years.

All three judges of the Division below correctly agreed that *Western Fire* provides the controlling framework for analyzing what constitutes “direct physical loss of or damage to” insured property in Colorado. The majority, however, erroneously imposed a “completely uninhabitable” requirement for coverage, which is entirely foreign to Spectrum’s policy, the *Western Fire* precedent, and property insurance law and practice more generally.

A. The Majority’s Complete-Loss Requirement Has No Basis in the Policy Language and Conflicts with the Reasonable Expectations of Policyholders.

Insurance policies must be construed according to their “plain language,” with any “ambiguities [resolved] in favor of the insured.” *Radil v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 233 P.3d 688, 692 (Colo. 2010). The plain language of the Continental policy at issue, like countless other standard-form commercial property insurance policies, imposes no complete-loss requirement. What is required—and *all* that is required—is “direct physical loss of or damage to” property. CF, p.1829.

By definition, “loss” or “damage” (which may be two different types or forms of injury, as the disjunctive word “or” indicates) can include *partial* loss or damage, including partial loss of or damage to property or its use or function. Merriam-Webster defines “loss” as “the *partial or complete* deterioration or absence of a physical capability or function.” MERRIAM-WEBSTER ONLINE DICTIONARY, Definition of *Loss* (as of Apr. 5, 2026) (emphasis added). And it defines “damage” as “loss or harm resulting from injury to person [or] property,” including “injury

that *lowers* value or *impairs* usefulness.” *Id.*, Definition of *Damage* (emphasis added). Authorities nationwide similarly recognize that physical loss or damage may be “in part.” *See infra* Section I.B.

Indeed, the Spectrum policy’s mitigation clauses expressly contemplate that coverage exists, and that mitigation is required, for property that experiences *partial* loss or damage. These common, standard-form clauses obligate the insured to “protect the property from *further loss or damage*”; they also reduce the amount Continental must pay by the amount of loss avoidable by “complete or *partial* resumption of operation of the property [insured] *whether damaged or not.*” CF, pp.1849-50 (emphasis added). These provisions would have no meaning or operation if the policy solely covered complete loss.

Further, the judicial creation of an unwritten restriction on coverage runs afoul of fundamental canons of construction. Grants of coverage like the one interpreted below must be “liberally construed in favor of the insured to provide the broadest possible coverage,” not construed to add atextual roadblocks to recovery. *Dupre v. Allstate Ins. Co.*, 62 P.3d 1024, 1031 (Colo. App. 2002). This principle applies with

special force here, in the context of “[a]n ‘all risk’ policy”—which this Court has long held guarantees recovery for “*all losses*” unless “the policy contains a *specific* provision expressly excluding a particular loss.” *Kane v. Royal Ins. Co. of Am.*, 768 P.2d 678, 679 n.1 (Colo. 1989) (emphasis added); *cf. Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1090 (Colo. 1991) (“[H]aving affirmatively expressed coverage through broad promises, the insurer assumes a duty to define any limitations upon that coverage in clear and explicit terms.”). Here, there is *no* partial-loss exclusion, much less a specific, clear, or express one.

The conclusion that “physical loss of or damage to” property is covered without any need for complete loss also aligns with general experience and common sense. If a policyholder suffers a fire, damage from a fallen tree, or loss of use from a gas leak that affects only *part* of the insured property or its functionality (e.g., certain rooms or structures), it has suffered direct physical loss of or damage to *that part* of its property and rightly expects corresponding coverage, even if other parts remain undamaged and fully usable. In disregarding this basic truth, the majority below (and Continental) failed to “honor[] the

reasonable expectations of an insured” to coverage. *Bailey v. Lincoln General Ins. Co.*, 255 P.3d 1039, 1050 (Colo. 2011).

Spectrum’s position—that “direct physical loss of or damage to” property in an all-risk policy may be in whole or in part—is thus the only interpretation faithful to the insuring agreement’s plain language, the text of the policy as a whole, and the contracting parties’ expectations. Further, even if Continental believes that a complete-loss interpretation is “also reasonabl[e],” at best, that would mean the policy is “ambiguous,” and Colorado courts resolve ambiguities “against the insurer” and in favor of coverage. *Hecla*, 811 P.2d at 1092.

B. The Majority’s Complete-Loss Requirement Conflicts with *Western Fire* and Case Law Nationwide Reaching Far Beyond the COVID-19 Context.

The majority’s complete-loss requirement is not only textually unfounded. It also contravenes well-established Colorado law and precedent nationwide on this precise issue, dealing with all manner of losses, including and going far beyond the COVID-19 context.

In its seminal *Western Fire* decision, this Court confirmed that loss of use of property due to a noxious airborne substance, even where

the loss is partial, constitutes “physical loss” of such property for purposes of property insurance coverage. There, local fire authorities temporarily closed a church building when it became infiltrated with vapors from gasoline under and around the building, “making further use of the building highly dangerous.” *Western Fire*, 437 P.2d at 55. The Court held that infiltration of the noxious vapors and subsequent impaired use (due to human safety concerns) “equates to a direct physical loss” covered under an all-risk property insurance policy. *Id.*

Like this case, *Western Fire* did not involve a complete loss of all covered property. The policy there covered “not only the [impacted] church building, but also the manse and two other church buildings.” *Id.* at 53. The Court, however, found coverage as a matter of law, despite only one of the four structures being impacted. *Id.* at 55-56. Further, while *Western Fire* found it *sufficient* that the gasoline vapors (an airborne toxin, like the coronavirus) rendered the one impacted building “uninhabitable,” *id.* at 55, the Court never suggested that the building’s uninhabitability (let alone, “complete uninhabitability”) was, contrary to the policy text, a *requirement* for coverage. To the contrary,

Western Fire cautioned against inferring restrictions on recovery “in the absence of a provision specifically limiting coverage.” *Id.* at 56.

In any event, as the first trial judge and the dissent below rightly explained, a structure may be rendered partly “uninhabitable” where, as here, the property or a portion thereof cannot be used for its *intended* purpose, even where it is not *completely* useless. *Spectrum*, ¶¶68-69, (Welling, J., dissenting); *accord Spectrum*, 2022 WL 22961794, at *8 (Colo. Dist. July 13, 2022). Indeed, just six months prior to *Western Fire*, this Court affirmed a finding that a house with jammed doors and cracked walls was “uninhabitable” where it “could not be used,” not for any purpose, but “for the purposes for which it had been designed.” *Mulhern v. Hederich*, 430 P.2d 469, 470 (Colo. 1967).

Outside Colorado, numerous courts have invoked *Western Fire* and its progeny in sustaining property insurance claims predicated on *partial* loss of use or functionality of property. As one recent insurance-law survey explained, *Western Fire* was one of the earliest decisions to “broadly interpret[] the physical loss or damage requirement” as satisfied by “loss of use” due to airborne toxins, and it has been relied on

in later decisions finding coverage where “bacteria, odor, smoke, or noxious gases” caused a “property’s value, usefulness, or functionality [to be] destroyed or *diminished*.” Scott G. Johnson, *What Constitutes Physical Loss or Damage in a Property Insurance Policy?*, 54 TORT TRIAL & INS. PRAC. L.J. 95, 100-02, 114-17 (Winter 2019) (emphasis added).

For instance, Vermont’s Supreme Court, in sustaining an insured’s COVID-19 pleading, extolled *Western Fire* as a “seminal case” holding that coverage may be owed “when property is unusable due to a health hazard,” adding that such loss of use “may be in whole or in part.” *Huntington Ingalls Indus., Inc. v. ACE Am. Ins. Co.*, 287 A.3d 515, 529-30 (Vt. 2022). North Carolina’s Supreme Court similarly held that insured restaurants had adequately pleaded “direct physical loss” based on COVID-related orders, where such orders “limited the sale of food and beverages” but did not require “outright” closure. *North State Deli, LLC v. Cincinnati Ins. Co.*, 908 S.E.2d 802, 805-06, 813 (N.C. 2024) (citing favorably *Huntington Ingalls*, which relied on *Western Fire*).

So, too, in *Mellin*, New Hampshire’s Supreme Court invoked *Western Fire* to sustain a claim for “direct physical loss” for a condo unit

rendered partially uninhabitable (yet still “occasionally” occupied) due to cat-urine odor emanating from a neighboring unit. *Mellin v.*

Northern Security Ins. Co., Inc., 115 A.3d 799, 804-05 (N.H. 2015).

Similarly, in *Sentinel*, Minnesota’s Court of Appeals invoked *Western Fire* to sustain a claim for “physical loss” based on asbestos

contamination that posed “a hazard to human health,” even though the contaminated buildings “remained occupied.” *Sentinel Mgmt. Co. v.*

N.H. Ins. Co., 563 N.W.2d 296, 298-300 (Minn. App. 1997).

Likewise, in *Oregon Shakespeare*, a court cited *Western Fire* for the rule that covered “physical loss or damage” occurs where a condition “renders the property unusable *for its intended purpose*,” finding this standard met when “wildfire smoke infiltrated [an insured] theater” and forced the cancellation of some (but not all) performances. *Oregon Shakespeare Festival Ass’n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *3, *9 (D. Or. June 7, 2016) (emphasis added), *vacated by settlement*.

Similarly, in *Stack*, a court held that a furnace suffered “direct physical damage” when discharged lead particles “prevented [the furnace] from being used for its ordinary” purpose of processing medical devices, even

though “the furnace could still be used to treat” non-medical devices.

Stack Metallurgical Servs., Inc. v. Travelers Indem. Co. of Conn., 2007 WL 464715, at *8 (D. Or. Feb. 7, 2007).

More recently, in *National Ink & Stitch*, the court found a computer system rendered “slower” by a ransomware attack to have suffered “damage” despite retaining a “residual ability to function.” *National Ink & Stitch, LLC v. State Auto Prop. & Cas. Ins. Co.*, 435 F.Supp.3d 679, 685-86 (D. Md. 2020). The court rejected the insurer’s argument that “physical loss or damage” required “an utter inability to function,” admonishing that “[t]he Policy language, and the relevant case law, impose no such prerequisite.” *Id.* at 686.

As *Western Fire* and the cases cited above (and countless others) show, the coverage-eviscerating ramifications of the Division’s new rule stretch far beyond the COVID-19 context—without valid basis. The Division’s complete-loss requirement is inconsistent with the “policy language,” reasonable expectations of coverage, controlling Colorado precedent, and other “relevant case law.”

C. The Majority’s Complete-Loss Requirement Is Arbitrary and Unjustified.

Rather than relying on the policy text, controlling precedent, or the policyholder’s reasonable expectations, the Division majority grounded its complete-loss requirement on extratextual considerations that fail on their own terms.

The majority insisted that a “complete uninhabitability” requirement is warranted because of a perceived difficulty in deciding when, short of complete loss, a loss caused by an airborne substance may cross the line from being *de minimis* (e.g., a “sneeze or cough that requires some cleaning”) to being severe enough to qualify for coverage. *Spectrum*, ¶41. But the policies contain no “severity” threshold, and the difficulty the majority envisioned is a phantom concern. A routine sneeze from a common cold fails to cause a covered loss, not because of insufficient “severity,” but rather, because it causes no loss of use to property *at all*, partial or complete. Those are not the facts here. As all three judges below acknowledged, *Spectrum* pleaded that the coronavirus and related government orders had “substantially impacted its operations and hindered its inability to use portions of its facilities,”

Spectrum, ¶57, such that Spectrum had to “shutter[] common areas” and “dining halls,” suspend “social programming,” and bar admission of “new residents” to open units, *id.*, ¶¶68-69 (Welling, J., dissenting).

To the extent the majority was concerned that enforcing the policy as written (i.e., without a complete-loss requirement) might open the door to trivial insurance claims, that concern lacks basis. Trivial risks produce trivial losses, and property insurance policies include deductibles, wear-and-tear exclusions, and waiting periods for business interruption losses to insulate property insurers from insubstantial claims. *See General Star Indem. Co. v. West Fla. Village Inn, Inc.*, 874 So.2d 26, 34 (Fla. App. 2004) (“a deductible” serves “as a monetary disincentive to file relatively trivial claims”).

The majority’s complete-loss requirement is also grossly disproportionate even to the concern it purports to address: a requirement of 100% uninhabitability judicially eliminates coverage for both policyholders with modest claims and policyholders like Spectrum that suffer substantial losses of use of, or damage to, large portions of their property or their property’s overall functionality.

Worse still, the majority’s framework requires exactly what it tries to avoid: drawing arbitrary lines divorced from the policy language. For example, the majority attempted to reconcile its complete-loss requirement with *Western Fire* by positing that in that case, an entire church “building” was rendered uninhabitable (even though three other buildings were not), whereas in this case, Spectrum’s retirement homes remained partially functional, even if certain facilities like dining halls, communal areas, and vacant units were completely closed off. *Spectrum*, ¶¶38-39. There is, however, nothing in “all risk” policies like those at issue here and in *Western Fire* that draws a “rooms-versus-buildings” distinction for establishing physical loss or damage.

Put simply, neither the policy text nor Colorado precedent supports the Division’s arbitrary complete-loss standard.

D. The Division’s New Rule Will Harm Policyholders by Eliminating Coverage They Reasonably Believe They Have Purchased.

The Division’s decision, if not reversed, threatens to undermine property-insurance coverage for all manner of Colorado policyholders whose properties are rendered partially, yet not completely, unusable—

policyholders who, until now, could count on standard-form policy text and precedent to sustain coverage for partial losses.

These include businesses that are forced to scale back—but not abandon—use or occupancy of their properties due to a pandemic (or a storm, fire, mudslide, or other significant peril); property owners who are displaced from their properties temporarily due to noxious odors; theaters that have performances interrupted (but not eliminated) by smoke; factories with equipment that suffers damage resulting in impaired (but not destroyed) functionality; or data centers with computer banks that are compromised but not utterly inoperable. *See supra* Section I.B. These are real-life cases of insureds that experienced “direct physical loss of or damage to” property within the ordinary, well-accepted meaning of that phrase—and who succeeded in pleading or proving their insurance claims—but who would potentially be barred from coverage under the Division’s novel standard.

The impact of this judge-made coverage barrier is particularly perverse as applied to “essential businesses” like Spectrum’s. Even while recognizing that viral spread and government restrictions

“substantially impacted” Spectrum’s operations, the Division opined that Spectrum could not plead a complete loss—and thus, could not recover under its policy—because it was an essential business forced to remain partially open under “orders from state and federal authorities.” *Spectrum*, ¶¶3, 37-39. There is no logic, much less any textual basis, for treating essential businesses that provide vital services worse off—and less protected—than inessential businesses. *See LTCPRO, LLC v. Johnson*, 2024 COA 123, ¶37 (“[A] contract should never be interpreted to yield an absurd result.”) (citation omitted).

II. Whether an Airborne Toxin, Such as a Virus, Can Cause “Direct Physical Damage” to Property Is a Fact-Laden Issue That Cannot Be Decided As a Matter of Law Under Rule 12(c) Against a Policyholder Plaintiff.

The trial court below broadly pronounced, without evidence and on a motion for judgment on the pleadings, that “COVID-19 does not physically injure or harm property as a matter of law”—and accordingly granted judgment in favor of Continental. *Spectrum*, 2023 WL 12128966, at *4 (Colo. Dist. Nov. 20, 2023). The Division affirmed, leaving the trial court’s pronouncement undisturbed, concluding that Spectrum could not demonstrate “physical damage” even if factual

questions surrounding the virus’s effects on property exist, because Spectrum could not show that its facilities were completely “uninhabitable.” *Spectrum*, ¶¶48-51.

The Division thus excused the trial court’s second-guessing of the policyholder’s allegations—and that court’s unsupported factual findings concerning the physical effects of an airborne toxin at the pleading stage—by articulating its new “complete uninhabitability” rule. This was reversible error.

A. Colorado Courts Do Not Decide Disputed Factual Issues, Particularly on Scientific Questions, at the Pleading Stage, Much Less Resolve Them Against Plaintiffs.

This Court reviews a lower court’s grant of a motion for judgment on the pleadings *de novo*. *Brown v. Long Romero*, 2021 CO 67, ¶17. In considering such motions, Colorado courts must accept “the allegations of the [complaint] as true” and “construe the allegations of the pleadings strictly against the movant.” *Id.*

Critically, “the court may only consider matters stated within the complaint itself, and may not consider information outside of the confines of that pleading.” *Public Service Co. of Colo. v. Van Wyk*, 27

P.3d 377, 386 (Colo. 2001); *see also Paradine v. Goei*, 2018 COA 55, ¶8 (same standards apply under Rules 12(c) and 12(b)(5)). At the pleading stage, courts may not “weigh potential evidence that the parties might present at trial” or “conjecture that [p]laintiffs will be unable to prove their claims.” *Clinton v. Security Benefit Life Ins. Co.*, 63 F.4th 1264, 1276 n.12 (10th Cir. 2023); *see also Warne v. Hall*, 2016 CO 50, ¶24 (construing Colorado pleading standards as harmonious with federal rules).

Faithful adherence to Colorado’s liberal pleading standards is especially crucial in cases, like this one, presenting disputed scientific questions—in this case, about what a virus invisible to the naked eye does and does not do. Courts are “not equipped to make plausibility determinations on complex scientific issues” at the pleading stage, “in the absence of a developed factual record.” *Adinolfe v. United Techs. Corp.*, 768 F.3d 1161, 1175 (11th Cir. 2014).

Further, a trial court has no “authority to fashion its own summary judgment-like filter and dismiss claims during the early stages of litigation,” “before a plaintiff can exercise its full rights of

discovery under the Colorado Rules.” *Antero Resources Corp. v. Strudley*, 2015 CO 26, ¶3. Nor may a court “assume[] the role of an expert” and supply its own “independent research and interpretation” of scientific matters “which properly should be interpreted only by experts in the appropriate field.” *Prestige Homes, Inc. v. Legouffe*, 658 P.2d 850, 854 (Colo. 1983).

B. Where a Policyholder Plaintiff Alleges That an Airborne Toxin Has Directly Caused Physical Damage to Its Property, It Has Plausibly Stated a Claim for “Direct Physical Damage to Property.”

A straightforward application of these pleading principles requires sustaining a policyholder plaintiff’s claim of “direct physical damage” where, as here, the plaintiff has alleged that the presence of a deadly virus, within and on surfaces of its property, has resulted in damage to (and loss of) that property. The affirmed trial court decision wrongly departed from these foundational pleading rules by making factual determinations contrary to the complaint’s well-pled allegations.

For example, the trial court, as affirmed by the Division, decreed that “COVID-19 infects people; it does not cause physical harm or loss to property.” *Spectrum*, 2023 WL 12128966, at *3 (Colo. Dist. Nov. 20,

2023). But that facile declaration poses a false distinction: people *use* property, and property insurance protects against loss of or damage to property that renders property *unsafe for people*. Further, that judicial pronouncement contradicts the complaint’s allegations—which are buttressed by scientific literature and governmental findings, some of which the complaint itself cites—about how the coronavirus “attach[es] to surfaces for prolonged periods of time” and thereby impairs the functionality of property. *Spectrum*, 2022 WL 22961794, at *3 (Colo. Dist. July 13, 2022) (quoting Compl. ¶81 & Colo. Dep’t of Pub. Health & Env’t, Fourth Updated Public Health Order 20-24).²

Similarly, the Division below referenced federal court assertions that COVID-19 does not produce physical loss of or damage to property

² *MJB Motels LLC v. County of Jefferson Board of Equalization*, 2023 CO 26, does not help Continental on this point. *MJB Motels* addressed a *tax* dispute, not an *insurance* dispute, and it never considered the phrase “physical loss of or damage to” property, much less cited *Western Fire*. And while *MJB Motels* noted that generalized economic effects of the pandemic on taxpayers’ properties were not “in or related to real property,” *id.*, ¶23, that reasoning is inapposite in the context of an “all-risk” policy and an insured that has expressly alleged on-site viral spread and government restrictions that directly damaged its insured property.

because it can be remediated via “standard cleaning measures.”

Spectrum, ¶26 (citation omitted). But whether and how easily property damage can be *remediated* says nothing about whether there was damage *in the first place*. Indeed, courts routinely find physical loss of or damage to property, even where damage-causing substances can be cleaned off or, over time, dissipate on their own. *E.g.*, *Western Fire*, 437 P.2d at 55 (gasoline fumes); *Oregon Shakespeare*, 2016 WL 3267247, at *3 (wildfire smoke in open-air theater that “dissipat[ed]” within “days”); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *3 (D.N.J. Nov. 25, 2014) (ammonia in packaging facility that had to “dissipate” before safe use); *NL Indus., Inc. v. Commercial Union Ins. Co.*, 926 F.Supp. 446, 457 (D.N.J. 1996) (“graffiti undoubtedly qualifies as property damage” although it can be cleaned off).

Further, although unnecessary to demonstrate “direct physical damage to” property, *Spectrum* alleged that it performed extraordinary remedial measures “beyond mere cleaning in order to remediate the alleged damage COVID-19 caused to its property.” *Huntington Ingalls*, 287 A.3d at 534. Such measures included, but were not limited to,

“ma[king] alterations to physical spaces,” “enhancing infection control, implementing sterilization procedures and equipment, and creating isolation areas in the community.” *Spectrum*, 2021CV30695, at *9 (Colo. Dist. July 13, 2022) (quoting complaint).

Ultimately, the capacity of an airborne toxin to cause physical damage to property is precisely the kind of scientific question that courts may not, and do not, resolve on the pleadings, against plaintiffs, without evidence. *E.g.*, *Huntington Ingalls*, 287 A.3d at 535 (holding COVID-19 insurance claims cannot be dismissed based on “a layperson’s understanding of the physical and scientific properties of a novel virus”); *cf.* *Sonrisa Holding, LLC v. Circle K Stores, Inc.*, 835 F.App’x 334, 341 (10th Cir. 2020) (the effect of gasoline vapors on property “is an inherently scientific and technical question”). The first trial judge and the dissenting Division judge well understood this, and indeed, other state courts have commended the trial court’s initial ruling in this case as “more faithful to Colorado’s motion to dismiss standard and, overall, substantially persuasive.” *Prime Hospitality*,

Inc. v. Acadia Ins. Co., 2022 WL 17251587, at *6 (Me. Bus. Ct. Nov. 2, 2022) (applying Colorado law).

In ruling otherwise, the majority and second trial judge below improperly “assumed the role of an expert” on scientific principles about the virus’s physical attributes, behavior, and effects on property, *Prestige Homes*, 658 P.2d at 854, without the benefit of any factual record, *Antero*, 347 P.3d at 151. They did so by resolving these scientific issues *against* Spectrum, when they need to be strictly construed against the movant-insurer. *Brown*, ¶17.

CONCLUSION

Respectfully, the Court should reverse the decision below.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on April 7, 2026, a true and correct copy of the foregoing was filed and served via the Colorado Courts E-Filing system on all counsel of record.

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