No. 21-1186

In the
United States Court of Appeals
for the Seventh Circuit

SANDY POINT DENTAL, P.C.,

Plaintiff-Appellant,

v.

THE CINCINNATI INSURANCE COMPANY, INC.

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:20-cv-02160.
The Honorable **Robert W. Gettleman**, Judge Presiding.

UNITED POLICYHOLDERS'S AMICUS BRIEF SUPPORTING REVERSAL

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-1186

Short Caption: Sandy Point Dental, P.C. v. Cincinnati Insurance Company

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ John S. Vishneski III Date: April 23, 2021

Attorney's Printed Name: John S. Vishneski III

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Attorney's Signature: /s/ Kevin B. Dreher Date: April 23, 2021

Attorney's Printed Name: Kevin B. Dreher

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ George M. Plews Date: 4/23/2021

Attorney's Printed Name: George M. Plews

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

Attorney's Signature: /s/ Gregory M. Gotwald Date: 4/23/2021

Attorney's Printed Name: Gregory M. Gotwald

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Attorney's Signature: /s/ Christopher E. Kozak Date: 4/23/2021

Attorney's Printed Name: Christopher E. Kozak

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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United Policyholders ("UP") submits this *amicus curiae* brief in support of Appellants ("Sandy Point"). UP has a special interest in this litigation[1] and can offer a unique perspective to the Court as it considers the issues raised by this case.

The uncontrolled spread of SARS-COV-2 ("coronavirus") throughout Illinois, like a spreading wildfire, constitutes a natural disaster that insurance should cover. Businesses that were habitable and safe for their ordinary and intended use one day now have become unsafe for their ordinary and intended use due to the infiltration of the COVID-19 disease. The inability to use property because it has become unsafe due to a physical condition outside the policyholder's control is the exact type of "physical loss" of property the "all-risk" insurance policy here was purchased and sold to address. The very courthouse of this Court is now unsafe for its intended use by judges, court personnel, litigants and the public in resolving vital conflicts. Little more than a year ago, the courthouse was safe—now it is unsafe due to the spread of coronavirus. Court proceedings have to take place through video conferences. The physical use of the courthouse is impaired. This loss of use constitutes a "physical loss" well within the ordinary meaning of those terms.

It is undeniable that the policyholder here, Sandy Point, sustained losses because of the pandemic. In an effort to avert illness and injury to citizens and to

[1] As detailed in its Motion for Leave to File Amicus Curiae Brief, UP is a non-profit, charitable organization founded in 1991 that provides valuable information and assistance to the public on insurers' duties and policyholders' rights. UP monitors developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps to preserve the integrity of the insurance system by educating consumers and advocating for fairness in sales and claim practices. Grants, donations and volunteers support the organization's work. UP does not accept funding from insurance companies.

slow or prevent community spread of the coronavirus—which itself is a tangible, physical thing—Illinois Governor Pritzker issued Executive Orders that required the closure of properties, including Sandy Point's properties. (Dkt. #23, Am. Compl. ¶¶ 7, 14, 32.) These orders recognize that the "continuous presence of the coronavirus on or around Plaintiff's premises has rendered the premises unsafe and unfit for its intended use and therefore caused physical property damage or loss" (Dkt. #23, Am. Compl. ¶ 33-36) and verify what is apparent to all: the presence of coronavirus on or around Sandy Point's premises rendered the premises unsafe and unfit for their intended use. (Dkt. #23, Am. Compl. ¶¶ 33-36.) As a result, Sandy Point alleges it sustained significant losses that continue to this day. (Dkt. #23, Am. Compl. ¶¶ 3, 14.)

Nevertheless, Cincinnati Insurance Company, Inc. ("Cincinnati") denied Sandy Point's claim. In ruling on Cincinnati's Motion to Dismiss, relying on a Southern District of New York case, the district court agreed with Cincinnati that the term "direct physical loss" in the policy at issue

> unambiguously requires some form of actual, physical damage to the insured premises to trigger coverage. The words 'direct' and 'physical,' which modify the word 'loss,' ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons extraneous to the premises themselves, or adverse business consequences that flow from such closure.

(Dkt. # 37 at 4). In reaching this conclusion, however, the district court did not consider (and its order does not anywhere mention) the policy's definition of "loss," which means "accidental loss or damage," in its policy construction. Having missed this critical definition in its analysis, the court incorrectly concluded that coronavirus must physically "alter the appearance, shape, color, structure, or other material dimension of the property"[2] for there to be covered property loss.

Indeed, the nature of property—the subject of Cincinnati's policy— supports the conclusion that Sandy Point's loss of use of its property due to the presence of COVID-19 on or about Sandy Point's premises constitutes a "direct physical accidental loss" of property. The loss of an important legal right (the right to use) associated with a thing (here, a building housing a dental office) by physical causes (the alleged presence of coronavirus on or around Sandy Point's premises) is covered.

In reaching its decision, the district court also declined to follow the majority case law, from both Illinois and the rest of the country, which rejects a narrow construction of "loss" and "damage." These cases hold that when physical conditions arise that make a property unsafe to use, the policyholder has suffered a "direct physical accidental loss." Importantly, this holding comes from an array of appellate decisions issued prior to the present pandemic.

Finally, the Court should not be swayed by any insurer claims made in the public arena that paying these losses will wreck the insurance industry. That is not a proper point of argument in a policy interpretation case. The Court has no authority to speculate about which party will be worse off if it loses, or what constitutes good economic policy. If insurers are in "dire straits" after paying covered COVID-19 losses, then they can ask elected officials for relief. The Court

[2] Dkt. 37 at 5.

cannot—and should not—rewrite the policy to accommodate an insurers' regret that it agreed to insure too many risks.

Regardless, any warnings of impending doom are entirely unfounded. Financially, insurers did very well during the pandemic. Not only have they reported massive profits, but also they raised rates on consumers in every quarter of 2020. They are poised to do so again in 2021. Virtually all of them have reinsurance. They can weather losses that most entities—such as Sandy Point and other policyholders—cannot bear. The Court's only role in this case is to ask whether Sandy Point's interpretation of the policy is reasonable. If so, then it must reverse the judgment below and let the chips fall where they may.

ARGUMENT

I. The District Court's Failure to Construe "Loss" in the Policy was Error

In construing Cincinnati's policy, the district court examined portions of the Building and Personal Property Coverage form and the Business Insurance Coverage Form. (Dkt. #37, Order at 2.) While the district court restated portions of the coverage grant for the Business Income Coverage part, and noted that Covered Cause of Loss meant "RISKS OF DIRECT PHYSICAL LOSS," the district court did not recognize "loss" as a defined term in the policy. In the Policy, "*Loss* means accidental loss or damage." (Dkt. 1.1, Ex. A to Compl, Policy R.1-1, PID 91.) Because it did not identify this defined term, the district court did not analyze it. Instead, the district court focused on the phrase "direct physical loss," construing "loss" in the phrase to mean "damage." (*See* Dkt. #37, Order at 4) ("The critical policy language here--'direct physical loss'—unambiguously requires some form of actual, physical *damage* to the insured premises to trigger coverage") (emphasis added). The district court's conclusion violates basic rules of construction because it fails to give meaning to both "loss" and "damage," the two words that define "loss" in the Policy.

Under Illinois law, a court's construction of an insurance contract is a matter of law. *Country Mut. Ins. Co. v. Livorsi Marine, Inc.*, 856 N.E.2d 338, 342 (Ill. 2006). The "public policy of this State… requires that insurance contracts be construed and enforced to accord with the objectively reasonable expectations of the insured." *Posing v. Merit Ins.*, 258 Ill. App.3d 827, 629 N.E.2d 1179, 1183 (Ill. 3 Dist. 1994). Further, in Illinois, contracts are to be "interpreted as a whole, giving meaning and effect to each provision." *Emergency Med. Care, Inc. v. Marion Mem'l Hosp.*, 94 F.3d 1059, 1061 (7th Cir. 1996). When a phrase in an insurance policy is undefined, courts afford that phrase "its plain and ordinary meaning." *See Gulino v. Econ. Fire & Cas. Co.*, 971 N.E.2d 522, 527–28 (Ill. App. Ct. 2012) (*citing Fremont Cas. Ins. Co. v. Ace-Chicago Great Dane Corp.*, 739 N.E.2d 85, 91 (Ill. App. Ct. 2000)).

In construing "accidental loss or damage," the words "loss" and "damage" cannot be synonyms because that would not give effect or meaning to these words. Moreover, the disjunctive "or" separating the two words underscores that the Policy provides coverage if one (loss) or the other (damage) occurs: it does not require both. Under the rules of construction, the words "loss" and "damage" in the phrase, "accidental loss or damage," cannot mean the same thing—and numerous courts have so held. *See, e.g., In re: Society Insurance Co. COVID-19 Business Interruption Protection Insurance Litigation*, MDL 2964, 2021 WL 679109 (N.D. Ill. Feb. 22, 2021) (applying Illinois, Minnesota, Tennessee and Wisconsin law) ("The disjunctive 'or' in that phrase means that 'physical loss' must cover something different from 'physical damage'"). By failing to consider the definition of "loss" in its analysis, the district court reached an improper construction that lead to an erroneous result.

Dictionaries define "loss" as "the act of losing possession," "failure to … utilize,"[3] and "the state of being deprived of or of being without something that one has had."[4] "Damage" is "loss or harm resulting from injury to person, property, or reputation,"[5] and "injury or harm that reduces value or usefulness."[6] Loss does not connote a "physical alteration" to "the appearance, shape, color, structure, or other material dimension" of property. By overlooking the definition of "loss," the district court mistakenly concluded that "direct physical loss" must include some physical alteration of property, when in fact, "direct physical loss" can also include loss or deprivation of use of property—the inability to use property for its intended business purpose can be a physical, tangible loss. In analyzing the "physical" part of "physical loss" in a similar property policy, Judge Chang concluded that alleging loss of use of a businesses' physical space for its intended purpose satisfies the pleading requirements:

First, viewed in the light most favorable to the Plaintiffs, the pandemic-

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[3] Merriam-Webster, www.merriam-webster.com/dictionary/loss (last visited April 20, 2021).
[4] Dictionary.com, www.dictionary.com/browse/loss (last visited April 20, 2021).
[5] Meriam-Webster, www.merriam-webster.com/dictionary/damage (last visited April 20, 2021).
[6] Dictionary.com, www.dictionary.com/browse/damage (last visited April 20, 2021).

> caused shutdown orders do impose a physical limit: the restaurants are limited from using much of their physical space. It is not as if the shutdown orders imposed a financial limit on the restaurants by, for example, capping the dollar-amount of daily sales that each restaurant could make. *No, instead the Plaintiffs cannot use (or cannot fully use) the physical space.* Indeed, the policy defines "covered property" to include buildings at the premises, not just personal property or movable items.

In re: Society Insurance Co., 2021 WL 679109 at *9 (emphasis added). Sandy Point alleges that the pandemic-caused shutdown orders effectively prevented it from using its premises for business. Complaint ¶¶ 8-14. Those allegations, under the terms of the Policy properly construed, should be sufficient to withstand a motion to dismiss. For this reason alone, the decision of the district court should be reversed.

II. Properly Construed, Cincinnati's Property Policies Provide Coverage for the Loss of Use of Property Sustained by Plaintiffs

In ascertaining the meaning of the phrase "direct physical accidental loss or damage" to property, it is critical not to minimize the significance and legal import of the word "property." At law, a thing is not "property" unless and until legal rights attach to it:

> *There is nothing which so generally strikes the imagination, and engages the affections of [humankind], as the right of property; or that sole and despotic dominion which one [person] claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.*

Sir William Blackstone, Commentaries of the Laws of England, Vol II, Of the Rights of Things (1756-1770).[7] The Supreme Court has described the nature of "property" in the context of the federal tax lien statute as a "'bundle of sticks,' a collection of individual rights which, in certain combinations, constitute property." *United States*

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[7] Substituting modern spelling and gender-neutral references.

v. Craft, 535 U.S. 274, 278 (2002) (*citing* B. Cardozo, Paradoxes of Legal Science 129 (1928)). "State law determines only which sticks are in a person's bundle." *Id.* Black's Law Dictionary defines "ownership" as "[t]he bundle of rights allowing one to *use*, manage, and enjoy property, including the right to convey it to others. Ownership implies the right to possess a thing, regardless of any actual or constructive control. Ownership rights are general, permanent, and heritable." Black's Law Dictionary 1215 (9th ed. 2009) (emphasis added); *see also Detrana v. Such*, 368 Ill. App. 3d 861, 868, 859 N.E.2d 142 (2006) (quoting Black's Law Dictionary seventh edition's definition of "ownership").

Whatever concept of property one adopts, the right and ability to *use* the property is at its core. An early listing of the bundle of rights for example, includes: (1) the right to possess; (2) the *right to use*; (3) the right to manage; (4) the right to the income; (5) the right to capital; (6) the right to security; (7) the power of transmissibility; (7) the absence of term; (8) the prohibition of harmful use; (9) liability to execution; and (10) residuary character.[8] The courts have long agreed that the concept of "property itself, in a legal sense, is nothing more than the exclusive right 'of possessing, enjoying and disposing of a thing,' which, of course, includes the *use* of a thing." *Chicago & W. Ind. R.R. v. Englewood Connecting Ry.*, 115 Ill. 375, 385, 4 N.E. 246, 249 (1886) (emphasis added). "The owners of real property have the constitutional right to *use* their property in any manner they desire, providing that such use does not interfere with the welfare of the people

[8] Johnson, Denise R., *Reflections on the Bundle of Rights*, Vermont Law Review, Vol. 32, 253 (2007).

generally." *Ave. State Bank of Oak Park v. Village of Oak Park*, 99 Ill. App. 2d 329, 337, 241 N.E.2d 630, 634 (App. 1st Dist. 1968) (emphasis added).

This "use" right is not "intangible" but physical: Sandy Point uses its property for dental procedures, and its right to use was and is directly impacted by community spread of the very "physical" coronavirus. (Dkt. #23, Am. Compl. ¶¶ 17, 34.)[9] As noted above, the word "loss" is distinct from the word "damage" and means, among other things, "the act of losing possession," and "deprivation," or "failure to utilize" or use. Sandy Point's property right of use has been lost for its intended business purpose, and consequently, it has suffered damage, *i.e.*, the revenue it could have received had its property right of use not been lost due to the community spread of coronavirus (and the necessary countermeasures taken to combat the pandemic).

Cincinnati's use of "direct accidental physical loss" recognizes that the loss of an important legal right (the right to use) associated with a thing (here, a building housing a dental office) by physical and accidental causes (the alleged presence of coronavirus on or around Sandy Point's premises) must be protected. Both "loss" and "damage" are separately specified as within the protection of the policy. The policy is bereft of any language supporting the district court's conclusion that Sandy Point must show some tangible injury or alteration to property or structure to trigger coverage. Indeed, other district court judges in this state (*Derek Scott Williams PLCC v. Cincinnati Ins. Co.*, No. 20 C 2806, 2021 WL 767617, at *4 (N.D.

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[9] Often, the only property right enjoyed by the operator of a dental office is the right to use the premises for the business, because someone else owns the building.

Ill. Feb. 28, 2021))[10] and others (*Studio 417, Inc. v. The Cincinnati Ins. Co.*, 20 CV 3127-SRB, 2020 WL 4692385, *5 (S.D. Mo., August 12, 2020)) have held to the contrary, each concluding that under the same Cincinnati policy language, a physical loss may occur when the policyholder simply cannot use the property.

In sum, the district court's rejection of Sandy Point's argument that "the language of the policy does not require a tangible, material loss to the physical structure, but allows for a partial loss to the properties from loss of use" (Dkt. #37, Order at 3) ignores both the rights-based fundamental modern notion of property and the rules of construction that apply to insurance policies.

III. Decades of Case Law Put the Insurers on Notice That "Physical Loss" Is Broad and Not Limited to Tangible Damage.

Beginning at least as early as the 1960s, courts warned insurers that "physical loss," and its variants, covers loss-of-use claims. *See, e.g.*, *Hughes* v. *Potomac Ins. Co.*, 199 Cal.App.2d 239 (Cal. Ct. App. 1962). In case after case, appellate courts—including those in Illinois—rejected a "tangible damage" requirement, holding the "physical loss" language provides coverage where property becomes too dangerous for its intended use.[11] Because of the ambiguous breadth of the term "physical loss," courts also "begged carriers to define the phrase to avoid the precise issue before the

[10] In *Derek Scott Williams*, the court held that "a reasonable factfinder could find that the term 'physical loss' is broad enough to cover, as [the plaintiff] argues, a deprivation of the use of its business premises." The court's reasoning was founded on the simple fact that "[t]hat's the common meaning of loss, *see* "Loss," Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/loss (last viewed Feb. 28, 2021), and there is no basis to believe that the Cincinnati policy uses the term any differently." *Id.*
[11] *See United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64 (Ill. 1991) and *Bd. of Educ. v. Int'l Ins. Co.*, 308 Ill.App.3d 597, 720 N.E.2d 622 (Ill. 1999) (decisions rejecting the idea that "physical loss" to property require alteration to property's physical structure).

Court now"—closures caused by a pandemic. *E.g.*, *Cherokee Nation* v. *Lexington Ins. Co.*, 2021 WL 506271, *3 (Cherokee Cnty., Okla., Jan. 14, 2021).

Those pleas went unheeded. Insurers are still using the same broad language despite decades of fair warning that "physical loss" includes "loss of use" and is not limited to "tangible damage." Cincinnati *chose* not to heed those warnings. Instead, Cincinnati continued selling broad coverage that does not require or even mention "tangible alteration." Courts lack power to alter Cincinnati's wording, and it was error for the district court to do so here. Cincinnati, like everyone, ought to be held to the words it used—not the words it now wishes it had used.[12]

Before the pandemic, five states' high courts[13] and seven other states' intermediate appellate courts[14] held in binding decisions that "physical loss" and its

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[12] In a different context, the Third Circuit chastised the insurance industry's continued use of a term that caused years of divergent judicial opinions, and on that basis, found the language ambiguous. *See New Castle County DE v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 243 F.3d 744, 755-56 (3d Cir. 2001) ("A single phrase, which insurance companies have consistently refused to define, and that has generated literally hundreds of lawsuits, with widely varying results, cannot, under our application of commonsense, be termed unambiguous. As such, we hold that an 'invasion of the right of private occupancy' must be construed liberally.") Likewise, the insurance industry's continuing use of the "ensuing loss" clause has caused years of interpretive struggle. In 1988, the United States Court of Appeals for the Fifth Circuit called this policy language "self-contradictory gibberish." *Lake Charles Harbor & Terminal Dist. v. Imperial Cas. & Indem. Co.*, 857 F.2d 286, 288 (5th Cir. 1988) (finding that catastrophic damage to a machine caused by its own mechanical breakdown was covered).

[13] *W. Fire Ins. Co.* v. *First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (gasoline fumes); *Sentinel Mgmt. Co.* v. *Aetna Cas. & Sur. Co.*, 615 N.W.2d 819 (Minn. 2000) (asbestos); *Mellin* v. *N. Sec. Ins. Co.*, 115 A.3d 799 (N.H. 2015) (urine odor); *Dundee Mut. Ins. Co.* v. *Marifjeren*, 587 N.W.2d 191 (N.D. 1998) (power outage); *Murray* v. *State Farm Fire & Cas. Co.*, 509 S.E.2d 1 (W. Va. 1998) (threat of rockfall).

[14] *Hughes* v. *Potomac Ins. Co.*, 199 Cal.App.2d 239 (Cal. Ct. App. 1962) (erosion of land beneath a house); *Azalea, Ltd.* v. *Am. States Ins. Co.*, 656 So. 2d 600 (Fla. Ct. App. 1995) (death of bacteria colony in treatment plant); *Bd. of Educ.* v. *Int'l Ins. Co.*, 720 N.E.2d 622 (Ill. Ct. App. 1999) (asbestos); *Widder* v. *La. Citizens Prop. Ins. Corp.*, 82 So. 3d 294 (La. Ct. App. 2011) (lead contamination); *Wakefern Food Corp.* v. *Liberty Mut. Fire Ins. Co.*, 968

variants included property that is rendered unsafe or unusable, even without tangible or structural damage. Federal appellate courts reached the same conclusion under the law of four other states.[15] Illinois numbers among the states that follow this majority rule and allow recovery without "tangible damage." *Wilkin Insulation Co.,* 578 N.E.2d at 931; *Elco Industries, Inc. v. Liberty Mut. Ins. Co.*, 414 N.E.2d 41, 45 (Ill. App. 1980); *Pittway Corp. v. American Motorist Ins. Co.*, 370 N.E.2d 1271, 1274 (Ill. App. 1977).

Only New York has generally taken the insurers' side—though it has not done so all of the time. Some states generally provide coverage without "tangible damage," with only minor exceptions. *Compare, e.g.*, *Hughes*, 18 Cal. Rptr. at 655 (rapid erosion of land underneath property caused "direct physical loss" to the home, even when the building was undamaged), *with MRI Healthcare of Glendale, Inc.* v. *State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 798-99 (2010) (when an MRI machine would not "ramp up" due to an excluded inherent defect, the machine did not experience "direct physical loss").[16]

A.2d 724 (N.J. App. Div. 2009) (electrical grid shutdown); *Farmers Ins. Co.* v. *Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993) (meth odor); *Graff* v. *Allstate Ins. Co.*, 54 P.3d 1266 (Wash. Ct. App. 2002) (meth residue).

[15] *Essex Ins. Co.* v. *BloomSouth Flooring Corp.*, 562 F.3d 399 (1st Cir. 2009) (Massachusetts law) (chemical odors); *Hampton Foods, Inc.* v. *Aetna Cas. & Sur. Co.*, 787 F.2d 349 (8th Cir. 1986) (Missouri law) (risk of collapse); *Am. Alliance Ins. Co.* v. *Keleket X-Ray Corp.*, 248 F.2d 920 (6th Cir. 1957) (Ohio law) (radium contamination); *Intermetal Mexicana, S.A.* v. *Ins. Co. of N. Am.*, 866 F.2d 71 (3d Cir. 1989) (Pennsylvania law) (theft).

[16] *Compare also Fuiji v. State Farm*, 857 P.2d 1051, 1052 (Wash. Ct. App. 1993) (no "physical loss" to a "dwelling" when only the "engineering unit" had actually suffered damage) *with Graff*, 54 P.3d at 1269-70 (rejecting a "visibility" standard for "physical damage" and holding that meth residue triggered coverage) (Washington law). There is also variation in some other states. *See Mastellone* v. *Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130, 1143 (Ohio Ct. App. 2008) (construing the term "physical injury" as requiring structural damage); *Source Food Techs., Inc.* v. *U.S. Fidelity & Guar. Co.*, 465 F.3d 834, 838

If Cincinnati wants to keep score, then it is at least 15-1 *in favor of* policyholders. Insurers—including Cincinnati[17]—have cited a swath of unpublished and trial-court orders to try to overcome this deficiency. It is wrong, however, to equate a ruling from a trial court with the considered judgment of a state or federal appellate court, announced in a published opinion. Considering *precedent*—which is what matters—reveals that appellate courts have almost universally rejected Cincinnati's position. To be sure, the law in some jurisdictions is variable. It is, however, false to claim that most states require "tangible alteration" to trigger the broader term "physical loss" in a business-interruption policy, or that there is some "consensus" that the insurers are correct.

To support their "majority of states hold" argument, insurers frequently reference a single section from one treatise—10A STEVEN PLITT, ET AL., COUCH ON INSURANCE §148:46 (3d ed., 2020 update)—that purports to summarize the law on this point.[18] That treatise section, however, distorts the state of things. It cites only *First Presbyterian* and *Hampton Foods* as pro-policyholder cases—even though there are many, many more that find for the policyholder. *Id.* This treatise cites five cases supporting the insurers' restrictive view: two from New York, the *MRI* case from California, an Oregon federal district court opinion (abrogated three years later in *Trutanich*, *supra*), and an unpublished disposition from the Sixth

(8th Cir. 2006) (narrowing Minnesota law on "physical loss"). This does not diminish the fact that fifteen jurisdictions allow recovery without "tangible damage."

[17] At the district court level, Cincinnati listed some of these cases in its Memorandum in Support of Motion to Dismiss (Dkt. 26 at 6-9, 13).

[18] Cincinnati cited this treatise and section in its Memorandum in Support of Motion to Dismiss at page 6, footnote 3.

Circuit. *Id.*

This is a markedly incomplete survey, and the Court should be skeptical of insurer assertions that it is intended to be comprehensive. Moreover, Couch's attempt to reconcile the split actually supports Sandy Point. Couch posits that the key factor in the "physical loss" analysis is whether a fortuitous, external force changed the condition of the property. *Id.* The circumstances here meet that test: the pandemic was fortuitous, and the alleged presence of coronavirus on or about the premises made Sandy Point's property unsafe and unusable.

Given that Illinois has rejected the "tangible damage" test multiple times, there is no reason to believe the Illinois Supreme Court would follow the *one* state where the insurers' position has generally prevailed, rather than the fifteen states that have generally rejected it. While the sheer volume of cases makes it impossible to discuss each case here, the key decisions illustrate why Cincinnati's position has persuaded few appellate judges.

In *Hughes* and *Murray*, the policy promised to pay for "direct physical loss to the property." In *Hughes*, the policy insured against "all physical loss to their dwelling and dwelling building." Erosion swept away the building's support, causing cosmetic damage but making it unsafe to inhabit. 199 Cal.App.2d at 248. In *Murray*, the policy promised to pay for "direct physical loss to property." There, unstable rocks above a house prompted an evacuation order from the government. 509 S.E.2d at 16-17.

The insurers denied coverage in both cases. Like here, they contended that their policies "only insured the physical damage to the dwelling." 509 S.E.2d at 16-17. Both courts disagreed. The reasoning in *Hughes* is persuasive:

> To accept [the insurer's] interpretation of its policy would be to conclude that a building which has been overturned or which has been placed in such a position as to overhang a steep cliff has not been "damaged" so long as its paint remains intact and its walls still adhere to one another.
>
> *Despite the fact that a "dwelling building" might be rendered completely useless to its owners, [the insurer] would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected.* Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner.

Hughes, 199 Cal.App.2d at 248-249 (quotations omitted, emphasis added).

Both courts stressed that the property was not safe—giving weight to the most important sort of property "loss." *Hughes* reasoned that "[i]t goes without question that [homeowners]' 'dwelling building' suffered real and severe damage when the soil beneath it slid away and left it overhanging a 30-foot cliff." 199 Cal.App.2d at 249. *Murray* echoed this, pointing out that the houses beneath the cliff "could scarcely be considered 'homes' in the sense that rational persons would be content to reside there." 509 S.E.2d at 17. That was a "physical loss."

These arguments have generally prevailed over the insurance industry's cramped positions. Other cases include *First Presbyterian*, where the Colorado Supreme Court held that loss of use can be a "physical loss." 437 P.2d at 55. There, "the accumulation of gasoline around and under the church building . . . ma[de] further use of the building highly dangerous" and caused a "direct physical loss." *Id.* In *Wakefern*, the court rejected "the narrowly-parsed definition of 'physical damage' which the insurer urges us to adopt" and held that "loss of function" sufficed. 968

A.2d at 735-38.

Similarly, in *General Mills, Inc. v. Gold Medal Insurance Co.*, 622 N.W.2d 147 (Minn. Ct. App. 2001), the court held that the policyholder sustained a "direct physical loss to insured property" when FDA regulations prevented it from selling food products treated with an unapproved pesticide, despite the fact the food products were safe for human consumption. In this case, an independent contractor hired by General Mills to treat its oats with an FDA-approved pesticide instead used a cheaper but unapproved pesticide. Although the pesticide had been approved by the FDA for treatment of other foods, and there was no dispute that the pesticide presented no hazard to the consuming public, its application to General Mills' oats violated FDA regulations on adulteration of food products. *Id*. at 150. General Mills could not sell its oat stocks or finished products that incorporated them under federal law. General Mills tendered the loss for coverage under a first party property policy, and its insurer denied the claim.

In the coverage litigation that ensued, the trial court found that General Mills had suffered a direct physical loss of insured property under its all-risk property policy. On appeal, the insurer argued that the district court had erred because the use of the unapproved pesticide did not render the oats (and products made from the oats) unfit for human consumption. The insurer argued that instead, the loss occurred because of government regulation and not "because of direct damage to the insured property," and thus there was no covered loss. *Id*. at 151-152. The appellate court rejected the insurer's argument, stating that "we have previously held that direct physical loss can exist without actual destruction of property or structural damage to property; it is sufficient to show that insured property is injured in some way." *Id*. at 152, *citing Sentinel Mgmt. Co. v. New Hampshire Ins. Co.,* 563 N.W.2d 296, 300 (Minn. App. 1997) (finding the safe housing function of apartment building was "seriously impaired or destroyed by the presence of asbestos fibers, although the building itself did not suffer a 'tangible injury'"). Because the "function" of the food products produced by the insured was "not only to be sold, but to be sold with an assurance that they meet certain regulatory standards," that function was "seriously impaired" by the inability to lawfully distribute the goods due to FDA regulations. *Id*.

This discussion could go on for pages, but UP will stop here. The Court will find guidance in the many other pre-COVID-19 cases that found coverage. *See, e.g.*, *Motorists Mut. Ins. Co.* v. *Hardinger*, 131 F. App'x 823, 827 (3d Cir. 2005 (e-coli contamination); *Manpower Inc*. v. *Ins. Co. of Pa.*, 2009 WL 3738099 (E.D. Wis., Nov. 3, 2003 (police order forbidding access to unstable building); *TRAVCO* v. *Ward*, 2010 WL 2222255 (E.D. Va., June 3, 2010) (toxic gas); *Or. Shakespeare Festival Ass'n* v. *Great Am. Ins. Co.*, 2016 U.S. Dist. LEXIS 74450 (D. Or., June 7, 2016) (wildfire smoke), *vac'd as a condition of settlement*.

Having failed to "defin[e] direct physical loss or damage as they (and others before them) have argued it should be interpreted," Cincinnati must honor its broadly worded promise of coverage. *Cherokee Nation*, 2021 WL 506271, *4. The Court of Appeals is not in the business of rescuing insurance companies who regret their choice to sell vaguely worded insurance policies, especially where the lack of clarity was well established in prior case law.

IV. The Court Should Not Be Swayed by Self-Serving Warnings About Ruining the Insurance Industry—Insurers Make These Claims After *Every* Disaster, and They Are Always Overstated.

This pandemic has imposed hardship and losses for a wide range of business concerns—some have gone out of business already, and others likely will before the pandemic is over. Insurers and industry-focused commentators have asserted that if insurers have to pay for policyholder losses caused by community spread of coronavirus, then they too will go out of business.

This is no basis to decide coverage: insurance policies should not be interpreted with the thumb on the scale to the benefit of either insurer or policyholder because of the impact the result would have to party's industry. The insurance industry should not be favored over the dental industries, for example. Rather, insurance contracts should be interpreted according to long-standing precedent and rules of construction, and in accordance with public policy favoring the spread and transfer of risk through the purchase of insurance.

Indeed, this is a threadbare cry. Too often, when they have faced a significant new loss, or when laws change that may lead to a proverbial avalanche of claims, insurance companies have sounded a false alarm of industry-wide insolvency. Typically, this is paired with a claim that their property insurance policies "never meant to cover that." That predicted collapse, however, has never arrived. Going back thirty years, insurers attempted to color the coverage discussion by asserting that the liability from claims launched by the passage and enforcement of the then-new strict liability environmental statute, CERCLA would bankrupt them.[19] Yet, insurers survived despite the fact that many courts found coverage for claims in CGL policies. The same can be said for the dire predictions about the losses insurers faced from asbestos claims, the aftermath of Hurricane Katrina, the World Trade Center attacks on 9/11, and SARS. Despite catastrophic events that affected millions of people, businesses, and properties, the insurance industry survived. It would be unwise and unjust to allow concerns about the number of claims and amount of losses facing the industry to guide the interpretation of the terms of the policy before the Court. Rather, the appropriate thing to do is to follow the rules of construction and let precedent and sound legal reasoning guide us where they may. To the knowledge of United Policyholders, no insurance company has entered insolvency due to the pandemic. Few other industries have been so fortunate.

Indeed, insurers have done *very* well during the pandemic. The precipitous drop in claims (and claim payments) in the last year have led to enormous windfalls for insurers. 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.[20] Chubb Ltd. reported net income of $1.19 billion in Q3 2020—

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[19] In testimony given before Congress in 1990, insurance industry representatives sounded the alarms, claiming that the cost of cleaning up even part of the pollution issues will be five times their total "surplus" and could be ruinous. *See Insurer Liability for Cleanup Costs of Hazardous Waste Sites*, No. 101-175 (101st Cong., 2d Sess., Sept. 27, 1990) (Committee on Banking, Finance, and Urban Affairs), pp. 18-29 and 75-76.

[20] R. 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

up 9.4%, or $100 million, from the year before.[21] CNA Insurance similarly reported a $106 million increase in net income in the same period.[22] Berkley Insurance reported a massive 161% increase ($312.2 million) in Q4 2020.[23] Rather than pay the COVID-19 claims their policies cover, the insurers have been hoarding this surplus. Not only that, but virtually all insurers *increased* rates on consumers in 2020, across all lines of business. The Arthur J. Gallagher Co., a large broker in Chicago, reported that 89% of its clients saw a rate increase for their property insurance—the "highest number recorded since the early 2000s."[24] From April through June 2020, property insurance rates spiked 22%, despite the insurers refusal to pay COVID-19 claims and despite the historically low rate of insurance claims in general.[25] Insurers ratcheted up prices again between July and September, with a total increase of 24% for commercial property coverage.[26] From

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[21] C. Wilkinson, *Chubb reports gains in Q3 profit, net premium written*, Business Insurance (Oct. 8, 2020), available at https://www.businessinsurance.com/article/20201028/NEWS06/912337411?template=printart

[22] A. Childers, *CNA Reports Higher Net Income Despite Cat Losses*, Business Insurance (Nov. 2, 2020), available at https://www.businessinsurance.com/article/20201102/NEWS06/912337508?template=printart

[23] J. Greenwald, *Berkley Reports 161% Jump in Profits*, Business Insurance (Jan. 26, 2021), available at https://www.businessinsurance.com/article/20210126/NEWS06/912339367/Berkley-reports-161-jump-in-profits

[24] M. Lerner, *Most Policyholders See Rate Hikes Across Multiple Lines*, Business Insurance (Oct. 26, 2020).

[25] M. Lerner, *U.S. Commercial Property Pricing up 22% in Q2*, Business Insurance (Aug. 10, 2020), https://www.businessinsurance.com/article/20201102/NEWS06/912337508?template=printart

[26] C. Wilkinson, *Insurance Prices Increased Sharply in Third Quarter*, Business Insurance (Nov. 5, 2020), available at https://www.businessinsurance.com/article/20201005/NEWS06/912337014?template=printa

October to December 2020, property insurance premiums increased—again—by 20%.[27] Finally, in late 2020, insurers told consumers to expect increases of 15% to 25% for property insurance in 2021—again, despite their refusal to pay any COVID-19 claims.[28]

In all likelihood, the industry will be fine if it must pay COVID-19 claims. It enjoyed substantial windfalls in 2020 while the rest of the economy suffered. Clearly, it is hedging future exposure with drastic premium increases.

Ultimately, if some insurance company eventually lacks the resources to pay claims and liquidates, then the insurance industry funds state insurance guaranty associations to help pay the covered claims owed by insolvent insurance companies. Likewise, elected legislatures (not unelected judges) have the province to help industries that are failing due to catastrophic losses. With the pandemic, both federal and state legislatures have taken steps, and are considering additional steps, to relieve industries pummeled with losses from COVID-19. It is those bodies that are tasked with making policy choices in that regard, and that is where those decisions should rightfully remain.

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[27] M. 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-

[28] J. Greenwald, *Continued Rate Increases Expected: Willis*, Business Insurance (Nov. 19, 2020), available at https://www.businessinsurance.com/article/20201119/NEWS06/912337904?template=printart

V. Conclusion

Cincinnati's Policy covers "direct physical accidental loss or damage" to property. The district court overlooked a defined term—"loss"—in the policy which in turn skewed its construction towards an incorrect construction that it applied to deny coverage. Had it considered that both "loss" or "damage" to property gives rise to coverage, then it would have found that allegations of the presence on or around Sandy Point's premises which prevented it from using its premises as intended were sufficient to state a claim for coverage. The right of use is at the core of modern concepts of property. For more than 50 years, courts around the nation, including in Illinois, have recognized that a "physical loss" includes more than tangible, structural alteration. That is particularly true as to losses from causes that render the property unsafe to use for its intended purpose. The pre-COVID-19 case law put insurers on notice that use of the phrase "direct physical loss" did not require tangible physical alteration. Yet still they sold policies which continued to use this very language, including the policies at issue here. Insurance companies cannot import limitations into the policies that they failed to make express. The insurers' insistence that the sky will fall should not free them from the broad obligation they sold. For all these reasons, Sandy Point's losses due to COVID-19 are covered.

April 23, 2021

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Circuit Rule 29 because, according to the word count function of Microsoft Word 2016, this brief contains 5,308 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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April 23, 2021

CERTIFICATE OF SERVICE

I, John S. Vishneski III, an attorney, hereby certify that on April 23, 2021, I caused the Brief of Amicus Curiae United Policyholders to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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