2021 WL 5969197 (N.C.App.) (Appellate Brief)
Court of Appeals of North Carolina,
Fourteenth District.

NORTH STATE DELI, LLC d/b/a Lucky's Delicatessen, Mothers & Sons, LLC d/b/a Mothers & Sons Trattoria, Mateo Tapas, L.L.C. d/b/a Mateo Bar DE Tapas, Saint James Shellfish LLC d/b/a Saint James Seafood, Calamari Enterprises, Inc. d/b/a Parizade, Bin 54, LLC d/b/a Bin 54, Arya, Inc. D/b/a City Kitchen and Village Burger, Grasshopper LLC d/b/a Nasher Cafe, Verde Cafe Incorporated d/b/a Local 22, Floga, Inc. d/b/a Kipos Greek Taverna, Kuzina, LLC d/b/a Golden Fleece, Vin Rouge, Inc. d/b/a Vin Rouge, Kipos Rose Garden Club LLC d/b/a Rosewater and Gira Sole, Inc. d/b/a Farm Table and Gatehouse Tavern, Plaintiffs-Appellees,

v.

THE CINCINNATI INSURANCE COMPANY; the Cincinnati Casualty Company; Morris Insurance Agency Inc.; and does 1 through 20, Inclusive, Defendants-Appellants.

No. COA 21-293.
November 29, 2021.

From Durham County

Brief of Amici Curiae United Policyholders and National Independent Venue Association in Support of Plaintiffs-Appellees [1]

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2 *STATEMENT OF IDENTITY OF* AMICI CURIAE *AND THEIR INTEREST IN THE CASE

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United Policyholders and National Independent Venue Association submit this *amicus curiae* brief in support of Plaintiffs-Appellees. United Policyholders is a respected national non-profit section 501(c)(3) organization and policyholder advocate. National Independent Venue Association is a trade association of independent performing arts venues formed in 2020 just prior to the pandemic, with nearly 2,000 charter members from all 50 states. The issues implicated by this case are of critical importance, as they may affect insurance recoveries for businesses throughout North Carolina, which include *amici's* members and those for whom *amici* advocate.

INTRODUCTION AND SUMMARY OF ARGUMENT

After businesses were forced to close due to the COVID-19 pandemic, many sought relief from their insurers. However, despite having promised to provide coverage for all risks of physical loss or damage unless specifically excluded, insurers denied claim after claim. Disputes over these denials have now reached the courts.

This appeal concerns the narrow issue of whether specified government orders caused "direct physical loss" of Plaintiffs-Appellees' property. But Cincinnati and the Insurance Industry *Amici* appear to seek a broader ruling - that the virus that causes COVID-19 does not cause "physical loss of or damage to" property that is insured under an "all risks" property insurance policy. Appellants' Br. 14-15, APCIA Br. 3-5. In doing so, they incorrectly contend that coverage under such ***3** policies has been limited to those caused by perils such as fire or hurricanes that cause structural damage to real property. The opposite is true. Decades of case law demonstrates that courts, the insurance industry, and policyholders have long shared an understanding that "all risks" policies like the one Cincinnati sold to North State Deli [2] cover a broad range of physical perils that rob property of its intended use, including carbon monoxide, odors, and even viruses such as the SARS-CoV-1 virus. The virus that causes COVID-19 is such a peril that triggers coverage under an "all risks" policy. Therefore, Cincinnati's effort to secure a ruling in its favor on this issue is wrong and premature.

ARGUMENT

I. ALL RISKS INSURANCE POLICIES PROVIDE EXPANSIVE COVERAGE TO POLICYHOLDERS.

An "all risks" insurance policy, like the one Cincinnati sold North State Deli, provides coverage for all risks that are not otherwise excluded. *See Avis v. Hartford Fire Ins. Co.*, 283 N.C. 142, 146, 195 S.E.2d 545, 547 (1973) ("Recovery will be allowed under a policy affording 'all risks' coverage for all losses of a fortuitous nature not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage.").

Policyholders, courts, and insurers - including Cincinnati - have for decades understood all risks policies to provide expansive coverage, including in situations where property was rendered unfit or unsafe for its intended use, regardless of ***4** whether there was physical alteration to property. When a policyholder cannot use property as intended due to an external physical peril, that is the type of "physical loss" or "physical damage" to property that all risks insurance policies were purchased to address. It is only now that Cincinnati seeks to narrow the broad nature of all risks policies, like the one it sold North State Deli, to protect policyholders for physical loss or damage to property only when the insured property suffers visible or structural damage. *See* Appellants' Br. 10-14.

A. Courts Have Long Held that No Tangible Alteration of Property is Necessary to Trigger Coverage Under an "All Risks" Policy.

The Insurance Industry *Amici* seek a narrow construction of insurers' duties under policies such as that issued to North State Deli, suggesting that property insurance policies historically covered the risk of fire and then "later expanded to include loss arising from other perils that damage property, such as theft, hurricanes, floods, and riots." APCIA Br. 2. It is true that insurers including Cincinnati have expanded the scope of property insurance coverage over the years. For instance, when the Insurance

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Services Office ("ISO") - an industry trade group that drafts widely used form policies that many insurers use as the basis for their policies - began drafting policies decades ago, coverage was triggered only if the property was "damaged or destroyed." *See* Frank S. Glendening, *Business Interruption Insurance: What Is Covered* 100 (1980). However, the ISO form property policies - like the Cincinnati policies at issue here - now include the broader trigger of physical "loss" or "damage" to property.

***5** Thus, by their plain text, property insurance policies now cover a broad range of physical perils that rob property of its intended use even if they do not cause visible, structural damage in the way that fires and hurricanes do (though even those perils often cause damage that is not apparent to the naked eye). Indeed, Insurance Industry *Amici* concede that "theft" is covered and often theft does *not* damage property in the same way that a fire might. APCIA Br. 9-10. Rather, theft is covered because if property is stolen, the policyholder cannot use that property for its intended use due to an external force beyond the policyholder's control. *See, e.g., Intermetal Mexicana, S.A. v. Ins. Co. of N. Am.*, 866 F.2d 71, 76 (3d Cir. 1989); *Great N. Ins. Co. v. Dayco Corp.*, 620 F. Supp. 346, 351 (S.D.N.Y. 1985).

Therefore, for decades, consistent with North Carolina law requiring broad construction of all risks policies, courts across the country interpreting property policies have found coverage when a property is deemed unfit or unsafe for its intended use:

• **Threat of collapse** that required abandonment of property. *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986); *Hughes v. Potomac Ins. Co.*, 199 Cal.App.2d 239, 248-49 (1962) (holding that policyholder's home, which became perched on the edge of a cliff after a sudden landslide, was damaged because it became unsafe to live in and thus useless).

***6** • **Threat of falling rocks**, regardless of whether rocks ever made contact with property. *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 493, 509 S.E.2d 1, 17 (1998).

• **A ransomware attack** that prevented the insured from "accessing" "data contained on the server, and all of its software" and therefore caused "loss of use, loss of reliability, or impaired functionality." *Nat'l Ink & Stitch, LLC v. State Auto Prop. & Cas. Ins. Co.*, 435 F. Supp. 3d 679, 686 (D. Md. 2020).

• **Asbestos** fibers that were "released into the air" and remained "airborne" for long periods of time. *U.S. Fid. & Guar. Co. v. Wilkin Insulation Co.*, 144 Ill.2d 64, 74-75, 578 N.E.2d 926, 931 (1991); *see also Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) ("physical loss" occurred when "the presence of large quantities of asbestos in the air of a building" made "the structure uninhabitable and unusable").

• **Sulfuric gas** that rendered a property "uninhabitable," even though drywall was "physically intact, functional and has no visible damage." *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013).

• **Urine odor**, because the term "physical loss" includes "changes" that "exist in the absence of structural damage." *Mellin v. N. Sec. Ins. Co.*, 167 N.H. 544, 550, 115 A.3d 799, 805 (2015); *see also* ***7** *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 405-06 (1st Cir. 2009) (odor that affected air and "permeated the building" constituted "physical injury to property").

• **Gasoline vapor** that rendered rooms of insured building "uninhabitable" and "dangerous" to use. *W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 36-37, 437 P.2d 52, 55 (1968) (en banc).

• **Methamphetamine vapor and odor**. *Farmers Ins. Co. of Or. v. Trutanich*, 123 Or.App. 6, 11, 858 P.2d 1332, 1336 (1993); *see also Graff v. Allstate Ins. Co.*, 113 Wash.App. 799, 806, 54 P.3d 1266, 1270 (2002) (finding coverage under vandalism policy when "methamphetamine lab released hazardous vapors into the house"; "visibility" of damage not required).

• **Ammonia gas** that "physically transformed the air within [the] facility" and made it "unfit for occupancy until the ammonia could be dissipated." *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014).

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• **Carbon monoxide**. *Matzner v. Seaco Ins. Co.*, 1998 WL 566658, at *4 (Mass. Super. Aug. 12, 1998).

Without acknowledging this case law, Cincinnati relies upon one section of an insurance industry treatise for the proposition that physical loss or damage requires a "physical alteration of the property." Appellants' Br. 12-13. However, that treatise inaccurately summarized the law, an error that one of the treatise authors ***8** subsequently corrected. *See* Richard P. Lewis et al., *Couch's "Physical Alteration" Fallacy: Its Origins and Consequences*, 56 Tort, Trial & Ins. Prac. L.J. 621, 632 (Fall 2021).

B. Insurers Have Conceded That An "All Risks" Policy Is Triggered Absent Structural Alteration of Property.

In contrast to their current position regarding coverage for policyholders' losses resulting from the COVID-19 virus, insurers previously agreed that physical "loss" or "damage" to property exists even in the absence of structural alteration. Insurers previously paid claims for losses caused by SARS-CoV-1, the novel coronavirus that caused a pandemic between 2002 and 2004.[3]

In response to the SARS pandemic, the ISO in 2006 drafted an "Exclusion of Loss Due to Virus or Bacteria" and made it available to its members, recognizing that property and business interruption claims could result from "disease-causing agents [that] may render a product impure (change its quality or substance), or enable the spread of the disease by their presence on interior building surfaces or the surfaces of personal property."[4] Explaining that mold infestation is considered "property damage," the ISO stated that this exclusion was needed because "other known substances (such as rotovirus)" could be "alleged to be property damage" and ***9** "could be used in an effort to trigger other coverage, such as business income coverage."[5]

And, mere months before the COVID-19 pandemic, Factory Mutual Insurance Company - one of the most sophisticated property insurers in the world - admitted in litigation that the presence of mold spores on property alone constituted insured "physical loss or damage" because it "rendered" the property "unfit for its intended use." *Factory Mut. Ins. Co. v. Federal Ins. Co.*, No. 1:17-cv-00760, ECF No. 127 at 3 (D.N.M. Nov. 11, 2019). Pointing to the case law cited above, Factory Mutual contended that "loss of functionality" constituted "physical loss or damage." *Id.* at 3, n.1. At minimum, Factory Mutual contended, the term "'physical loss or damage,' which is undefined, is susceptible of more than one reasonable interpretation and is therefore ambiguous." *Id.* In North Carolina, ambiguous policy terms must be construed against the insurer. *See Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 9, 692 S.E.2d 605, 612 (2010).

C. Insurers Were Aware of the Broad Interpretation of Physical Loss or Damage Under "All Risks" Policies and Did Nothing to Narrow the Language.

In light of the many decisions that have interpreted physical loss or damage broadly, the insurance industry was well aware that the language in policies such as those sold by Cincinnati was, at best, ambiguous. Despite this knowledge, it did nothing to narrow the language. As the drafter of the policy, the insurer bears the ***10** responsibility to make its policies clear and unambiguous. *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970).

A recent COVID-19 coverage case noted this concern: "Carriers have utilized the phrase direct physical loss for over fifty (50) years and courts have begged carriers to define the phrase to avoid the precise issue before the Court now." *Cherokee Nation v. Lexington Ins. Co.*, 2021 WL 506271, at *3 (Okl. Dist. Jan. 28, 2021). "Despite these pleas and the known confusion surrounding the phrase 'direct physical loss,' Defendant Insurers made no attempt to clarify or define that phrase within the [insurance] policy to avoid the [policyholder's reasonable expectation] that losses such as the closure of a business in response to the Pandemic would be covered - at least, not until it was too late." *Id.*

Cincinnati, like the rest of the insurance industry, was aware of the history of broadly interpreting direct physical loss or damage and could have revised its policies to narrow the coverage it provided if it did not want to cover such losses. Cincinnati chose

not to do so. It cannot now ask the Court to rewrite its policies after the fact. *See, e.g., Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 437-38, 146 S.E.2d 410, 416 (1966) (holding when an insurer employs a "slippery" word in its policy and "falls into a coverage somewhat more extensive than it contemplated, the fault lies in its own selection of the words by which it chose to be bound.").

*11 II. THE VIRUS THAT CAUSES COVID-19 RESULTS IN INSURED "PHYSICAL LOSS" OR "DAMAGE" TO PROPERTY.

Because the trial court granted summary judgment in favor of North State Deli on the basis of the government orders, this appeal does not present the question whether the COVID-19 virus causes physical loss or damage insured under Cincinnati's policy, as Cincinnati concedes. Appellants' Br. 25. However, under the policy language and the case law discussed above, the virus causes physical loss or damage insured under a property insurance policy. Specifically, the virus alters the air and surfaces inside insured property, converting the property from safe to dangerous vectors of transmission, as could be proven in discovery based on the scientific research discussed below.

A. COVID-19 Physically Affects the Air and Surfaces in Property.

The World Health Organization and researchers funded by the National Institutes of Health have advised that people can become infected with the coronavirus by touching virus-laden objects and surfaces, and then touching their eyes, nose, or mouth. [6] This mode of transmission - indirect transmission via objects and surfaces - is known as "fomite transmission." A study of a COVID-19 outbreak identified indirect transmission via objects such as elevator buttons and restroom ***12** taps as an important possible cause of a "rapid spread" of the coronavirus in a shopping mall in China. [7] Additional research has shown that the coronavirus remained viable for up to 28 days on a range of common surfaces - such as glass, stainless steel, and money - left at room temperature. [8]

Further, because cleaning of surfaces normally does not fully remove the virus, some physical residue of the virus, and some alteration of the surface caused by the virus, remains after cleaning. [9] Cincinnati *itself* has acknowledged as much, noting in its "tips for sanitation in the age of coronavirus," that, while cleaning may lower the number of germs on a surface, it will not eliminate them. [10] A study found that even after trained hospital personnel used disinfection procedures in COVID-19 patient treatment areas, much of the virus survived. [11]

Additionally, the CDC has recognized an infected person can generate virus-laden ***13** aerosols that linger in the air well after the person leaves the area. [12] Moreover, the virus can migrate substantial distances through a building's ventilation systems. One study found the presence of the coronavirus within the HVAC system servicing hospital ward rooms of COVID-19 patients. This study detected SARS-CoV-2 RNA in ceiling vent openings, exhaust filters, and central ducts more than 50 meters from the patients' rooms. [13] Another study concluded that the spread of the coronavirus "was prompted by air-conditioned ventilation," with persons who sat downstream of the HVAC system's air flow becoming infected. [14] Further, federal agencies have recommended that facilities improve their ventilation and HVAC systems to mitigate against the physical effects of the virus on air. [15] OSHA has found that the COVID-19 virus is a "physically harmful agent" that poses a "dire" "mortality and morbidity risk" such that "the grave ***14** danger from exposures to SARS-CoV-2 is clear." [16] OSHA went on to note that the COVID-19 virus is a "highly transmissible virus" that "primarily ... spreads from an infected person to others ... through the respiratory droplets that are produced when an infected person coughs, sneezes, sings, talks, or breathes," that transmission of the COVID-19 virus occurs "where small respiratory particles are able to remain suspended in the air and accumulate," and "[p]re-symptomatic and asymptomatic transmission continue to pose serious challenges to containing the spread of COVID-19." [17]

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Cincinnati and the Insurance Industry *Amici* suggest that the COVID-19 virus fails to meet an implied requirement in standard property insurance policies for "tangible" alteration. Appellants' Br. 18; APCIA Br. 6. To the extent that they suggest "tangible" alteration is structural alteration, that is not supported by the law or policy language, as discussed above. Nevertheless, the virus *does* physically alter the air and surfaces within property, as North State Deli could prove in discovery based on the wealth of scientific studies and growing evidence about the virus's physical properties. Those effects on property are even greater than those caused by perils such as carbon monoxide, odors, and the like.

Courts recognize that parties should have the opportunity to prove, after a full opportunity for discovery, that the virus caused physical loss of or damage to property through mechanisms such as these. *See, e.g.,* ***15** *Novant Health Inc. v. Am. Guarantee and Liab. Ins. Co.*, 2021 WL 4340006, at *3 (M.D.N.C. 2021) (denying insurer motion to dismiss because "[w]hether COVID-19 has resulted in direct physical damage or loss to Novant, and if so to what extent, are questions better evaluated on a developed factual record"); *Brown's Gym, Inc. v. The Cincinnati Ins. Co.*, 2021 WL 3036545, at *2 (Pa. Com. Pl. July 13, 2021) (also denying insurer motion to dismiss). This Court should not foreclose the opportunity for policyholders in North Carolina to do so.

B. The "Period of Restoration" Does Not Narrow the Scope of Coverage.

Cincinnati and the Insurance Industry *Amici* suggest that the "period of restoration" definition narrows the broad construction of "physical loss or damage." Appellants' Br. 10; APCIA Br. 6. But the "period of restoration" does not purport to affect the *trigger* of coverage. Instead, it spells out the *duration* of coverage for a covered loss. The "period of restoration" description also is entirely consistent with the measures a business must take to respond to the coronavirus. If a policyholder restores unsafe physical spaces to a safe and usable condition by, for instance, installing new partitions or ventilation systems, reconfiguring physical space to permit social distancing, or engaging in deep cleaning and sanitizing, it effects a repair, rebuild, or replacement of its property. *See In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, 521 F. Supp. 3d 729, 742 (N.D. Ill. 2021) (if "the coronavirus risk could be minimized by the installation of partitions and a particular ventilation system, then the restaurants would be expected to 'repair' the space by installing those safety features").

***16** Finally, *Harry's Cadillac-Pontiac-GMC Truck Company v. Motors Insurance Corporation*, 126 N.C. App. 698, 486 S.E.2d 249 (1997), provides no support to the position that the COVID-19 virus does not cause physical loss or damage. In *Harry's Cadillac*, a car dealership made a claim for business interruption coverage after a snowstorm. 126 N.C. App. at 699, 486 S.E.2d at 250. The undisputed evidence (following discovery) showed that any loss of business income occurred because of the "inability to gain access to the dealership due to the snowstorm," and not any "physical loss of or damage to property." *Id.* at 702, 251. [18] Rather, the only loss of or damage to property claimed by the policyholder was damage to its roof, which admittedly caused no loss of business income. *Id.* at 702, 251-52. This decision, on narrow causation grounds, did nothing to limit coverage where a policyholder *can* prove (after a full opportunity for discovery) that the virus did cause physical loss of or damage to property.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below and, at minimum, not foreclose the opportunity for policyholders in North Carolina to prove that the virus caused physical loss of or damage to property that resulted in loss of business income.

***17** DATED: November 29, 2021

Respectfully submitted,

ROBINSON, BRADSHAW & HINSON, P.A.

Electronically submitted

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Appendix not available.

Footnotes

2 "North State Deli" refers to all Plaintiffs-Appellees.

3 Todd C. Frankel, *Insurers Knew the Damage a Viral Pandemic Could Wreak on Businesses. So They Excluded Coverage*, Washington Post (April 2, 2020), https://www.washingtonpost.com/business/2020/04/02/insurers-knew-damage-viral-pandemic-could-wreak-businesses-so-they-excluded-coverage/.

4 ISO Circular (July 6, 2006) (App. 1-12).

5 Letter from A. Casillo to S. Cullen, October 2, 2006 (App. 13-14). This document was produced by the ISO - and later publicly filed - in *Hartford Fire Ins. Co. v. Moda LLC, et al.*, No. HHD-CV-20-6127638-S (Sup. Ct., Jud. Dist of Hartford at Hartford).

6 WHO, *Transmission of Sars-CoV-2: Implications for Infection Prevention Precautions* (July 9, 2020), https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions; Alicia N.M. Kraay et al., *Risk for Fomite-Mediated Transmission of SARS-CoV-2 in Child Daycares, Schools, Nursing Homes, and Offices*, CDC, 27(4) Emerging Infectious Diseases 1229 (Apr. 2021), https: // wwwnc.cdc.gov/eid/article/27/4/20-3631_article.

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18 Though not at issue in *Harry's Cadillac*, such losses are often covered under “Ingress/Egress” provisions that are triggered when loss or damage to third-party property hinders access to the insured's business.

1 Pursuant to N.C. R. App. P. 28(i)(2), *amici* certify that no person or entity - other than *amici* and their counsel - directly or indirectly either wrote this brief or contributed money for its preparation.

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