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THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIFIED QUESTIONS
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Mary Geiger Lewis, United States District Court Judge

Appellate Case No. 2021-001209
District Court Case No. 3:20-cv-02275

Sullivan Management, LLC,

Plaintiff,

v.

Fireman's Fund Insurance Company,
and Allianz GLOBAL Risks US
Insurance Company,

Defendants.

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AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS

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INTEREST OF *AMICUS CURIAE*

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

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

On business interruption related to COVID-19, UP gave three separate NAIC presentations in 2020.[1] UP called attention to the uniform pattern of coverage denials by insurance companies nationwide (even where policy language differed and policies contained no virus or pandemic

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[1] NAIC Special Session on COVID-19 Lessons Learned, https://www.youtube.com/watch?v=J2QmaZqd9Vk; Testimony of Amy Bach on Business Interruption Policies and Claims, Summer National Meeting Property and Casualty Insurance (C) Committee August 12th, 2020,https://uphelp.org/wp-content/uploads/2021/01/up_business_interruption_policies_and_claims.pdf;Testimony of Amy Bach on COVID-19 Related Business Interruption Claims, Coverage Issues, Disputes and Litigation, Summer National Meeting, Consumer Liaison Committee, August 14th, 2020, available at https://uphelp.org/wp-content/uploads/2021/01/up_business_interruption_policies_and_claims.pdf

exclusion), coupled with unsupported assertions that paying claims would bankrupt the insurance industry. UP also presented evidence that insurance companies were not candid with regulators about the significance of virus and pandemic-related limitations and exclusions they added to their policies.[2] Although insurance companies had paid business interruption claims stemming from the SARS CoV-1 outbreak, some told regulators they had never paid virus-related losses to justify not reducing rates when they added virus exclusions after the outbreak.

UP chooses cases cautiously and appears as *amicus curiae* nationwide. UP's briefs provide a counterweight to the claims of the insurance industry and facilitate evenhanded development of the law. UP has filed *amicus* briefs in federal and state courts across the country in numerous cases. Its briefs have been cited in the opinions of multiple state supreme courts as well as the U.S. Supreme Court.[3]

In this brief, UP seeks to fulfill the classic role of *amicus curiae,* supplementing the efforts of counsel and drawing the Court's attention to law that might otherwise escape consideration. Its commitment to advocating for policyholders during the pandemic has been vital. As commentators have stressed, an *amicus* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (*quoting* Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)). The issues presented in the certified questions will affect coverage not just for COVID-related insurance claims, but also future policyholders that suffer losses caused by

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

3 *See Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Sproull v. State Farm Fire & Cas. Co*., No. 126446, 2021 WL 4314060 (Ill. Sep. 23, 2021); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005); *Cont'l Ins. Co. v. Honeywell Int'l, Inc*., 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co.v. Wolfe*, 105 A.3d 1181, 1185-6 (Pa. 2014).

things like toxic fumes, smoke, asbestos fibers, bacteria and other invisible materials that render property unusable without a structural alteration of property. Decades of precedent have found these unexpected causes of loss to be covered, and the Court should consider the full scope of what will be lost if the insurance companies' arguments are accepted here.

PRELIMINARY STATEMENT

Businesses of all sizes buy property and business interruption insurance to ensure that their properties can be used to generate revenues. When property is impacted in a way that interrupts operations and the ability to drive revenues – whether from a massive hurricane, invisible noxious fumes, or a microscopic but deadly virus – the "physical loss or damage" to the property is the same and is equally insurable. Make no mistake, COVID causes "physical loss or damage" to property, as the Complaint in this action alleges. Particles of SARS-CoV-2 suspended in the air or on surfaces take property that is safe and usable for business purposes and turns it into property that is unsafe and unusable – possibly even deadly. That represents "physical loss or damage" in every sense. And that is what business interruption insurance is for – to protect against interruptions following loss or damage to property from all risks of loss, big and small, even if there is no "structural alteration" or "permanent dispossession" of property.

Insurance companies support that understanding by selling policies that cover "physical loss or damage" without saying anything about a supposed requirement of "structural alteration" or "permanent dispossession" of property. The insurance companies have failed to add such terms to their policies even though courts have held for decades that such things are not required for a finding of "physical loss or damage" and have urged insurance companies to clarify their policy language if they expect to limit coverage to such circumstances. South Carolina law prohibits the

insurance companies from changing the terms of their policies after the fact, or having this Court make such changes for them.

If this Court departs from the decades of rulings on the meaning of "physical loss or damage" and adds new requirements not found in the insurance policy that Sullivan purchased, then going forward, insurance coverage for all sorts of losses that do not involve either "permanent dispossession of . . . or physical alteration to property" will be called into question. There is a virtually endless list of such perils – including fumes, odors, smoke and ash, toxic particles, and other damaging or deadly microscopic material – all of which have been covered under property insurance policies for decades. Such a disregard of precedent will hurt future policyholders unlucky enough to suffer physical losses that do not involve structural alteration of property, yet cause unexpected and insurable disruptions to their businesses. It also will undermine the societal benefits of risk-spreading and prompt indemnification required of a well-functioning insurance industry.

Insurance companies have set aside billions of dollars to pay COVID business interruption claims (particularly under the 17% of policies sold without a virus exclusion[4]), as seen from early industry reports showing over $1.3 Billion in "incurred losses" as of just November 2020.[5] Notably, "incurred losses" is defined to include reserves, consistent with standard insurance industry accounting practices, so for the most part, these Billions do not reflect amounts paid to policyholders.[6] If an insurance company is not ordered to pay what its policy promises, then these

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4 *See* COVID-19 PROPERTY & CASUALTY INSURANCE BUSINESS INTERRUPTION DATA CALL PART 1 | PREMIUMS AND POLICY INFORMATION JUNE 2020, at p. 4 available at https://content.naic.org/sites/default/files/inline-files/COVID-19%20BI%20Nat%27l%20Aggregates_2.pdf.

5 *See* COVID-19 PROPERTY & CASUALTY INSURANCE BUSINESS INTERRUPTION DATA CALL PART 2 | CLAIM AND LOSS INFORMATION NOVEMBER 2020, available at https://content.naic.org/sites/default/files/inline-files/COVID-19%20BI%20Nat%27l%20Claims%20Aggregates_Nov.pdf.

6 *Id.* at p. 2 ("Case Incurred Loss means indemnity case reserves plus claim payments made to date.").

sums will be reclassified as assets for accounting purposes, adding further to the enormous windfall profits and record Trillion dollar surplus[7] that insurance companies accumulated amidst premium hikes[8] imposed throughout the pandemic.

STATEMENT OF THE CERTIFIED ISSUES PRESENTED FOR REVIEW

The Honorable Mary Geiger Lewis of the United States District Court for the District of South Carolina certified, and this Court accepted, the following questions for review pursuant to Rule 244, SCACR:

1. Does the presence of COVID-19 in or near Sullivan's properties, and/or related governmental orders, which allegedly hinder or destroy the fitness, habitability or functionality of property, constitute "direct physical loss or damage" or does "direct physical loss or damage" require some permanent dispossession of the property or physical alteration to the property?
    a. Do other policy terms, e.g., those in the Communicable Disease Coverage Extension, evidence that COVID-19 can constitute "direct physical loss or damage?"
    b. Is the phrase "direct physical loss or damage to property" ambiguous?
2. Do the Policy's Business Access and/or Civil Authority coverage require a complete prohibition of all access to Sullivan's properties?

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7 *See* National Association of Insurance Commissioners, *U.S. Property & Casualty and Title Insurance Industries – 2021 First Half Results* at p. 1 (showing a record surplus of over $1 Trillion, representing an increase of about $110 Billion since the onset of the pandemic) and p. 6 ("Net cash provided by operating activities totaled $63.7 billion for the first six months of 2021 compared to $45.9 billion for the same period in 2020, representing a 39.1% increase.") (available at https://content.naic.org/sites/default/files/inline-files/Property-Casualty-and-Title-Insurance-Industries-2021-Mid-Year-Report.pdf).

8 *See,* Compendium of Articles, Addendum 1 at 1-43.

3. Has there been a "communicable disease event" as that term is used in the Communicable Disease Coverage Extension?

4. Does Sullivan's alleged expenditures to mitigate COVID-19 qualify for Loss Avoidance or Mitigation Coverage?

5. Does the Mortality and Disease Exclusion bar all coverage or is it ambiguous and/or is it in conflict with the Communicable Disease Coverage Extension?

In this *amicus curiae* brief, United Policyholders addresses the first, second and fifth certified questions.

FACTUAL BACKGROUND

As to the operative facts, United Policyholders adopts the Statement of Facts set forth in the Brief of Plaintiff, Sullivan Management, LLC ("Sullivan"), filed with this Court on Dec. 10, 2021 at 6-8 ("Pl. Br."). Still, it is important to refresh this Court's recollection about the extreme impact of the COVID-19 pandemic on people, property and commerce across South Carolina. At the pandemic's start in the spring of 2020—almost two years ago at this point—citizens wore masks and gloves *if* they ventured outside their homes at all. They disinfected their groceries and constantly washed their hands.

Because it remains suspended and re-suspended in the air for hours and survives on surfaces for days, SARS-CoV-2 turned every location or business where people congregate into a natural disaster. *Friends of Danny DeVito v. Wolf,* 227 A.3d 872, 889–90 (Pa. 2020), *cert. denied,* 141 S. Ct. 239 (2020). From March through July of 2020 there were over 90,000 COVID-19 cases in South Carolina.[9] Considering the limited testing ability at that time, the real numbers were

[9] Johns Hopkins Univ. of Medicine Coronavirus Resource Center, Addendum 2 at 46 (with cursor placement showing cumulative cases as of Aug. 1, 2020) (available at https://coronavirus.jhu.edu/region/us/south-carolina).

likely higher. Despite exhaustive precautions, nearly 16,000 South Carolinians have died from COVID-19 to date.[10] We must not lose sight of the intensity of the catastrophe despite the passage of time.

ARGUMENT

"In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer, and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right." *Shaw v. Psychemedics Corp*., 426 S.C. 194, 197, 826 S.E.2d 281, 282 (2019). Under the law and public policy of South Carolina, along with all principles of fairness, justice and equity, the answers to the certified questions establish the existence of coverage here.

I. COVID CAUSES "PHYSICAL LOSS OR DAMAGE" UNDER LONGSTANDING PRECEDENT THAT FIREMAN'S FUND HAS KNOWN ABOUT FOR DECADES WITHOUT CHANGING THE TERMS IN THE POLICIES IT SELLS

A. For Over 60 Years, Courts Have Held that "Physical Loss or Damage" Does Not Require "Structural Alteration" or "Permanent Dispossession" of Property

The answer to the first certified question can be found in more than 60 years of insurance law from across the country. Where property is rendered unfit for its intended use – as by smoke from forest fires, toxic dust from nearby building collapses, or microscopic viruses that could kill inhabitants – policyholders are entitled to coverage even if property has not been permanently

[10] *Id*., Addendum 2 at 44.

dispossessed or structurally altered.[11] During the 1950s,[12] the 1960s,[13] the 1970s,[14] the 1980s,[15] and the 1990s[16] – courts consistently have found such losses covered as "physical loss or damage."

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[11] *See, e.g.,* Gregory Packaging, Inc. v. Travelers Prop. Cas. Co., No. 2:12-cv-04418, 2014 WL 6675934, at *5-6 (D.N.J. Nov. 25, 2014) (concluding that "property can sustain physical loss or damage without experiencing structural alteration," that "the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated," and therefore that the ammonia discharge caused direct physical loss or damage); Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co., No. 1:15-cv-01932-CL, 2016 WL 3267247, at *5-6 (D. Or. June 7, 2016), *vacated by joint stipulation*, 2017 WL 1034203 (Mar. 6, 2017) (smoke from wildfires).

[12] American Alliance Ins. Co. v. Keleket X-Ray Corp., 248 F.2d 920, 925 (6th Cir. 1957) (finding that the policyholder, which manufactured instruments used in measuring radioactivity, had suffered property damage from a release of radon dust and gas which made the building unsafe, and made it impossible to calibrate the instruments prior to sale because of background radiation).

[13] Hughes v. Potomac Ins. Co., 18 Cal. Rptr. 650, 655 (Cal. Ct. App. 1962) (finding that the policyholder's home – which became perched on the edge of a cliff after a landslide deprived it of lateral support and stability – was damaged because it became unsafe to live in and was thus, useless); W. Fire Ins. Co. v. First Presbyterian Church, 437 P.2d 52, 54 (Colo. 1968) (en banc) (finding a "direct physical loss" where a church complied with the fire department's order to close because gasoline vapors made "use of the building dangerous").

[14] Cyclops Corp. v. Home Ins. Co., 352 F. Supp. 931, 937 (W.D. Pa. 1973) (finding the policyholder entitled to coverage for loss of business income where vibration of motor, without apparent damage, caused the business to be shut down).

[15] Hampton Foods, Inc. v. Aetna Cas. & Sur. Co., 787 F.2d 349, 352 (8th Cir. 1986) (finding the policyholder could claim business income coverage where risk of collapse necessitated abandonment of grocery store).

[16] In chronological order: Hetrick v. Valley Mut. Ins Co., 15 Pa. D. & C. 4th 271, 1992 WL 524309, at *3 (Pa. Comm. Pl. May 28, 1992) (finding there would be coverage for loss of use of a house if an outside oil spill made the house uninhabitable); Largent v. State Farm Fire & Cas. Co., 842 P.2d 445, 446 (Or. App. 1992) (noting that insurance company conceded methamphetamine fumes could cause "accidental direct physical loss"); Farmers Ins. Co. v. Trutanich, 858 P.2d 1332, 1335 (Or. App. 1993) (finding costs of methamphetamine odor covered as direct physical loss or damage); Azalea, Ltd. v. American States Ins. Co., 656 So. 2d 600, 602 (Fla. Dist. Ct. App. 1995) (finding damage to sewage treatment plant from chemicals that destroyed a bacteria colony necessary for the plant to operate amounted to "direct damage to the structure"); Arbeiter v. Cambridge Mut. Fire Ins. Co., No. 9400837, 1996 WL 1250616, at *2 (Mass. Super. Mar. 15, 1996) (finding oil fumes present in house after discovery of oil leak constituted physical damage); Sentinel Mgmt. Co. v. N.H. Ins. Co., 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (finding the presence of asbestos could constitute physical loss or damage); Murray v. State Farm Fire & Cas. Co., 509 S.E.2d 1, 17 (W. Va. 1998) (finding a home rendered unlivable by falling rocks had suffered a "direct physical loss to the property"); Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc., 78 Cal. App. 4th 847, 865 (2000) (holding that the intermingling of a quarter pound of wood shavings in 80,000 pounds of almonds caused physical loss or damage to the almonds even though the almonds were structurally unchanged); Matzner v. Seaco Ins. Co., 9 Mass. L. Rptr. 41, 1998 WL 566658, at *4 (Mass. Super. Aug. 12, 1998) (concluding that "direct physical loss or damage" was ambiguous and could mean either "only tangible damage to the structure of insured property" or "more than tangible damage to the structure of insured property," and that "carbon monoxide contamination constitutes 'direct physical loss of or damage to' property"); Columbiaknit, Inc. v. Affiliated FM Ins. Co., No. 98-434-HU, 1999 WL 619100, at *7-8 (D. Or. Aug. 4, 1999) (finding that policyholder could bear its burden to demonstrate that clothes containing mold or mildew suffered "direct physical loss or damage" if it established "at trial a class of garments which has increased microbial counts and that will, as a result, develop either an odor or mold or mildew"); Board of Educ. v. International Ins. Co., 720 N.E.2d 622, 625-26 (Ill. App. 1999) (citing liability insurance coverage cases finding that incorporation of asbestos into buildings caused "property damage," defined under liability policies to be "physical injury to or destruction of tangible property").

These rulings continued into the 2000s,[17] when insurance companies paid claims for losses caused by a novel coronavirus, SARS-CoV-1.[18] Even after that outbreak, they continued to use "physical loss or damage" in their policies, and courts continued to find coverage for their business interruption losses in the absence of structural alteration.[19] Thus, it was entirely reasonable for Sullivan to interpret that standard-form language in its Policy as providing coverage for the losses Sullivan suffered when its business operations were suspended by the latest novel coronavirus, SARS-CoV-2, which causes COVID-19.

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[17] In chronological order: *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 825-26 (Minn. 2000) (holding that "[a] principal function of any living space [is] to provide a safe environment for the occupants" and "[i]f rental property is contaminated by asbestos fibers and presents a health hazard to the tenants, its function is seriously impaired"); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. 01-1362, 2002 WL 31495830, at *8-*9 (D. Or. June 18, 2002) (concluding that mold damage to house could constitute "distinct and demonstrable" damage and that inability to inhabit a building may constitute "direct, physical loss"); *Cooper v. Travelers Indem. Co. of Ill.*, No. 01-cv-2400, 2002 WL 32775680, at *1 (N.D. Cal. Nov. 4, 2002) (holding that the presence of coliform bacteria and E.coli could constitute physical loss or damage); *Graff v. Allstate Ins. Co.*, 54 P.3d 1266, 1269 (Wash. Ct. App. 2002) (holding that the presence of methamphetamine vapors could constitute physical loss or damage).

[18] The coverage included a $16 million payout to one hotel chain, Mandarin Oriental International. Gavin Souter, Hotel Chain to get Payout for SARS-Related Losses, BUSINESS INSURANCE (Nov. 2, 2003), available at https://www.businessinsurance.com/article/20031102/story/100013638/hotel-chain-to-get-payout-for-sars-related-losses.

[19] In chronological order: *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 824–27 (3d Cir. 2005) (holding that the presence of E. coli could constitute physical loss or damage); *De Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 722-23 (Tex. App. Mar. 31, 2005) (finding mold damage constituted "physical loss to property"); *Schlamm Stone & Dolan LLP v. Seneca Insurance Co., No. 603009/2002, 2005 WL 600021at *4 (N.Y. Sup. Ct. Mar. 4, 2005)* (finding "the "the presence of noxious particles, both in the air and on surfaces of the plaintiff's premises, would constitute property damage under the terms of the policy"); *Cook v. Allstate Ins. Co.*, No. 48D02-0611-PL-01156, 2007 Ind. Super. LEXIS 32, at * slip op. at 9-10 (Ind. Super. Ct. Madison County Nov. 30, 2007) (finding infestation of house with brown recluse spiders constituted "sudden and accidental direct physical loss" to the house, and "[c]ase law demonstrates that a physical condition that renders property unsuitable for its intended use constitutes a 'direct physical loss' even where some utility remains and, in the case of a building, structural integrity remains"); *Brand Mgt., Inc. v. Maryland Cas. Co.*, No. 05-cv-02293, 2007 WL 1772063, at *2 (D. Colo. June 18, 2007) (noting that where a sushi manufacturer which closed for 15 days to disinfect its premises after discovery of listeria contamination, the insurance company voluntarily paid the business income claim); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co.*, No. 05-1315, 2007 WL 464715, at *8 (D. Or. Feb. 7, 2007) (finding "physical loss or damage" to a policyholder's heat treater for medical implants when a lead hammer was mistakenly left in the treater; noting that "[t]here is no question that the physical transformation of the furnace which rendered it useless for processing medical devices, the use for which it was specially certified, reduced both the value of the furnace and [the policyholder's] ability to derive business income from the furnace. This reduction of value was caused by an incident that is fairly characterized as 'direct physical damage'").

B. Fireman's Fund Knew About the Rulings Finding Coverage Without "Structural Alteration" But Never Added More Restrictive Terms to the Policies It Sells

The insurance industry – including Defendants Fireman's Fund Insurance Company and Allianz Global Risks US Insurance Company (collectively "Fireman's Fund") – is well aware of these decisions. In fact, a trade organization that drafts policy language for the industry admitted that its responsibilities include monitoring such decisions and updating its forms and endorsements in response thereto.[20] Yet it never added a requirement of permanent dispossession or physical alteration to its policy forms. Instead, it left the language unchanged, knowing that phrase "physical loss or damage" has been interpreted by policyholders and courts alike *not* to require either permanent dispossession or physical alteration.

Fireman's Fund never added a requirement in any of its policies stating that losses are only covered if there is a "structural alteration" or permanent dispossession" of property, either. The history on this point makes clear that Fireman's Fund, like the rest of the insurance industry, never narrowed the coverage provided in its standard-form policies for "physical loss or damage" as that phrase was understood and interpreted for decades by both policyholders, courts and the insurance companies themselves.

C. Courts Cannot Change the Policy To Say What Fireman's Fund Now Wishes It Had Said at the Time of Sale

South Carolina law understandably prohibits insurance companies from having a court add or alter terms of the policy that the insurance company sold to its policyholder. As this Court has aptly stated: "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." W*hitlock v. Stewart Title Guar. Co.*, 399 S.C. 610,

[20] ISO Circular dated July 6, 2006, Addendum 4 at 60-72)

616, (2012). Fireman's Fund to have this court add terms and restrictions found nowhere in Sullivan's Policy must fail.

1. Fireman's Fund Did Not Draft the Policy To Require "Physical Alteration" of Property (Although It Could Have)

If Fireman's Fund disagreed with the decades of cases finding coverage based on "physical loss or damage" without "physical alteration," it easily could have revised its policy forms to add such a requirement. It did not. This Court cannot add such terms or requirements to the policy under settled South Carolina law.

Even if there was a requirement for "physical alteration" of property (which there is not), it is met here. COVID in the air or on surfaces turns property that is safe and usable into property that is unsafe, unusable and possibly even deadly. That is a "physical alteration" under any reasonable interpretation. Business owners pay hefty premiums to protect against losses sustained following loss or damage to property, whether from fire and smoke that renders some or all of a property unusable or by an invisible virus that does the same thing.

2. Fireman's Fund Did Not Draft the Policy To Require "Permanent Dispossession" of Property (Although It Could Have)

Likewise, the Policy Sullivan purchased does not require "permanent dispossession" of property. Such a hidden requirement would drastically reduce coverage with no warning to the policyholder. This is especially true with respect to the Policy's valuable business interruption coverage – which covers lost revenues starting from the time property is physically lost, whether that loss be temporary or permanent.

For example, consider a loss involving a stolen food truck. Clearly, theft constitutes "physical loss" of property and the Policy's business interruption coverage insures lost revenues following the theft. *See* ECF #45-2 at 29 and Appendix 1 at 30. What if, after three weeks, the police recover the truck, and the policyholder is back in business in a month? Under Fireman's

Fund's cramped interpretation, there would be no covered business interruption loss because there was no "permanent dispossession" of property. That cannot be correct. The loss of the food truck meets the Policy's requirement of "physical loss" even though it is not "permanent." The same is true in the COVID context.

D. This Court Should Not Be Misled By Erroneous Statements in a Section from "Couch"

Fireman's Fund likely will veil its effort to revise the terms of the Policy by citing to an insurance treatise that states, erroneously,[21] that physical alteration has always been required. The Motion to Dismiss that Fireman's Fund filed in the U.S. District Court of South Carolina – prior to the certification of questions to this Court – relies heavily on 10A Couch on Ins. § 148:46 (3d Ed. West 1998) (generally "*Couch Third"*). *See* ECF #45-1 at 13-14, and Appendix 3 at 225-26.

In 1995, *Couch Third* added a new section, § 148.46, titled "Generally; 'Physical' loss or damage." That section claimed that it was a "widely held" rule that coverage should not apply unless the policyholder showed "a distinct, demonstrable, physical alteration" of the property." The problem, though, was that no case actually said that. *Couch Third*'s claim in § 148.46 was simply not true.

The formulation in *Couch Third* appears to have been based on *one* federal case (not a state-court decision) – *Great Northern Insurance Co. v. Benjamin Franklin Federal Savings & Loan Ass'n*, 793 F. Supp. 259, 263 (D. Or. 1990) ("*Ben Franklin*"). Yet nowhere in *Ben Franklin* does the court state there must be "a distinct, demonstrable, physical alteration" of property to trigger coverage: *Couch Third* invented that. Moreover, the Oregon state appellate

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[21] The origins of this unsupported statement in the treatise are examined thoroughly in Richard P. Lewis, Lorelie S. Masters, Scott D. Greenspan and Chris Kosak, *Couch's "Physical Alteration" Fallacy: Its Origins and Consequences* 56:3 TORT, TRIAL & INS. PRAC. L.J. 62, 634 (Fall 2021) (Addendum 5 at 73- 98 and available at https://papers.ssrn.com/sol3/ papers.cfm?abstract_id=3916391).

court – more an arbiter of Oregon law than a federal judge ostensibly bound to follow Oregon law under the *Erie* Doctrine[22] – rejected *Ben Franklin* three years later in *Farmers Insurance Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. Ct. App. 1993). Importantly, *Trutanich* was decided two years *before* the release of *Couch Third*, but *Couch Third* chose to ignore it (and, as discussed below, continues to do so).

Couch Third did acknowledge that "physical loss or damage" does not always require "physical alteration," citing a single case – *Western Fire Insurance Co. v. First Presbyterian Church,* 437 P.2d 52 (Colo. 1968); 10A Couch on Insurance 3d § 148:46. In doing so, the treatise suggests that this standard is the minority rule. To the contrary, when this section first was written in the 1990s, the reasoning and result from *Western Fire* had been adopted by at least thirteen courts, and was the majority rule.[23] Section 148.46 from *Couch Third* simply misstated the law, and continues to do so.

Indeed, the *Couch Third* author responsible for § 148.46 acknowledged almost a decade ago that the "modern interpretative trend" *did not require* a distinct, demonstrable, physical alteration: "The modern interpretive trend is liberalizing the meaning of direct physical loss to focus upon loss of use as opposed to direct physical loss involving physical alteration." Steven Plitt, "*Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alteration*" CLAIMS JOURNAL (Apr. 15, 2013) (available at

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22 *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

23 While this does not appear to be a huge number of cases, property and time-element disputes have historically resulted in far fewer decisions than, for instance, liability insurance disputes. For instance, as of 1995 when *Couch Third* first published its formulation, there were only about 250 – total – time-element cases. Richard P. Lewis & Nicholas M. Insua, Business Income Insurance Disputes § ___ (Wolters Kluwer, 2d ed., ___ & 2022 Supp.). It is then all the more surprising to see this error continue to appear in *Couch Third* even up through the December 2021 supplement.

https://amp.claimsjournal.com/magazines/idea-exchange/2013/04/15/226666.htm) (emphasis added).

The November 2021 supplement of another treatise co-authored by the same commentator (Steven Plitt) similarly confirmed that "it is difficult to distill a general rule" regarding the judicial interpretation of physical loss or damage, and that "there is substantial support for the principle that an insured need not prove damages affecting the structural integrity of property in the sense that a part of the property must be removed and replaced with new materials or reassembled." *See* John DiMugno, Steven Plitt, and Dennis J. Wall, *Catastrophe Claims: Insurance Coverage for Natural and Man-Made Disasters* § 8:6 (Nov. 2021 supplement).

Despite these analyses of the law stating a contrary conclusion, the December 2021 update to § 148.46 of *Couch Third* continues to state that the "widely held" rule requires a "distinct, demonstrable physical alteration." That was wrong when *Couch Third* first was published in 1995 – and it is wrong today. In fact, § 148.46 continues to cite *Ben Franklin* as support for its overstated "distinct, demonstrable physical alteration" formulation. *Couch Third* also continues to ignore *Trutanich*, where the Oregon Court of Appeals rejected *Ben Franklin*. *Trutanich,* 858 P.2d at 1335 (rejecting the insurance company's argument that "methamphetamine 'cooking' [odor] constituted 'direct physical loss,'" concluding that "odor was 'physical,' because it damaged the house"). *Compare to Couch Third* § 148.46 (Dec. 2021 Supp.) (citing *Ben Franklin* but not citing Oregon Court of Appeals' decision rejecting it in *Trutanich*). Similarly, § 148.46 continues to only cite *Western Fire* for the "opposite result" – *i.e.* that "physical alteration" is not required – despite that it continues to be the majority rule.

Other treatises have correctly concluded that the majority of cases do not interpret "physical loss or damage" to require "physical alteration" of property. *See e.g.* 3 Allan D. Windt, Insurance Claims & Disputes § 11:41 (6th ed. 2013) ("when an insurance policy refers to physical loss of or damage to property, the 'loss of property' requirement can be satisfied by any 'detriment,' and a 'detriment' can be present without there having been a physical alteration of the object."); 5 John Alan Appleman & Jean Appleman, Insurance Law & Practice 2d § 3092 (1970 & 2012 Supp.) ("The courts have construed the scope of what constitutes 'physical loss or damage' liberally," while still recognizing that some losses (such as a withdrawn warranty) were not "physical"). Any further citations to § 148.46 of *Couch Third* should be disregarded.

E. Fireman's Fund Admits – In the Policy Itself – That a Communicable Disease Can Cause "Physical Loss or Damage"

Fireman's Fund's core argument that COVID cannot cause "physical loss or damage" is undermined by the terms of the Policy itself. The Policy includes a Communicable Disease Coverage Extension that expressly admits that communicable diseases cause "direct physical loss or damage":

> **we will pay for direct physical loss or damage to Property Insured caused by or resulting from a covered communicable disease event** at a location . . .

See ECF #45-2 at 44-45, Appendix 1 at 45-46.

Having sold a policy that expressly makes the direct causal connection between "physical loss or damage" and "communicable disease," it is untenable for Fireman's Fund to seek dismissal of Sullivan's complaint on the grounds that Sullivan's allegations that COVID-19 causes physical loss or damage are "implausible." The proof of plausibility is found in the Policy itself. Fireman's Fund's self-defeating argument here must be rejected.

By stating that "direct physical loss or damage" can be caused by a communicable disease, Fireman's Fund made clear that losses from the COVID-19 pandemic are necessarily subject to

coverage. Any other interpretation would render this coverage extension illusory, which is barred by South Carolina insurance law. *See Isle of Palms Pest Control Co. v. Monticello Ins. Co*., 319 S.C. 12, 459 S.E.2d 318, 321 (S.C. Ct. App. 1994), *aff'd* 321 S.C. 310, 468 S.E.2d 304 (1996) (South Carolina recognizes the illusory coverage doctrine to protect policyholders where the terms of the policy exclude from coverage "the very risk contemplated by the parties," rendering a policy provision "virtually meaningless").

F. The COVID Cases Fireman's Fund Relies on Are Distinguishable and Are Criticized by Insurance Law Scholars and State Court Judges

1. The Cases Cited by Fireman's Fund Are Distinguishable

Fireman's Fund has and will rely on cases granting dismissals of COVID-related business interruption claims, but they are not a one-size-fits-all lot. The vast majority of those cases are very different from this one, both in terms of the policy language at issue and the allegations in Sullivan's complaint.

Most of the cases on which Fireman's Fund relies involved policies that provided much narrower coverage – usually featuring an ISO Virus Exclusion.[24] Because the policies in those cases have broad virus exclusions, the complaints in those cases usually *did not allege* "physical loss or damage" caused by SARS-CoV-2 to avoid "pleading into" the exclusion. Instead, counsel for those plaintiffs often alleged that *the orders themselves* caused physical loss or damage (*i.e.,* loss of use not connected to any "physical loss or damage" either at or away from the insured premises). In most of these cases, the resulting dismissals were based on the *absence* of allegations of "physical loss or damage" as opposed to a conclusion that the virus does not cause such loss or damage. No such absence of allegations exists here.

[24] While its omission from Sullivan's Policy is noteworthy, UP takes no position in this brief regarding the enforceability of the standard form virus exclusion or whether its presence in a property insurance policy in fact precludes coverage for all virus-related losses.

This case is different. Here, Fireman's Fund did not include a broad virus exclusion barring coverage for losses caused by a virus. Unlike Fireman's Fund's cases, Sullivan's complaint here includes extensive allegations that SARS-CoV-2 caused physical loss or damage at and near the insured premises. See ECF #1-2 at ¶¶ 33, 50, 58-65 and Appendix 2 at 187, 194-195.

The fact that other businesses purchased coverage or made allegations that limited their rights does not justify abridging Sullivan's right to recovery here.

2. The Cases Cited by Fireman's Fund Are the Subject of Deserved Criticism

Judges and legal scholars alike are sharply criticizing the decisions on which Fireman's Fund relies here. As one jurist stated in a recent decision denying a motion to dismiss in a COVID-related business interruption case:

> Zurich claims that there is nothing "physical" about the losses or damage flowing from the COVID-19 virus. Zurich notes that some courts in other jurisdictions have addressed this issue – remarkably at the pleading stage – remarkably with little apparent deliberation. Yes, Zurich can cite decisions where courts, agree with it. Some of them merely note that claimants haven't even alleged physical damage using the words "physical". Others go further. The virus damages lungs not property, they say.
>
> But can this merely be asserted to become true? Maybe this kind of result is the product of an expansive view of "plausibility" under the pleading standard adopted by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly.* But Connecticut's standard prefers a ruling from the evidence rather than the gut.
>
> * * *
>
> The rush to judgment on the question of physical damage in some courts—without reasoning and without evidence—has been ill advised. For now, in this court, and for this policy, it would be wrong to rush.

New Castle Hotels LLC v. Zurich Am. Ins. Co., No. X07-HHD-CV-21-6142969-S, 2021 WL 4478669, at *2, 3 (Conn. Super. Ct. Sept. 7, 2021).

Another judge put it this way, explaining the importance of accepting allegations regarding the impact of the coronavirus on property as true and having the case decided based on the actual evidence:

> Defendant's counsel argues that it does not matter what Plaintiffs alleged in their complaint because a virus like SARS-CoV-2 can never trigger coverage since it can just be wiped off. How do I know that? Counsel suggests that it is a "fact" subject to judicial notice, but at least in Illinois, only commonly known facts beyond reasonable dispute are subject to judicial notice. Ill. R. Evid. 20l(b). Hard to imagine that emerging "facts" about a novel coronavirus would satisfy that standard. There is far from universal agreement on how the virus attaches to surfaces and the effectiveness of efforts to remove the virus.

JDS Constr. Grp., LLC, v. Cont'l Cas. Co., No. 2020 CH 5678, Order at 3-4 (Ill. Cir. Ct. Oct. 25, 2021) (Addendum 3 at 54-59) (*citing* N. Cimolai et al., *"Environmental and Decontamination Issues for Human Coronaviruses and Their Potential Surrogates,"* Journal of Medical Virology 2020; 92: 2498-2510; M. Aydogdu et al., *"Surface Interactions and Viability of Coronavirus,"* Journal of the Royal Society Interface 18: 20200798).

The court in *JDS Construction* also criticized the apparent tendency to follow the decisions in other cases involving other policy wordings and different state law, stating:

> Economists refer to this as an appeal to "herding behavior" – a process by which group-think replaces individual decision-making. . . . Judges are not sheep, and I do not decide a case by counting noses. Further, the "herd" can be wrong. *See, e.g.,* A. Daughety et al., "Stampede to Judgment: Persuasive Influence and Herding Behavior by Courts," 1 American Law and Economics Review 158 (Fall 1999).

Id. at 4. Numerous courts agree.[25]

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[25] *See e.g.*, *MacMiles, LLC v. Erie Ins. Exch.*, No. GD-20-7753, 2021 WL 3079941, at *5 (Pa. Com. Pl. May 25, 2021) ("merely accepting the non-binding decisions of other courts 'by the purely mechanical process of searching the nations courts for conflicting decisions' amounts to an abdication of this Court's judicial role*");* *Ungarean, DMD v. CNA*, No. GD-20-006544, 2021 WL 1164836, at *6 (Pa. Com. Pl. Mar. 25, 2021) (same); *Brown's Gym, Inc. v. Cincinnati Ins. Co.*, No. 20 CV 3113, 2021 WL 3036545, at *19 (Pa. Com. Pl. July 13,

(*footnote continued*)

Legal scholars and insurance law experts similarly have criticized the courts that have ignored well-pleaded allegations of "physical loss or damage" from SARS-CoV-2 and dismissed cases without accepting the allegations as true or considering the evidence. *See* Knutsen and Stempel, *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 CONN. INS. LAW J. 185 (2020) (Addendum 6 at 100-200). Professors Knutsen and Stempel offer the following assessment of those decisions, on which Fireman's Fund heavily relies:

- "[W]e remain disappointed in the quality of analysis applied in many of the COVID coverage cases, which has often been reductionist, simplistic, crabbed, and overconfident regarding textual analysis, as well as insufficiently sensitive to the value of trial proceedings for resolving these disputes." *Id.* at 192, Addendum 6 at 108.

- "Judges granting dismissal motions without any opportunity for discovery, and denying any possibility of coverage at the metaphorical starting gate, have undermined the traditional American commitment to jury trials as well as widely accepted legal principles of insurance policy construction such as interpreting ambiguous terms against the drafter and considering policyholder reasonable expectations." *Id.*

2021) ("State trial courts throughout the nation have agreed with the foregoing rationale articulated in the federal case law in denying insurers' attempts to dismiss business interruption insurance claims filed by insureds who assert that COVID-19 was present on their covered property"); *Goodwill Indus. of Orange Cnty., Cal. v. Phila. Indem. Insur. Co.*, No. 30-2020-01169032-CU-IC-CXC, 2021 WL 476268, at *3 (Cal. Super. Ct. Jan. 28, 2021)) (stating that the Federal cases relied on by the insurance company "are not binding on this court and were decided under a different standard" [compared to a motion to dismiss] and that unlike the insurance company's cases, the plaintiff did allege that the coronavirus and COVID-19 caused physical loss or damage to the property at issue, which allegations must be accepted as true); *Snoqualmie Enter. Auth. v. Affiliated FM Ins. Co.*, No. 21-2-03194-0 SEA, 2021 WL 4098938, at *6 (Wash. Super. Sept. 3, 2021) ("This Court is not persuaded by [another judge's] reliance on the opinions of other federal district court opinions across the country that applied the laws of other states, nor its holding that the undefined phrase 'all-risks of physical loss or damage' cannot be reasonably interpreted by the average lay person to include the insured's inability to physically use, control, or manipulate its property as a result of the COVID-19 closure orders and Tribal resolutions"), *Boardwalk Ventures CA LLC v. Century-National Ins. Co.*, 20STCV27359, 2021 WL 1215892, at * 3 (Cal. Super. Ct. Mar 18, 2021) (rejecting the "litany of unpublished federal district court cases" cited by the insurance company "in support of the proposition that courts applying California law have 'uniformly dismissed lawsuits like the instant action'" – recognizing that these cases are not binding and the dismissal was not proper); *Risinger Holdings, LLC v. Sentinel Ins. Co.*, No. 1:20-CV-00176, 2021 WL 4520968, at *12 (E.D. Tex. Sept. 30, 2021) (holding that the policy's use of "physical loss" is ambiguous and concluding that the policyholder "may have suffered direct physical loss due to Governor Abbott's lockdown order by being deprived of the use or full use of the physical space of its covered property, or alternately, because of the severe material losses it endured when it was forcibly excluded from its businesses").

- "A more extensive and nuanced analysis of COVID coverage issues suggests to us that policyholders should be winning most of these dismissal motion cases – at least on the loss and damage issues – and proceeding further in the adjudication process. Notwithstanding some shining exceptions, the first wave of decisions in these cases has been largely disappointing and reflects poorly on the legal and hyper-textual analysis of the bench." *Id.* at 193-94, Addendum 6 at 109-110.

Such criticism is deserved. Fireman's Fund's arguments should be rejected.

II. THE POLICY DOES NOT REQUIRE A "COMPLETE PROHIBITION OF ALL ACCESS" TO INSURED PROPERTY

This Court should reject Fireman's Fund's attempt to add a requirement for "complete prohibition of all access" to the insured premises as a requirement for Business Access or Civil Authority coverage. Neither extension of coverage in the Policy requires any such thing. To the contrary, the Business Access coverage expressly covers the "***suspension*** of **operations** at a location if access to such location is *impaired* or obstructed." *See,* ECF #45-2 at 43, Appendix 1 at 42 (italics added, bolding used in Policy to denote defined terms). Obviously, a requirement that access be "hindered" is different from the stricter requirement of "complete prohibition" that Fireman's Fund seeks to add here. Moreover, the Policy defines "suspension" to include a "slowdown . . . of operations" (*See,* ECF #45-2, Appendix 1 at 85), which obviously does not align with a supposed requirement of a "complete prohibition of all access."

The heightened restriction on coverage simply was not included in the Policy that Fireman's Fund drafted and sold to Sullivan. South Carolina law forbids the judicial addition of such terms now.

III. FIREMAN'S FUND'S INTERPRETATION OF THE MORTALITY EXCLUSION CLASHES WITH THE COMMUNICABLE DISEASE COVERAGE, RENDERING THOSE TERMS AMBIGUOUS UNDER SOUTH CAROLINA LAW

In successive briefs filed with the District Court, Fireman's Fund took diametrically opposed positions regarding the meaning and application of the Mortality Exclusion in its Policy.

In its Motion To Dismiss, Fireman's Fund stated that "[t]he exclusion is applicable to all coverage except Communicable Disease." ECF #45-1 at 28, Appendix 3 at 240. Six weeks later, in its Reply Brief, Fireman's Fund stated that "the exclusion states that it is 'Applicable to all Coverages'." ECF #49 at 14, Appendix 4 at 263. Apparently, not even Fireman's Fund knows how the Mortality Exclusion is to be applied.

One thing is for sure – the Policy does not expressly pair the Communicable Disease coverage as a narrow exception to a broad "virus exclusion" concealed within the otherwise narrow terms of the Mortality Exclusion. When Fireman's Fund wanted an exclusion in the Policy to have an exception for only certain extensions of coverage, it said so expressly in the terms of the exclusion itself. *See, e.g.,* ECF #45-2 at 30, Appendix 1 at 31 (exclusion for fine arts, money, securities or salesperson's samples applied "except to the extent such coverage may be specifically provided by Item V.D.5, Fine Arts Coverage; Item V.D.11 Money and Securities Coverage; or Item V.D.16 Salespersons Samples Coverage"); *id.* at 31 (Ordinance or Law exclusion applied "except to the extent such coverage may be specifically provided in Item V.F.5. Ordinance or Law Coverage"); *id.* at 45 (stating that a covered loss under the Communicable Disease Coverage does not trigger Debris Removal Coverage "except as provided by Communicable Disease Coverage"); *id.* at 46 (same regarding the Fungus Remediation Coverage); *id.* at 50 (same regarding the Outdoor Trees, Shrubs, Plants, and Lawn Coverage); *id.* at 99 (same regarding the Contaminated Food Coverage); *id.* at 103 (exclusion for fire or water or other means to extinguish a fire applied "except as specifically provided in F.1.c. below").

If Fireman's Fund wanted to draft a broad virus exclusion, then it could have done so, instead of including the word "virus" together with several other causes of mortality and death (*i.e.*, "natural causes, disease, sickness, any condition of health, bacteria, or virus") in a narrowly

worded Mortality Exclusion. And if Fireman's Fund wanted the Communicable Disease coverage to be a narrow exception to a broad virus exclusion, then it could have used cross-referencing terms like the six examples cited above (*i.e.*, "this Virus Exclusion applies except as specifically provided in the Communicable Disease Coverage"). Fireman's Fund did none of these things.

The Communicable Disease Coverage is not a narrow exception to a broad "virus exclusion." At best, these provisions – which Fireman's Fund itself describes in opposite ways *in its own briefs* – are ambiguous and must be construed against Fireman's Fund under black letter South Carolina law.

IV. THE COURT SHOULD NOT BE DISTRACTED BY "CRIES OF WOLF" FROM FIREMAN'S FUND OR THE INSURANCE INDUSTRY

For decades, insurance companies skewed the analysis of environmental coverage by arguing they would be rendered bankrupt if required to cover such claims. They alleged that the costs would be five times their total "surplus" and could ruin the industry. *See Insurer Liability for Cleanup Costs of Hazardous Waste Sites*, No. 101-175 (101st Cong., 2d Sess., Sept. 27, 1990) (Committee on Banking, Finance, and Urban Affairs), at pgs. 18-29 and 75-76. Although the industry was held accountable for many such clean-ups, the collapse never arrived.

In response to the pandemic, insurance companies are "crying wolf" again, and will soon do so in *amicus* briefs filed in this Court by the industry's lobbyists. This Court has good reason to be skeptical of the assertions it will hear that a decision favoring Sullivan in these proceedings will bankrupt the entire insurance industry.

First of all, such outcome-driven arguments have no place in contract disputes, where the rights and obligations of the parties are decided by the terms of the contract to which the parties agreed. Moreover, the insurance industry's claims, though irrelevant, are deceptive.

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

Meanwhile, the insurance industry has used the pandemic to extract premium increases that have resulted in enormous profits. For example, in July 2020, Progressive Insurance Company "boasted about an 83% year over year increase in net income" which works out to about $800 million per quarter.[26] Chubb Limited reported net income of $1.19 billion in its third quarter, in 2020—up 9.4%, or $100 million, from the year before.[27] CNA Insurance similarly reported a $106 million increase in net income in the same period.[28] W.R. Berkley Corporation reported a massive 161% increase in its fourth quarter, in 2020.[29] Overall, the insurance industry is now sitting on a record surplus of over $1 Trillion, up over $110 Billion since the beginning of 2020. *See supra* at n. 7.

In fact, insurance companies significantly *increased* their rates in 2020 and 2021 across all lines of business – all while refusing to pay COVID-related business interruption claims. One broker reported that 89% of its clients saw a rate increase for their property insurance—the

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[26] Richard Holober, *Progressive Insurance Hoards Covid-19 Windfall Profits*, Consumer Federation of California (Aug. 13, 2020) (available at https://uphelp.org/wp-content/uploads/2021/02/cfc_progressive.pdf).

[27] Claire Wilkinson, *Chubb reports gains in Q3 profit, net premium written*, Business Insurance (Oct. 28, 2020) (available at https://www.businessinsurance.com/article/ 20201028/NEWS06/912337411/Chubb-reports-gains-in-Q3-profit,-net-premium-written).

[28] Angela Childers, *CNA Reports Higher Net Income Despite Cat Losses*, Business Insurance (Nov. 2, 2020) (available at https://www.businessinsurance.com/article/%2020201102/NEWS06/912337508/CNA-reports-higher-net-income-despite-cat-losses).

[29] J. Greenwald, *Berkley Reports 161% Jump in Profits*, Business Insurance (Jan. 26, 2021) (available at https://www.businessinsurance.com/article/00010101/NEWS06/912339367/Berkley-reports-161-jump-in-profits).

"highest number recorded since the early 2000s."[30] From April through June 2020, property insurance rates spiked by 22%.[31] Insurance companies ratcheted up prices again between July and September, with a total increase of 24% for commercial property coverage.[32] From October to December 2020, premiums increased another 20%.[33] In late 2020, insurance companies told consumers to expect increases of 15% to 25% in the coming year,[34] and rates rose as predicted in 2021, with property insurance seeing the sharpest rate hikes.[35]

The practice of using catastrophes to increase profits has been a cornerstone of the insurance playbook for decades. *See* J. Robert Hunter, THE INSURANCE INDUSTRY'S INCREDIBLE DISAPPEARING WEATHER CATASTROPHE RISK: HOW INSURERS HAVE SHIFTED RISK AND COSTS ASSOCIATED WITH WEATHER CATASTROPHES TO CONSUMERS AND TAXPAYERS (Consumer Federation of America, Feb. 17, 2012) ("industry data demonstrates that insurers have significantly and methodically decreased their financial responsibility for [catastrophic] events in recent years and shifted much of this risk to consumers and taxpayers. . . . most of these savings have been achieved by hollowing out the coverage . . . and raising rates") (Addendum at 201 and available at

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30 Matthew Lerner, *Most Policyholders See Rate Hikes Across Multiple Lines*, Business Insurance (Oct. 26, 2020) (available at https://www.businessinsurance.com/article/20201026/NEWS06/912337341/Most-policyholders-see-rates-hikes-across-multiple-lines-Arthur-J-Gallagher-Re).

31 Matthew Lerner, *U.S. Commercial Property Pricing up 22% in Q2*, Business Insurance (Aug. 10, 2020) (available at https://www.businessinsurance.com/article/00010101/NEWS06/912336034/US-commercial-property-pricing-up-22-in-Q2).

32 Claire Wilkinson, *Insurance Prices Increased Sharply in Third Quarter*, Business Insurance (Nov. 5, 2020) (available at https://www.businessinsurance.com/article/00010101/NEWS06/912337590/Insurance-prices-increased-sharply-in-third-quarter-Marsh).

33 Matthew Lerner, *Global Prices Rise 22% in Q4: Marsh*, Business Insurance (Feb. 4, 2021) (available at https://www.businessinsurance.com/article/20210204/NEWS06/912339588/Global-prices-rise-22-in-Q4-Marsh-Global-Insurance-Market-Index-).

34 Judy Greenwald, *Continued Rate Increases Expected: Willis*, BUSINESS INSURANCE (Nov. 19, 2020) (available at https://www.businessinsurance.com/article/20201119/NEWS06/912337904/%20Continued-rate-increases-expected-Willis-Towers-Watson).

35 Gavin Souter, *Insurance Premium Renewal Rates Continue To Rise*, BUSINESS INSURANCE (Dec. 7, 2021) (available at https://www.businessinsurance.com/article/20211207/NEWS06/912346421/Insurance-premium-renewal-rates-continue-to-rise).

https://consumerfed.org/pdfs/InsuranceRegulationHurricaneRiskDisappearingCoverageStudy2-12.pdf). The enormous profits that insurance companies are reaping from the pandemic show that nothing has changed.

Unlike the insurance industry, state, local, and federal governments have done their share. The United States government has appropriated some $2.59 trillion in budgetary resources for federal agencies to respond to the pandemic in the form of contracts, grants, loans, and other assistance, including direct payments like Economic Impact Payments.[36] South Carolina provided small businesses grants and loans totaling tens of millions of dollars.[37] These efforts, however, are intended to supplement insurance claims and other available relief, and do not excuse insurance companies from honoring the promises that they made.

CONCLUSION

For the reasons discussed above, this Court's answers to the certified questions should be as follows:

- #1 – Yes. The presence of COVID-19, which allegedly hinders or destroys the fitness, habitability or functionality of property, constitutes "direct physical loss or damage";
- #2 – No. The Policy's Business Access and Civil Authority coverages do not require a complete prohibition of all access to Sullivan's properties; and
- #5 – The Mortality and Disease Exclusion conflicts with the Communicable Disease Coverage Extension and does not unambiguously bar coverage for Sullivan's claim.

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[36] U.S. Treasury DataLab, *How is the federal government funding relief efforts for COVID-19?* (available at https://datalab.usaspending.gov/federal-covid-funding/ (last visited June 23, 2021).

[37] Together SC, "Impact and Reach of SC CARES Nonprofit Relief Grants Program" Feb. 14, 2021 (available at https://www.togethersc.org/blog/sc-cares--how-to-apply-for-nonprofit-relief-grants) (stating that South Carolina has given over $25 million in grants to small businesses).

Sullivan's causes of action should proceed to be discovery, and a factual record should be developed in anticipation of a merits determination.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Brief of *Amicus Curiae* complies with Rules 208(b) and 211, SCACR, as required by Rule 213, SCACR.