

## CASINOS, COVID, AND COVERAGE: JURISPRUDENTIAL AND INSURANCE IMPLICATIONS OF A LITIGATION PANDEMIC

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### Abstract

*The onset of the COVID-19 pandemic in early 2020 impacted all walks of American life. Litigation and insurance coverage disputes were no exception. In addition to the impact on dispute resolution procedure (e.g., postponed trials, masked trials, the rise of remote depositions, hearings, and oral argument), there were more than two thousand insurance coverage lawsuits spurred by pandemic-related restrictions on business operations and the resulting lost revenue.*

*Entertainment and retail venues not deemed “essential” were particularly impacted due to both official government orders closing or restricting operations as well as reduced customer demand stemming from fear of infection. Although some policyholders with the right mix of risk management in place obtained insurance coverage, most were denied benefits in what proved to be a historically unprecedented wave of insurer victories that not only restricted recovery for standard fare business interruption coverage but also potentially altered the landscape of insurance law.*

*Covid coverage litigation in Nevada provided examples of both specialized coverage battles and disputes involving the more common business interruption provisions of standard commercial property policies. Businesses in Nevada enjoyed some degree of success at the state trial court level but were largely unsuccessful in federal court. The Nevada Supreme Court ruling for insurers in JGB Vegas Retail v. Starr Surplus Lines in September 2023 was a decision potentially serving as a close-to-final nail in the coffin of policyholder claims pursuant to basic commercial property insurance.*

*The long-term impact of the COVID-19 coverage litigation remains to be seen but likely will prompt a shift in risk management strategy for businesses serving the public, particularly entertainment venues. In addition, these cases risk undoing decades of precedent favoring policyholders regarding insurance policy trigger. The pandemic litigation may thus prove to have been both a financial and jurisprudential windfall for the insurance industry.*

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## I. INTRODUCTION

The onset of the COVID-19 (hereinafter “Covid”) pandemic battered American business, prompted a wide range of government-ordered restrictions, and unleashed a torrent of insurance coverage litigation, most of it involving the “business interruption” provisions of commercial property insurance policies. Insurers predicted dire financial ruin for their industry if required to pay business interruption benefits, a gloom-and-doom scenario that along with a give-no-quarter litigation strategy produced a surprising winning streak, particularly in federal courts.<sup>1</sup>

In contrast to the nationwide policyholder losing streak, which continued in the District of Nevada federal court,<sup>2</sup> casino, resort, and retail properties in Nevada initially enjoyed some degree of success at the state trial court level.<sup>3</sup> The Nevada Supreme Court grant of interlocutory review and reversal of a pro-policyholder ruling in *JGB v. Starr Surplus Lines* (hereinafter “*JGB*”) then placed the state more in line with the national picture. The Supreme Court’s *Starr Surplus Lines vs Eighth Judicial District Court*<sup>4</sup> ruling sided with the insurers and did not have the sort of braking effect on insurer momentum for which policyholders had hoped. Instead, *JGB* brought policyholders closer to complete defeat as yet another court sided with insurers denying coverage. Although policyholders have prevailed in some states and many states have yet to issue definitive opinions,<sup>5</sup> insurers have continued to win in most state courts even if not to the overwhelming extent they have won in federal courts.

In addition to being another proverbial nail in the metaphorical coffin of Covid coverage litigation, *JGB* also is part of a potential jurisprudential shift on the oft-litigated insurance coverage question of when insurance coverage is “triggered” by injury to or loss of property. *JGB*, like the bulk of Covid coverage decisions, took the view that Covid on property was not sufficiently “physical”

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<sup>1</sup> See Erik S. Knutsen & Jeffrey W. Stempel, *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 CONN. INS. L. J. 185, 201–28 (2020) (providing examples of insurer predictions of dire consequences for industry and the public if required to cover Covid-related losses).

<sup>2</sup> See cases cited *infra* note 28.

<sup>3</sup> See cases cited *infra* note 29.

<sup>4</sup> *JGB Vegas Retail v. Starr Surplus Lines Ins. Co.*, Case No.: A-20-816628-B, 2020 Nev. Dist. LEXIS 1512 (Nov. 30, 2020), *writ. Granted*; *Starr Surplus Lines Ins. Co. v. Eighth Jud. Dist. Ct. of Nev.*, No. 84986, 2022 Nev. Unpub. LEXIS 854 (July 29, 2022); *Starr Surplus Lines Ins. Co. v. Eighth Jud. Dist. Ct.*, 535 P.3d 254 (Nev. 2023), summarized *infra* notes 30–64.

<sup>5</sup> See cases cited *infra* notes 25–30 (summarizing Covid coverage caselaw); see also *Covid Coverage Litigation Tracker*, UNIV. OF PA., <https://celt.law.upenn.edu/> (last visited Mar. 30, 2024) (summarizing case results in federal and state courts with respective insurer win rates of roughly 88% (658 wins in 743 cases) and 75% (178 wins in 237 cases)).

damage or loss.<sup>6</sup> Prior to the Covid line of cases, courts had largely taken a much broader view of physical damage, finding substantially less permanent or palpable injury could constitute coverage-triggering injury.<sup>7</sup>

In addition to providing a brief overview of the Covid pandemic and its ensuing insurance litigation, this Article assesses developments in Nevada, particularly the Supreme Court's important decision. After a critical look at the decision, this Article examines the merits and methodology of Covid coverage decisions and their implications for future coverage decisions and the insurance marketplace.

## II. THE COVID ONSLAUGHT AND OUTCOMES TO DATE OF INSURANCE COVERAGE CLAIMS CURRENT

### A. A Once-in-a-Century Pandemic and Consequent Coverage Claims

The Covid pandemic shook society. Among widespread government closure orders, pitched political debate, rapid vaccine development and administration, the onset of the pandemic saw hotly contested insurance coverage disputes as well.<sup>8</sup> Insurers successfully shaped the public discussion of Covid and insurance as one in which imposing coverage upon insurers was unfair and so potentially costly that it could imperil the insurance industry and the economic system.

The Covid pandemic created not only a public health crisis<sup>9</sup> but also an insurance coverage imbroglio, prompting near-immediate business interruption

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<sup>6</sup> See *Starr Surplus Lines Ins. Co.*, 535 P.3d at 266–67.

<sup>7</sup> See cases cited *infra* note 112.

<sup>8</sup> See *Covid Coverage Litigation Tracker*, *supra* note 5 (noting that Covid coverage litigation commenced as early as March 2020); see also Christopher C. French, *COVID-19 Business Interruption Insurance Losses: The Cases for and Against Coverage*, 27 CONN. INS. L. J. 1, 3 (2020) (acknowledging that Covid infections were presenting serious problem). As is now common knowledge, governments exhibited a range of reactions to the Covid problem. Some (e.g., Canada, New Zealand, Hawaii), ordered substantial comprehensive “lock-downs” as a means of retarding the spread of the disease. Others, such as Sweden, adopted a system of modified restrictions that varied among states. See, e.g., Kwado Agyapon-Ntra & Patrick E. McSharry, *A Global Analysis of the Effectiveness of Policy Responses to COVID-19*, NATURE (Apr. 6, 2023), <https://www.nature.com/articles/s41598-023-31709-2> (reviewing different national responses and comparative effectiveness).

<sup>9</sup> Courts, like other institutions, were affected by the pandemic. See, e.g., *Washburn v. Univ. Med. Ctr. of S. Nev.*, 2:19-cv-01120-JCM-DJA, 2020 U.S. Dist. LEXIS 52354, at \*2 (D. Nev. Mar. 19, 2020) (the apparent first judicial ruling on a request for delay in proceedings due to the pandemic providing for motion hearing by conference call “[d]ue to the evolving health crisis in the community” and following Center for Disease Control recommendations “to ensure the safety of the community

claims by policyholders impacted by a rash of government restrictions ordered in response to the pandemic.

#### B. Insurer Reaction: Chicken Little Gets the Wagons in a Circle, with Surprisingly Effective Results

Before cases seeking coverage had even been filed, insurers and their representatives quickly moved to denigrate arguments for coverage. Insurers engaged in a pre-emptive strike to argue that policy terms such as “physical loss” do even not arguably encompass the business shutdowns resulting from Covid. Within weeks of the beginning of the pandemic, insurers or their counsel were campaigning to label Covid as uncovered,<sup>10</sup> although some industry commentary was more restrained.<sup>11</sup> In addition to making a public legal argument against

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through social distancing”); *see also* United States v. Barkman, 446 F. Supp. 3d 705, 706–07 (D. Nev. 2020) (involving challenges to prison operations due to dangers of Covid in confined situation).

<sup>10</sup> *See* Knutsen & Stempel, *supra* note 1, at 201–28; *see, e.g.*, Larry P. Schiffer, *Does the Novel Coronavirus Cause Direct Physical Loss of or Damage to Property?*, NAT’L L. REV. (July 13, 2020), <https://www.natlawreview.com/article/does-novel-coronavirus-cause-direct-physical-loss-or-damage-to-property> (Insurer counsel concluded that “[b]ased on the case law and the nature of the novel coronavirus, it appears unlikely that courts will conclude that viral contamination causes ‘direct physical loss.’”); Randy J. Maniloff & Margo Meta, *New DJ Takes Different Tack on Business Interruption Coverage for COVID-19*, COVERAGE OPS. (Mar. 26, 2020), <https://www.coverageopinions.info/COVID19ISSUE/COVIDNewDJ.html> (describing French Laundry Partners, LP v. Hartford Fire Ins. Co., et al., Complaint for Declaratory Relief, Calif. Superior Ct., Napa County (Mar. 25, 2020) case seeking declaration of coverage); Christine G. Barlow, *What Is Physical Damage, and Does COVID-19 Cause Any?*, PROP. CASUALTY360 (Mar. 27, 2020), <https://www.propertycasualty360.com/2020/03/27/what-is-physical-damage-and-does-covid-19-cause-any-414-175030/?slreturn=20240230224458> (“When policies don’t define a term, courts generally refer to a standard dictionary. Merriam-Webster defines damage as ‘loss or harm resulting from injury to person, property or reputation.’ Since this is not definitive, we look at the definitions of loss and harm. Loss is defined as ‘destruction, ruin,’ and harm is defined as ‘physical or mental damage.’ The virus does not harm physical property. The virus may be cleaned off like any other germs or bacteria . . . The property does not need to be replaced or repaired, just cleaned as advised by [public health authorities.]”).

<sup>11</sup> *See, e.g.*, *Coronavirus Coverage Issues Loom: Policy Details Crucial to Determine Success of Commercial Claims*, BUS. INS. 4 (Apr. 2020) (surveying possible Covid-related claims implicating Property Business Interruption insurance, Directors and Officers Liability insurance, Cyber Risk insurance, Medical Malpractice insurance, and Workers Compensation insurance); Stephen Catlin, *Setting the Right Tone: Insurers Must Clarify the Role Insurance Can Play in Recovering from Future Pandemics*, BEST’S REV. (Aug. 2020),

coverage, insurers made a very public business/financial argument that Covid coverage would be so costly as to imperil the health, stability, and perhaps even the survival of insurers.<sup>12</sup> Although there was some policyholder argument to the

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<https://news.ambest.com/articlecontent.aspx?refnum=299423&altsrc=43> (“[First, insurers] and brokers should do a much better job when communicating with the public and with governments, especially regarding the true value that insurance provides. Secondly, it’s in the nature of our business to focus on the past, and therefore we often neglect giving adequate thought about the future. Finally, I regret that – when an event occurs that causes extreme human suffering – the insurance industry often views the event primarily in terms of dollars and cents . . . . Unfortunately, the coronavirus has amplified some of the things that I believe the industry often does poorly.”).

<sup>12</sup> See, e.g., Kate Smith, *Pandemic Partnerships*, BEST’S REV. (Aug. 2020), <https://news.ambest.com/articlecontent.aspx?refnum=299433&altsrc=43> (“Even with pandemic excluded from most business interruption policies, COVID-19 is expected to cost the insurance industry more than \$200 billion.”); Kate Smith, *The COVID Catastrophe: The Global Pandemic Is on Track to Be the Costliest Event in Insurance History. It’s Also a Defining Moment for the Industry*, BEST’S REV. (June 2020), <https://news.ambest.com/articlecontent.aspx?AltSrc=53&RefNum=297254> (“The COVID-19 outbreak could dwarf other catastrophe losses insurers have seen.”) (but also noting that “[e]ven with the economic downturn, the insurance industry, on the whole, is in a strong capital position.”). A sidebar to the article (subtitled “*The X Factor*”) continues with similar alarmist quotes:

The Insurance Information Institute and American Property Casualty Insurance Association place the estimates much higher. The APCIA forecast losses of up to \$668 billion per month, while the III estimated retroactive BI could cost the industry up to \$380 billion per month.

‘That’s an industry-breaking event,’ James Lynch, chief actuary for the III, said. ‘That would break the industry in two directions. One, the financial load it would place on companies to have to pay claims they had priced the business for, and had specifically excluded, would create financial ruin. Moreover, that intervention into clear policy language would call into question the entire insurance business model . . .’

‘The exclusion for viruses is not an ambiguous one,’ Lynch said. ‘It’s an exclusion of loss due to virus or bacteria. When it was filed, the filing specifically mentioned the potential for a pandemic similar to SARS CoV-1. And the current pandemic is SARS CoV-2. So, I don’t think there’s a lot of ambiguity here about what the exclusion was meant to exclude.’

*Id.*

contrary,<sup>13</sup> the claims of insurers and their counsel dominated discussion of the potential threat to the industry posed by Covid coverage claims.

Insurers also engaged in shrewd case selection and litigation management. Although there have been roughly 2,500 Covid coverage cases to date, insurers made motions to dismiss or summary judgment motions in only 40 percent of them.<sup>14</sup> It appears carriers sought judgment as a matter of law via a Rule 12 motion or through a summary judgment motion in cases before judges viewed as most receptive to the insurer position that the presence of virus was not “physical” damage necessary to trigger insurance coverage. Rather, argued insurers, trigger required a tangible, irreversible “breaking” of something. Further, insurers took the position that a government closure order or virus could not satisfy this standard.

As part of this strategy, insurers deployed the tactic of removal of cases filed in state court to federal court.<sup>15</sup> They correctly reasoned that federal judges

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<sup>13</sup> See, e.g., Andrew G. Simpson, *P/C Insurers Put a Price Tag on Uncovered Coronavirus Business Interruption Losses*, INS. J. (Mar. 30, 2022), <https://www.insurancejournal.com/news/national/2020/03/30/562738.htm> (As stated by policyholder attorney John Houghtaling II who characterized “the insurance industry [as] pushing out deceptive propaganda that the virus does not cause a dangerous condition to property” which “is a lie, it’s untrue factually and legally.”); Christine Spinella Davis, *Business Interruption Coverage for COVID-19 Losses: You Can Satisfy the “Physical Loss or Damage” Requirement in Your Commercial Property Policy*, IT PAYS TO BE COVERED (Apr. 24, 2020), <https://www.itpaystobecovered.com/2020/04/business-interruption-coverage-for-covid-19-losses-you-can-satisfy-the-physical-loss-or-damage-requirement-in-your-commercial-property-policy/> (“Temporary loss of use and loss of functionality alone may satisfy the physical loss or damage requirement in a property policy.”); Mark Packman & Jason Rubinstein, *COVID-19 Claims May Survive Insurers’ Physical Loss Defense*, LAW360 (Sept. 1, 2020), <https://www.law360.com/articles/1306134> (“There is significant evidence to suggest there are many legal paths available to plaintiffs as they struggle with losses related to COVID-19.”).

<sup>14</sup> See *Covid Coverage Litigation Tracker*, *supra* note 5 (dismissal motions made in approximately 1,000 of the 2,400 cases included in Tracker database as of January 16, 2024).

<sup>15</sup> There have been roughly 750 federal court decisions on dispositive motions in Covid coverage cases as contrasted to fewer than 250 state court decisions in such cases, even though policyholder plaintiffs typically begin suit in state court, which is viewed as more favorable to policyholders than federal court. The disparity thus logically results from removal by defendant insurers of cases initiated in state court. See *Covid Coverage Litigation Tracker*, *supra* note 5; see also *Covid Coverage Litigation Tracker*, CCLT Case List, PENN CAREY L. UNIV. OF PENN., <https://cclt.law.upenn.edu/cclt-case-list/> (last visited Mar. 7, 2024) (reflecting cases filed in state court and removed to federal court).

would be more receptive to arguments of noncoverage<sup>16</sup> as well as more aggressive in deciding cases as a matter of law even without benefit of disclosure or discovery. Federal courts also tend to have faster dockets than state courts, which assisted insurers in obtaining early favorable rulings that could in turn be used as illustrative precedent in subsequent cases, creating a snowball effect favoring denial of coverage. By late 2020, insurers had assembled a sufficiently large mass of favorable precedent to influence courts based on winning percentage alone.<sup>17</sup>

### III. CASINO COVERAGE AND GENERAL RETAIL COVERAGE CLAIMS

#### A. Distinguishing Policies and Coverages

Although standard form commercial property policies dominate the market, there are a variety of property insurance policies. Some policies expressly cover infectious diseases, government shutdown orders, and other sources of business interruption that do not involve classic and unquestionable physical damage such as that resulting from a fire, windstorm, or malfunctioning equipment (e.g., refrigerator leak, boiler explosion, electrical mishap).

Specific event cancellation insurance policies are also available. Perhaps the most prominent example is the policy applicable to cancellation of the Wimbledon tennis tournament in 2020. With considerable foresight, Wimbledon's organizers had purchased an event cancellation policy that had no applicable exclusions. When the Covid pandemic hit in March 2020 and was in full swing during that Spring, it became obvious that the tournament, scheduled for late June with the title matches in early July, could not be held as scheduled. And since the end of the pandemic and the ability to hold mass public events in the future was uncertain, rescheduling was not an option. Wimbledon was

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<sup>16</sup> See *Covid Coverage Litigation Tracker*, *supra* note 5 (reflecting even higher insurer win rate in federal court than in state court); *Covid Coverage Litigation Tracker*, *CCLT Case List*, *supra* note 15.

<sup>17</sup> See, e.g., *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, Case No. 5:20-cv-04265-BLF, 2020 U.S. Dist. LEXIS 242885 (N.D. Cal. Dec. 28, 2020) at \*8–9 (citing other decisions in District ruling for insurers in Covid coverage cases); see *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, 504 F. Supp. 3d 1191 (D. Kan. 2020) (describing and following anti-coverage rulings of other courts); *Geragos & Geragos Engine Co. No. 28, LLC v. Hartford Fire Ins. Co.*, CV 20-4647-GW-MAAx, 2020 U.S. Dist. LEXIS 237547 (C.D. Cal. Dec. 3, 2020) at 6–7 (“Several courts in this district (including this Court) and elsewhere across the nation have found that Covid-related restrictions on commercial activity . . . do not constitute ‘direct physical loss’ or ‘physical damage’ to property” . . . [The policyholder] has not offered a persuasive argument for why all those courts decided the issues incorrectly. It repeats the same arguments [the have been rejected in earlier decisions].”).

canceled and its insurers paid the agreed policy limits without objection—a rare policyholder win with minimal drama.<sup>18</sup>

Wimbledon's lesson in effective risk management was undoubtedly replicated in less public ways for other events that depend on being held on schedule. Some events, such as National Basketball Association and National Hockey League games could be held in a "bubble" isolating players, coaches, and staff—but there remained a substantial loss of revenue from the elimination of live crowd attendance. To date, the sports leagues have largely been unsuccessful in obtaining insurance coverage for the substantial limitations on play that arguably amount to a de facto or partial cancellation of the 2020 season.<sup>19</sup>

Public venues such as casinos also frequently purchase some form of infectious disease coverage even if they do not have event cancellation coverage per se. But these policies are often sold with sub-limits on disease or government shutdown losses. As one example, a major nightclub and restaurant operation purchased commercial property and business interruption insurance with a \$350 million overall policy limit and (according to the insurer) infectious disease sub-limits of \$1.5 million. The parties debated about whether sub-limits had properly been made a part of the policy and if so, the proper application of the sub-limits—the subject of heated but eventually settled litigation.<sup>20</sup> Similar situations (perhaps minus debate about whether sub-limits had properly been included in the policy) undoubtedly occurred underneath the radar of the public domain of court dockets and reported cases.

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<sup>18</sup> The reported payout to the policyholder was almost \$142 million—but it should be remembered that Wimbledon had paid almost \$32 million in premiums over a seventeen-year period following the SARS epidemic that prompted the purchase.

Assuming relatively good investment returns over a period during which stock market averages doubled and compound returns, the insurer did not do that badly even on this isolated risk on which it paid out, let alone on its entire book business in a larger, presumably uncorrelated risk pool. That said, the size of the Covid pandemic undoubtedly undermined the risk pooling of event cancellation insurers during 2020.

In addition, despite the large insurance payout, Wimbledon appears to have lost \$180 million or more in revenue (\$160 million in media rights, \$151 million in sponsorship, \$52 million in local ticket sales totaling \$363 million total revenue minus \$39 million in saved prize money and \$142 million of insurance proceeds totaling \$181 million. *See Wimbledon Shows How Pandemic Insurance Could Become Vital for Sports, Other Events*, INS. J. (Apr. 13, 2020), <https://www.insurancejournal.com/news/international/2020/04/13/564598.htm>.

<sup>19</sup> *See, e.g.*, Joel Rosenblatt & Robert Burnson, *AIG Beats Back Baseball Suit Seeking Lost Revenue from Covid*, BLOOMBERG L.: INS. (June 17, 2022, 12:00 PM), <https://news.bloomberglaw.com/insurance/aig-beats-back-baseball-suit-seeking-lost-revenue-from-covid-2>.

<sup>20</sup> *See* Complaint, *Hakkasan USA, Inc. v. Endurance Am. Specialty Ins. Co.*, No. A-20-816145-C (Clark Cty., Nev., June 5, 2020). The case has since settled, with terms undisclosed.



Notwithstanding the availability of specific policies specifically covering pandemic events, they are not in particularly wide use. This may result from risk managers, brokers, and agents failing to adequately market such policies. The conventional explanation for its limited use, however, is that these are hard risks to calculate, resulting in high premiums that most policyholders are unwilling to pay. Wimbledon was willing to buy event cancellation coverage at substantial cost because the tennis tournament was the only “property” to be protected and there were no easy avoidance or mitigation strategies.

By contrast, a department store, restaurant, or casino has alternatives that may make it balk at paying high premiums for an insurance product that covers a risk seen as remote and that is not necessarily fatal to the business. For example: a store can sell online even if closing the physical door to in-person customers (or may qualify as an essential business allowed to remain open despite a general government quarantine); a restaurant may sell food for pickup or delivery; a casino may have online gaming.

But as illuminated by the 20-20 hindsight of Covid, having specific disease or event cancellation insurance would have been worth the premiums charged for many commercial entities during 2020. In retrospect, the product was probably undersold, whatever the specific reasons. Going forward, the product remains available but the market is “hard” (characterized by limited availability, low policy limits relative to risk, and comparatively high premiums) rather than “soft” (characterized by extensive availability of policies with substantial policy limits for sale as relatively low premium costs). The product probably still makes substantial sense for many or even most policyholders doing retail business open to the public, particularly entertainment venues, but risk managers (or their more immediately bottom-line oriented bosses) may be unwilling to pay the price.

Of course, the price is really high if one suffers substantial losses from infectious disease or its impact and cannot obtain coverage pursuant to the basic commercial property policies held by most businesses, which was the situation in most Covid coverage cases. The typical commercial property policy provides extensive coverage but does not expressly agree to cover pandemic-style losses. Despite this, policyholders have a credible case for coverage, considerably stronger than acknowledged by the insurance industry or most courts to date.

## B. The Litigation Scorecard: Federal and State

Despite the availability of relatively strong policyholder arguments about the nature of physical injury, damage, and loss, policyholders have fared poorly in coverage litigation involving basic standard form policies with Business Interruption/Business Income coverage. They have fared even worse when arguing that a government shutdown order alone constitutes property damage.

Within days of government recognition (now widely seen as belated) that Covid was highly contagious and dangerous,<sup>21</sup> insurance claims for business interruption were widely anticipated with additional anticipated coverage controversy involving other insurance products. Lawsuits followed relatively quickly, numbering more than 1,000 by Fall 2020.<sup>22</sup>

By October, roughly 25 of these cases had some sort of substantive decision, most commonly the grant or denial of a motion to dismiss for failure to state a claim, particularly the latter, pro-insurer result.<sup>23</sup> Insurers prevailed in 18 of the 25 cases, with courts granting Rule 12(b)(6) (or its state equivalent) dismissal based on a lack of sufficiently triggering damage, a virus exclusion, or both.<sup>24</sup> The speed of these decisions and the success of insurers should be regarded—at least on the triggering damage question—as surprising to the point of being stunning.<sup>25</sup>

What has been particularly startling and troubling to me (and an admittedly small number of academic colleagues<sup>26</sup> as well as policyholders and

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<sup>21</sup> See *Weekly Press Briefing on COVID-19 Director's Remarks – 7 October 2020*, PAN AM. HEALTH ORG. (Oct. 7, 2020), <https://www.paho.org/en/file/75190/download?token=YQKHpctX> (As of October 7, 2020, there have been a reported 17 million cases of Covid resulting in 574,000 deaths in the Americas with the US alone remaining responsible for 40% of new cases.).

<sup>22</sup> See Baker, *supra* note 5; see also *Developments in Coronavirus Insurance Coverage Litigation and Legislation*, COVINGTON & BURLING (Aug. 13, 2020), <https://www.cov.com/en/news-and-insights/insights/2020/08/developments-in-coronavirus-coverage-litigation-and-legislation> (more than 700 coverage cases filed by August 2020).

<sup>23</sup> See *id.* In what might be termed the “first wave” of Covid property insurance and business interruption cases, the majority have been brought by policyholders as plaintiffs rather than by insurers seeking a declaratory judgment of no coverage. For clarity, this Article will generally use the term “policyholders” to include both named insureds and all other insureds under a policy unless insured status is important to determination of a coverage issue.

<sup>24</sup> See *id.*

<sup>25</sup> Stempel & Knutsen, *supra* note 1, at 190.

<sup>26</sup> Erik Knutsen and I are perhaps the only insurance law professors strongly disagreeing with the results and reasoning of most decisions denying Covid coverage. See generally JEFFREY W. STEMPEL & ERIK S. KNUTSEN, STEMPEL & KNUTSEN ON INSURANCE COVERAGE § 15.07 (4th ed. 2016). Professor Baker's writings reflect some similar skepticism but as curator of the University of Pennsylvania Covid Coverage Tracker, he has refrained from taking a particular position on these issues but has also noted that federal court reluctance to certify coverage questions to relevant state courts is odd given the importance of the issue and the state-law based regime of insurance. Other law faculty with whom I have conferred since March 2020 tend to support decisions denying coverage but also note that insurers have stronger argument regarding a virus exclusion than regarding existence of triggering physical injury.

their counsel) is the rationale of the insurer winning streak and the conclusory rejection of coverage by most courts. The insurance industry has succeeded in defeating coverage with an argument—lack of sufficient physical damage or loss *as a matter of law*—that is in my view weak and should at least have given courts pause. That courts “bought” this argument in cases involving policies with a specific virus exclusion is particularly troubling. The latter situation is a compelling one for insurer victory. The former is both problematic and risks unwise constriction of the concepts of loss, damage, and insurance policy trigger.<sup>27</sup>

Of the two arguments against coverage, the virus exclusion is stronger. In addition to containing broad language more specific to the Covid situation, the virus exclusion is backed by a “legislative history” indicating that it was expressly designed to avoid coverage in situations such as the SARS epidemic of the early twenty-first century. Consequently, it rather clearly was designed to cover cousins of SARS such as the Covid pandemic, which involves a variant of the virus that prompted the virus exclusion. One wonders, therefore, why insurers with virus exclusions did not lead with this argument, a seemingly solid winner. Several explanations, most of them troubling, suggest themselves.

First, and most benign, is the simple procedural/doctrinal practice of addressing the insuring agreement of a policy before addressing exclusions (and likewise addressing applicability of exclusions before focusing on exceptions to exclusions). As insurers are quick to note in litigation, a court need not worry about an exclusion if the policyholder’s claim does not first come within coverage provided by the insuring agreement.

But a countervailing norm of litigation is to lead with one’s strongest argument. To torture a sports metaphor, the “no physical damage” argument is a contested shot while the virus exclusion is a slam dunk. Although insurers converted an extremely high percentage of these contested shots, one still wonders why they largely passed on the slam dunk relative to pushing the no-physical-damage argument.

This raises the second rationale for the insurers’ tactics: industry solidarity. Not every insurer writing basic commercial property and business interruption coverage included a virus exclusion in their policies. Industry estimates are that roughly 80% of policies sold after SARS contained virus exclusions, a figure that matches fairly closely with the presence of virus exclusions in policies at issue in litigated cases. But 20% of all property

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<sup>27</sup> The typical property insurance policy form also contains a pollution exclusion barring coverage for damage resulting from the release or discharge of a “pollutant,” which is broadly defined. But in the early stages of the Covid pandemic, the conventional wisdom among insurance experts was that this exclusion designed to reach operational pollution (e.g., leaking pipes, dumped waste, spreading smoke) was unlikely to be found applicable to Covid business interruption claims. Insurers nonetheless frequently invoked the exclusion as an additional barrier to coverage, with surprising success, particularly if the definition of “pollutant,” included words such as “virus” or “bacteria” or “infectious material.”

insurance policies without virus exclusions remains a large number. These insurers thus had to win based on the no-physical-damage argument or any pollution exclusion in the policy, which should have been even a longer shot because normal English speakers do not refer to contagious illness as “pollution.”

Examining the caselaw, insurers Erie, Cincinnati, and Society, relative to the industry as a whole, tended not to have virus exclusions in their policies, which unsurprisingly made them aggressive in arguing for the absence of physical damage or loss from Covid. More surprising is that their brethren soft-pedaled available virus defenses in favor of leading with—and pushing hard on—the no-physical-damage argument. I attribute some of this to industry solidarity as well as individual insurer interests in contested cases.

If the virus exclusion insurers relied primarily on the virus exclusion, it would inevitably result in case records and judicial opinions suggesting that there was or at least could be coverage in the absence of a virus exclusion—which would in turn hurt the Eries, Cincinnati, and Societies of the insurance world-cum-fraternity. Realizing that the tables might be turned in the future, insurers with virus exclusions that could have produced a streamlined, easier victory, nonetheless vigorously litigated the no-damage argument as an accommodation to industry interests as well as their own.

The third explanation, like the second, is a blend of industry and individual insurer interests. Rather than standing in solidarity with insurers that failed to include a specific virus exclusion in their policies, insurers with such exclusions may have aggressively litigated the physical injury issue hoping to establish favorable precedent that could be deployed against policyholders in future disputes. Establishing restrictive concepts of physicality, damage, and loss could aid the industry in future coverage battles. It could even reverse (expressly or implicitly) precedents favoring policyholders that had emerged from caselaw involving asbestos, pollution, smoke, or other diminution of insured property.

Pre-Covid insurance coverage caselaw had steadily moved from a concept of physical damage that required a palpable “crunching” of insured property and had accepted as a trigger of coverage restrictions on property use stemming from harmful components on the property that stopped short of inflicting palpable or irreversible injury (e.g., gases, smoke, sludge). Although insurers often argued that these decisions were misplaced, they nonetheless acknowledged the trend but refused to place express definitions of the damage and loss terms in their typical policies. Winning on these issues in Covid cases would give insurers not only the benefit of avoiding coverage in a particular case but also potentially cut back on prior adverse precedent that had accepted policyholder arguments for a less palpable or permanent concept of physicality and damage or loss.

### C. Covid Litigation in Nevada and the Supreme Court’s *JGB* Decision

The nationwide wave of initial insurer victories was more muted in Nevada. Although federal courts in the state largely followed the trend,<sup>28</sup> several state court decisions denied insurer motions and slated cases for trial.<sup>29</sup> But policyholders encouraged by state trial court victories in Nevada had their hopes more-or-less dashed by the Nevada Supreme Court's decision in *JGB*, which denied an insurer motion to reject a retail policyholder's claim for coverage.<sup>30</sup>

I use the hedging language of 'more-or-less' because the high Court's opinion is significantly more nuanced than most Covid coverage rulings. It avoids express or implicit retrenchment from earlier precedents regarding physical damage or loss. It also leaves open (albeit only slightly) a door for some policyholders with different situations and policies to prevail in future Covid coverage claims. But no amount of nuance can sugarcoat the *JGB* result for policyholders. Insurers scored a big victory, one particularly important in the continuing saga of the Covid coverage wars as it may influence decisions of other state high courts that have yet to decide these issues.

Further, the decision was unanimous. Had there been a split in votes or even a single dissent, policyholders would have been aided in litigating pending decisions before other state high courts. Rather than halting or slowing down insurer momentum as policyholder counsel had hoped, *JGB* arguably is close to a tipping point that may prevent policyholders from ever reversing or modifying the trend in Covid coverage decisions.

The *JGB* case began when the Grand Bazaar Shops, a collection of retailers at the intersection of Las Vegas Boulevard (the "Strip") and Flamingo Road faced Covid-related closures mandated by a March 2020 gubernatorial order mandating that "all nonessential businesses close to prevent the virus's spread." Although "[b]y June 2020, the Shops were allowed to reopen, subject to restrictions designed to reduce the spread of the virus [s]ome of JGB's tenants never opened."<sup>31</sup> As the Court conceded, there was no doubt that the tenants and

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<sup>28</sup> See e.g., *Circus Circus LV, LP v. AIG Specialty Ins. Co.*, 525 F. Supp. 3d 1269 (D. Nev. 2021); *Egg & I, LLC v. U.S. Specialty Ins. Co.*, Case No. 2:20-cv-00747-KJD-DJA, 2021 U.S. Dist. LEXIS 35949 (D. Nev. Feb. 25, 2021); *Tao Grp. Holdings, LLC v. Emps. Ins. Co. of Wausau*, Case No.: 2:21-cv-00382-GMN-NJK, 2022 U.S. Dist. LEXIS 41520 (D. Nev. Mar. 8, 2022); *Wynn Resorts, Ltd. v. Factory Mut. Ins. Co.*, Case No. 2:21-cv-01230-CDS-EJY, 2023 U.S. Dist. LEXIS 140316 (D. Nev. Aug. 10, 2023).

<sup>29</sup> See, e.g., *JGB Vegas Retail v. Starr Surplus Lines Ins. Co.*, Case No.: A-20-816628-B, 2020 Nev. Dist. LEXIS 1512 (Eighth Jud. Dist. Ct., 2020), *rev'd*, *Starr Surplus Lines Ins. Co. v. Eighth Jud. Dist. Ct.*, 535 P.3d 254 (Nev. 2023); *Nevada Prop. 1 LLC v. Factory Mut. Ins. Co.*, No. A-21-831049-B, 2021 Nev. Dist. LEXIS 268 (Nev. Dist. Ct. Sept. 1, 2021).

<sup>30</sup> See *Starr Surplus Lines*, 535 P.3d at 254.

<sup>31</sup> *Id.* at 258.

JGB as landlord had incurred damages from this series of events.<sup>32</sup> Because the trial court had denied a motion to dismiss and permitted discovery and then denied summary judgment, there was a substantial record regarding traits of the Covid virus and its impact.<sup>33</sup>

Nonetheless, the *JGB* Court was unmoved on the issue of insurance coverage, even though an “all-risk” policy was at issue. The insuring agreement at issue provided coverage for: “[l]oss directly resulting from necessary interruption [of normal business operations] caused by direct physical loss or damage to real or personal property . . . arising from a peril insured against.” This included losses from interruption by civil or military authority if there was “damage to or destruction of property” within a mile of the policyholder premises resulting in prohibition of access by the government.<sup>34</sup> And even though the *JGB* Court acknowledged the coverage provided in the policy for “extra expense, ingress/egress, and rental value” and quoted a leading treatise’s description of time element/business income/business interruption coverage as permitting recovery for “loss resulting from the inability to put damaged property to its normal use.”<sup>35</sup>

Despite the clear occurrence of substantial business loss, policyholder JGB lost on the threshold issue of whether any of the loss resulted from “physical loss or damage,”<sup>36</sup> key terms the insurer did not define in the policy even though

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<sup>32</sup> See *id.* (“The closures resulted in economic strife or both JGB and its tenants. Reopening required additional expenses, too: JGB and its tenants installed sanitizer stations, social-distancing signs, and plexiglass and performed regular cleanings to reduce the chance of spreading the virus at the Shops.”).

<sup>33</sup> *Id.* at 258–59 (“Discovery proceeded revealing (1) how the COVID-19 virus spreads in aerosolized form: (2) that SARS-CoV-2 is a physical particle that can deposit onto property for several days, which can then transmit from the infected property as a “fomite”; (3) confirmed cases of COVID-19 at the Shops and statistical modeling indicating a strong likelihood that individuals with COVID-19 were at the Shops before and after the Governor’s first closure order; (4) the associated likelihood that these infected individuals rapidly redeposited SARS-CoV-2 onto the Shops’ property; and (5) various measures used by JGB and its tenants to reduce the chance of catching or spreading the virus.”).

<sup>34</sup> See *id.* at 257 (quoting policy).

<sup>35</sup> *Starr Surplus Lines Ins. Co. v. Eighth Jud. Dist. Ct.*, 535 P.3d 254, 257 (Nev. 2023) (quoting 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 41.01[2][a] (Jeffery E. Thomas, ed., 2022)).

<sup>36</sup> See *id.* at 261 (citing Antonin Scalia & Brian Garner, *Reading Law: The Interpretation of Legal Texts* 140 (2012), *Chicago Manual of Style* § 5.172 (17th ed. 2017)). It could be argued, and has been by insurers, that Covid-inflicted business losses are not sufficiently “direct” as well as insufficiently physical – but this argument against coverage is very weak. Policyholders typically alleged that the virus, whether sufficiently physical or not, was directly on their property and directly discouraging patronage. In addition, government shutdown orders during March

the policy defined many other terms. But the insurer's failure to define the important terms was implicitly excused as the Nevada Supreme Court embraced dictionary definitions<sup>37</sup> of physicality, loss, and damage that favored the insurer even though definitions that favor the policyholder are routinely found in commonly used and relied upon dictionaries.<sup>38</sup>

The Nevada Supreme Court's preferred dictionary definition for "loss" was "destruction, ruin" and the "act of losing possession."<sup>39</sup> Its preferred definition of "damage" was "loss or harm resulting from injury to person, property, or reputation."<sup>40</sup> A normal speaker of English might stop right there and conclude that the injury to the policyholder satisfies these definitions.

As to "loss," a reader of the definition might plausibly note that when the Governor ordered closure of the JGB property, making both JGB as landlord and its tenants immediately unable to operate their businesses. They lost constructive possession of the property at issue even if they continued to have technical and legal rights or ownership. They could not use the property as they wished and as it previously had operated without violating the law. The normal "bundle of sticks" associated with property rights of landlord and lessee were dramatically curtailed.

As to "damage," the same normal layperson reading Merriam-Webster's Collegiate Dictionary could plausibly conclude that both landlord and tenants suffered "loss or harm resulting from injury" in that both the presence of Covid on surfaces and in the air coupled with the government shutdown order was an injury in that it made the insured property less useful and produced rather immediate resulting harm.

There are other aspects of the dictionary definitions of loss and damage that create a stronger case for coverage. For example, "deprivation" is a common

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2020 were effective immediately and resulted in either total cessation of operations or severe restrictions on operations.

There was nothing very indirect or attenuated about the impact on property, stoppage of business operations, or economic loss inflicted by Covid. The serious question was whether those losses possessed sufficient physicality. Despite this, the *JGB* Court addressed the issue in a manner not particularly helpful in that it bundled the word direct tightly with the words physical, loss, and damage while discussing grammar rules.

<sup>37</sup> See *id.* ("Because the policy does not define the term 'direct physical loss or damage,' we begin with its plain meaning" which involves "consulting dictionary definitions" and "starting with the dictionary definition in interpreting a policy's exclusionary provision.") (citing *Okada v. Eighth Jud. Dist. Ct.*, 408 P.3d 566, 571 (Nev. 2018) and *Century Sur. Co. v. Casino W., Inc.*, 329 P.3d 614, 617 (Nev. 2014)).

<sup>38</sup> See *infra* text accompanying notes 50–52; see also Knutsen & Stempel, *supra* note 1.

<sup>39</sup> See *Starr Surplus Lines*, 535 P.3d at 261 (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 736 (11th ed. 2020)).

<sup>40</sup> *Id.* (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 314 (11th ed. 2020)).

synonym for loss that more plainly illustrates the manner in which Covid injury qualifies as loss. One might therefore accuse the *JGB* Court of some cherry picking of dictionary verbiage that favored the insurer or unreasonably refusing to recognize that the verbiage it used did not foreclose policyholder recovery. The *JGB* decision is troubling in its refusal to acknowledge that even with the dictionary definitions used by the Nevada Supreme Court, one can reasonably construe the words to apply to *JGB*'s Covid-related business interruption losses.

The *JGB* Court arguably broke or at least bent another interpretative rule requiring that the presence of two or more reasonable interpretations of a term makes the term ambiguous, triggering the consequent rule that ambiguous terms are construed against the drafter (almost always the insurer) unless the ambiguity can be resolved through extrinsic evidence such as drafting history, trade usage, course of dealing, specific party understanding, objectively reasonable expectations or the like.

The *JGB* Court avoided the full impact of dictionary definitions, layperson impressions, and the ambiguity approach by taking a rather crabbed view of the dictionary terms and contrasting the nature of Covid's injuriousness with that of other property-damaging forces that had been the subject of prior insurance coverage cases.<sup>41</sup> On one hand, this was of substantial benefit to policyholders because it preserved the broad concepts of loss or damage reflected in these earlier cases. But in taking this tack, the Nevada Supreme Court exaggerated distinctions between Covid and those cases.

For example, the Nevada Supreme Court found (*as a matter of law*, effectively concluding that *no* reasonable judge or juror could conclude otherwise) that the Covid virus, even if physically attaching to property or lingering in the air of confined space "does not give rise to the necessary transformative element" of these other more palpable maladies injuring property.<sup>42</sup> Further, the Nevada Supreme Court accepted the view that Covid is not injurious to property but rather merely to humans on property.<sup>43</sup> *JGB* favorably quoted the Wisconsin Supreme Court's decision observing that "the presence of COVID-19 does not constitute a physical loss of or damage to property because it does not alter the appearance, shape, color, structure, or other material dimension of the property."<sup>44</sup> To qualify for coverage, the agent of

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<sup>41</sup> See *id.* at 262–63 (contrasting more subtle impact of Covid on premises as compared to fire, water, smoke, odors, noxious gasses, asbestos, lead, contamination, or other outside forces intruding upon property that demand an immediate mitigation or repair response).

<sup>42</sup> *Id.* at 264 (citing cases denying Covid business loss coverage).

<sup>43</sup> See *id.*

<sup>44</sup> *Starr Surplus Lines Ins. Co. v. Eighth Jud. Dist. Ct.*, 535 P.3d 254, 264 (Nev. 2023) (quoting *Colectivo Coffee Roasters, Inc. v. Society Ins.*, 974 N.W.2d 442, 447 (Wis. 2022)).



injury must not only be physical but the damage to the property must be physical.<sup>45</sup>

The Wisconsin court's vision of physicality, damage, and loss adopted by the *JGB* Court has significant analytical defects. The *JGB* opinion fell prey to many of these same analytical failings. *JGB* took a pro-insurer look at the dictionary in violation of the traditional norm of broad construction giving policyholders the benefit of the doubt. To get the benefit of the doubt, the policyholder must demonstrate a reasonable meaning of the words that favor coverage. In *JGB* and many other covid coverage disputes, policyholders met that burden.

*JGB*, like the majority of Covid cases, also erred by pretending that the words "physical, loss," and "damage" were so facially clear that resort to even a glimpse of extrinsic background information was not only unnecessary but impermissible. Rather than launch into a critique of the shallowness and superficiality of modern textualism,<sup>46</sup> one can criticize this portion of *JGB* simply by pointing out the fairly rich history of insurer attitudes toward losses inflicted by disease.

Although it is correct that the primary concept of "loss" or "damage" among insurers is palpable, concrete injury from fires, floods, vandalism, explosions and the like, the insurance industry clearly appreciated the capacity of disease, pollution, and other temporary, non-structural influences to inflict property damage and thus trigger business interruption or order-of-civil-authority coverage. That's why the industry developed and the bulk of insurers utilized a broad virus exclusion in response to the SARS epidemic in property/business interruption policies.<sup>47</sup> Where they did, they deserve to avoid Covid coverage. Where they did not, the Nevada Supreme Court and others gave them unwarranted, windfall<sup>48</sup> victories.

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<sup>45</sup> *Id.* at 265 (quoting *Sagome v. Cincinnati Ins. Co.*, 56 F.4th 931, 935 (10th Cir. 2023)).

<sup>46</sup> See generally Jeffrey W. Stempel & Erik S. Knutsen. *Rejecting Word Worship: An Integrative Approach to Judicial Construction of Insurance Policies*, 90 U. CIN. L. REV. 561 (2021).

<sup>47</sup> See *infra* text and accompanying notes 89–96 (discussing derivation of virus exclusion developed by the Insurance Services Office ("ISO") and industry acknowledgement that without such an exclusion disease-related property damage was subject to coverage).

<sup>48</sup> Insurance theory posits that policies with more limited coverage involve lower premiums while policies with broader coverage demand high premiums. Consequently, one can safely presume that insurers selling policies without a virus exclusion charged more (which could be profitably invested during the 2006-2020 time period when the stock market largely boomed) and profited proportionally more than insurers placing express virus exclusions in their policies. The Covid decisions giving the same treatment to both types of policies thus allow the insurers without a virus exclusion to avoid coverage they otherwise promised and gain an economic

*JGB* is different than many Covid coverage denial decisions in that—to its credit—it takes pains to avoid express or implicit overruling of decisions finding property damage due to the presence on property of vapors, bacteria or other foreign substances such as ammonia, methamphetamine odor, cat urine odor and the like.<sup>49</sup> The *JGB* Court distinguished these cases from Covid disputes in that “[u]ninhabitability cases are often characterized by a physical force that originates in the property” and that “[t]hese forces were not, as is the case here, merely present at the property by way of people breathing, sneezing, or coughing throughout the property.”<sup>50</sup>

According to the *JGB* Court, in the cases finding coverage, “even when the force does not originate within the property, it IS so connected to the property that the property effectively becomes the source of its own loss or damage” and “where coverage IS found, the property typically exhibits some sort of defect jeopardizing the property’s habitability or function.”<sup>51</sup> The Nevada Supreme Court further noted that:

[t]he absence of a defect both inherent to the property and that compromises the property’s essential function reaffirms why summary judgment IS appropriate here. There are many ways that real or personal property may cease to be useful. Not all of them are inherent to the property. Here, too, people might be dissuaded from visiting the Shops for a host of reasons: the weather, the market, their preferences, or even their personal health and well-being. None of these reasons show property loss or damage, and *JGB* likewise has not provided evidence creating a material issue of fact to the contrary.

For these same reasons, we also conclude that coverage cannot exist under the civil or military authority and ingress/egress provisions. Coverage under those provisions depends on restricted access due to “damage to or destruction of property ... by peril(s) insured against” within one mile of the Shops or as a “direct result of loss or damage by a peril insured against” within one mile of the Shops, respectively. In the same way the Shops did not experience the peril of “direct physical loss or damage,” it follows that *JGB*’s evidence does not support that the Shops or the property within one mile of it are subject to the

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advantage over the arguably more responsible insurers that included an express virus exclusion and put policyholders on notice that Covid-type claims were outside coverage.

<sup>49</sup> See *Starr Surplus Lines*, 535 P.3d at 265. Although the cases cited by the *JGB* Court are from outside Nevada, the opinion strongly suggests that the Nevada Supreme Court would take a similar view of such situations and find coverage.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 265–66 (all caps “IS” in original).

kind of harm contemplated under these policy provisions as a matter of law.<sup>52</sup>

This assessment is narrow and precise but arguably too clever by half—and once again continues the Covid-era tendency of courts to cut insurers a jurisprudential break despite prior precedent and insurance norms that support favoring policyholders in such situations. *JGB* and other decisions attempt to avoid this inconsistency and departure from typical insurance coverage analyses by declaring that the policy language is so very clear that what might be termed tiebreaker or level-playing-field rules do not apply. Upon closer examination, the distinction drawn by the Nevada Supreme Court is unpersuasive.

First, *JGB*, while doing a better job than most Covid decisions of acknowledging arguably adverse case law,<sup>53</sup> nonetheless arguably misstates prior law on physical injury. In many of the cases finding coverage from less palpably visible agents of injury, the offending odor, pollution, contamination, smoke, fumes, or vapors was hardly “inherent in the property” and did not become part of the damaged property in significantly greater degree than did the Covid virus. The damaging agent in prior cases came from an outside source but that did not defeat coverage.<sup>54</sup> It should not have defeated coverage in *JGB*.

Further, even if the caselaw was completely in accord with this distinction, there is no basis for it in either the text of the policy nor in insurance theory. Property insurance has been designed, since ancient times, to provide compensation to policyholders who suffer financial loss from injury to property<sup>55</sup> that is not the result of market forces, changing tastes, brand diminishment and the like.<sup>56</sup> So long as the property itself is adversely affected in a sufficiently

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<sup>52</sup> *Id.* at 266.

<sup>53</sup> *See id.* at 265–67.

<sup>54</sup> *See* Knutsen & Stempel, *supra* note 1, at 241–43 (citing cases where damage to property from external sources deemed sufficient triggering property damage); *see, e.g.,* Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co., 98 NW.2d 280 (Minn. 1959) (coverage found when smoke emanating from separate property (a house 75–100 feet away) blows on to facility making powered eggs, resulting in spoliation damage to product/property).

<sup>55</sup> The request for compensation is not based on policyholder claims of entitlement but rather is a contractual claim based on earlier premium payment in return for the insurer’s commitment. Courts consistently and disappointingly appear to treat coverage claims as though policyholder is seeking funds as a matter of intrinsic entitlement rather than purchased contract protection. *See generally* Jeffrey W. Stempel, *The Insurance Contract as Thing*, 44 TORT, TRIAL & INS. L. J. 813 (2009) (analyzing insurance policies as goods purchased by policyholders that should be “merchantable” by providing the intended coverage apt for the situation).

<sup>56</sup> Insurers rightly note that a policyholder cannot claim business interruption benefits if the decline in revenue results from a bad consumer review or a shift in consumer taste (e.g. a health craze that reduces demand for the policyholder’s donuts). But if a restaurant is evacuated due to an ammonia leak in the shopping

detectable and tangible fashion (rather than due to market forces, changing tastes, etc.), it should not matter (absent an on-point exclusion) whether the injury is inflicted by a thrown rock, a windstorm, fire, or less visible (but nonetheless detectable) means such as pollution, disease agents, toxins and the like. Nor should it matter whether the source of the injury is significantly internal and attached to the property (e.g., water intrusion undermining stability) or external (incoming fumes causing closure or requiring repair).

Damage is damage and loss is loss, regardless of degree of visibility and duration or source. A kitchen closed by a collapsing roof or smoke from a nearby fire or infestation (or perhaps even by government prohibition standing alone) is still a kitchen closed and business lost. The time required to rectify the problem and the damages incurred of course will vary. But it is beyond dispute that loss and damage took place regardless of whether the source was inherent in the property or inflicted from the outside.

Disturbingly, the *JGB* Court implicitly accepted the insurance industry argument that viral damage to property surfaces or air was insufficient trigger of coverage because air circulates and viruses can be wiped away. First, this does not negate the fact of damage, however temporary. There may not be much coverage for damages that can be quickly and easily mitigated, but that is an issue of calculating the amount of injury not the existence of injury. For example, pipes may be clogged and unusable until unclogged. Even though the pipes remain structurally sound, they are physically damaged and their users have been deprived of the use of the property by this damage until the unclogging is complete. Whether the clogs came from within the insured property (e.g., debris from shedding lining) or from outside forces (debris washed into the pipes) or a hybrid (accumulated sludge from operations) does not change the fact of loss or damage.

Second, the record in *JGB* itself and ample information in the public domain strongly suggest that eliminating Covid on property was difficult and required considerably more than merely wiping up after a spill. One large medical provider found it extremely difficult to eliminate the virus from its facilities even with intensive, ongoing cleaning.<sup>57</sup> And although air circulates, moving the Covid virus out, it also permits the continuing introduction of incoming Covid infection. Until the ubiquitous voraciousness of Covid eventually subsided in 2021 (or later in some areas) due to vaccination and increasing acquisition of immunity through experience, it was simply not in the same league as the common cold to which the *JGB* Court implicitly compared it.<sup>58</sup>

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center or closed by authorities because of contamination on property, this is not the sort of purely economic, non-physical loss generally falling outside of coverage.

<sup>57</sup> See, e.g., *infra* text and accompanying notes 80–84.

<sup>58</sup> See *Starr Surplus Lines Ins. Co. v. Eighth Jud. Dist. Ct.*, 535 P.3d 254, 264 (Nev. 2023) (requiring that even if Covid virus has physical contact with property, to qualify as triggering physical loss or damage, it must have a “necessary

[W]e conclude that the district court clearly erred in denying Starr summary judgment on JGB's breach of contract and declaratory relief claims because JGB's evidence in opposing summary judgment does not create a genuine dispute of material fact as to the existence of "direct physical loss or damage" as required for coverage under the policy. The evidence, taken as true, demonstrates only economic loss sustained amidst a worldwide pandemic. Because such economic loss was not caused by direct physical loss or damage to the property, we would turn away from "the North Star of this property insurance policy" should we uphold the summary judgment denial under these circumstances [quoting *Santo's Italian Café LLC v. Accuity Ins. Co.*, 15 F.4th 398, 402 (6th Cir. 2021)]. Accordingly, Starr is entitled to summary judgment on these remaining claims in light of JGB's failure to make a showing sufficient to establish coverage. We join a striking majority of our colleagues across the country in reaching this conclusion. See *Oregon Clinic, PC v. Fireman's Fund Ins. Co.*, 75 F.4th 1064, 1071 n.1 (9th Cir. 2023) (noting "more than 800 cases nationwide").<sup>59</sup>

Despite its erudition, careful prose, recognition of prior precedent favoring policyholders, and awareness of interpretative rules favoring policyholders, *JGB* in the end joins the herd of problematic cases denying coverage. The *JGB* Court's failure to fully follow the legal precepts it acknowledged in the opinion is testament to the power of insurance industry public relations. Insurers melodramatically claimed industry collapse if forced to cover Covid, engaged in shrewd case selection and litigation tactics, and then rode to further victory through a bandwagon effect.

*JGB's* minimization of portions of the case record supporting the policyholder is also troubling. Much of the information produced in the trial record spoke quite strongly about the irascible nature of the virus. Evidence distinguished Covid from mere sneezes by patrons in ordinary times. Contrary to the "just wipe it off" argument made by insurers, the actual science of the pandemic reflected that remediation of Covid injury was considerably more complicated. The virus was constantly reappearing on premises and resisted deep cleaning. Unlike ordinary illnesses and even previous epidemics such as SARS, the resilience and massive distribution of Covid prompted massive government-mandated closure of considerable breadth, length, and severity.

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transformative element something like" fire, water or smoke (citing *Port Auth. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) because "[o]therwise, the alleged presence of a physical force would "render [] every sneeze, cough, or even exhale" a qualifying harm" (quoting *Cosmetic Laser, Inc. v. Twin City Fire Ins. Co.*, 554 F. Supp. 3d 389, 407 (D. Conn. 2021))).

<sup>59</sup> *Id.* at 266–67 (citations removed).

*JGB* appears to have minimized portions of the record favoring the policyholder or disregarded it altogether in characterizing the evidence as showing only “economic loss” with no link to “direct physical loss or damage to property.” This would be troubling enough after a bench trial, but at least that would be an adjudication consistent with the rules of civil litigation. But in the summary judgment context, it was the *JGB* Court that strayed from the North Star by adjudicating disputed facts via summary judgment rather than permitting greater scrutiny of the facts via trial.

Another disappointing aspect of *JGB* is its application of the pollution exclusion to bar Covid coverage, which bears quoting at some length.

Even if we found *JGB*’s position on the existence of “direct physical loss or damage” persuasive here, Starr maintains that the pollution and contamination exclusion otherwise bars coverage because the definition of “pollutants or contaminants” in the policy undisputedly includes “virus.” *JGB* contends that the COVID-19 virus does not fall within the type of virus referenced in that definition, as the definition’s surrounding context shows that the exclusion is intended to preclude coverage only for “traditional environmental pollution.” Situated in this context, *JGB* argues that “virus” is intended to exclude coverage only for viruses stemming from pollution, such as “when a wastewater treatment plant releases virus-containing waste into the water supply.”

An exclusion “must be narrowly tailored so that it ‘clearly and distinctly communicates to the insured the nature of the limitation, and specifically delineates what is and is not covered.’” [] Therefore, the onus falls on the insurer to use “obvious and unambiguous language” in drafting the exclusion, indicative of the “only reasonable interpretation.” An insurer also carries the burden of “establish[ing] that the exclusion plainly applies to the particular case before the court.” *Id.*; see also Stempel & Knutsen, *supra* § 15.01 [C] (“[E]stablished coverage can be defeated or reduced only if the insurer shoulders the burden of persuasion to establish the applicability of an exclusion . . . that reduces or restricts coverage.”). Thus, analysis of the exclusion here must begin with the plain text. In interpreting policy language in its “ordinary and popular sense,” the court must step into the shoes of “one not trained in law or in insurance.” [quoting and citing *Century Surety v. Casino West.*, 130 Nev. at 398,

329 p.3d at 616 (internal quotation marks omitted)]. Nevertheless. “[o]ne should assume the contextually appropriate ordinary meaning unless there is reason to think otherwise.” If two reasonable interpretations exist, the exclusion is ambiguous, and the court should construe the ambiguity ‘against the drafting party and in favor of the insured.’ We look to the policy language as a whole in our assessment, seeking to avoid absurd results.

The initial question here—a question of law—is then whether the meaning of “virus” as used in the pollutants or contaminants definition clearly encompasses SARS-CoV-2 and thereby bars coverage under the exclusion. We conclude it does. The definition explicitly lists “virus” as one of the excluded pollutants or contaminants. *Virus* IS commonly defined as “the causative agent of an infectious disease” or “any of a large group of submicroscopic infective agents that are regarded either as extremely simple microorganisms or as extremely complex molecules, that typically contain a protein coat surrounding an RNA or DNA core.” *Virus*, *Merriam-Webster’s Collegiate Dictionary*, *supra* at 1397–38. It is undisputed that SARS-CoV-2 IS a virus. Thus, an ordinary and popular understanding from “one not trained in law or insurance” of the word “virus” extends to the SARS-CoV-2 *virus*.<sup>60</sup>

Here again, the *JGB* Court says many of the right things but fails to fully apply the precedents and principles cited in favor of embracing dictionary literalism. Admittedly, the version of the exclusion found in the policy at issue had added the word “virus” to the usual litany of substances contained in the policy’s definition of pollutants. But as discussed below aggressively deploying even this exclusion grates against both insurance policy interpretation norms and the particular history of the pollution exclusion.

Rather than construing the pollution exclusion narrowly and strictly with the burden of persuasion borne by the insurer and ambiguity resolved in favor of the policyholder, *JGB* gives broad reading to the word “virus”—exactly the opposite of the ground rule it acknowledges and in considerable tension with the Court’s holding in *Century Surety v. Casino West*, in which the Court quite sensibly held that injuries inflicted due to a malfunctioning heater giving off carbon monoxide was a poisoning event and not a pollution event.

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<sup>60</sup> *Id.* at 267–68 (citations to *Century Surety v. Casino West* streamlined; all caps “IS” in original).

If the *Casino West* Court had followed the *JGB* approach, it would have opened a dictionary (presumably *Merriam-Webster's New Collegiate Dictionary*),<sup>61</sup> found that words like “chemical” or “vapor” encompass carbon monoxide, and then ruled in favor of the insurer and barred coverage for the hotel in which four persons died of poisoning, prompting suits against the hotel which in turn sought coverage from its liability insurer. But instead of following this literalist approach, the *Casino West* Court appreciated that the application of even a broadly worded pollution exclusion was ambiguous in the context of a traditional non-pollution even such as malfunctioning equipment producing dangerous conditions for lodgers.<sup>62</sup>

Of the two decisions regarding the pollution exclusion, *Casino West* is better reasoned and rightly decided. Although *JGB* at least preserves the *Casino West* precedent, it reflects a weaker approach (broad, literal construction of terms without regard to background, purpose, and context and insufficiently strict

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<sup>61</sup> Once again, reliance on dictionaries presents problems in that courts or individual jurists are frequently accused of “dictionary shopping” in order to find definitions that support their preferred results in a case. *See generally* Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L. J. 275 (1998); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFFALO L. REV. 227 (1999); James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483 (2013); John Calhoun, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 YALE L. J. 484 (2014).

Consequently, some consistency in dictionary use is preferred. But this comes at some cost in that consideration of a variety of dictionaries yields additional data from which a court can draw conclusions regarding word meaning and its clarity or “plain meaning,” a term more complex and problematic than appreciated by courts. *See* Jeffrey W. Stempel, *What Is the Meaning of “Plain Meaning”*, 56 TORT, TRIAL & INS. PRAC. L.J. 552 (2021). I rather like Merriam-Webster's New Collegiate Dictionary and use it with some frequency. But it is not the only dictionary of value.

More problematic is excessive, often almost exclusive, focus on dictionaries as a vehicle of interpretation and judicial decision. *See* Mark A. Lemley, *Chief Justice Webster*, 106 IOWA L. REV. 299 (2020) (criticizing U.S. Supreme Court's myopic focus on dictionary definitions to the exclusion of other indicia of word meaning and providing examples of its perniciousness in intellectual property law); *see also* *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (Judge Learned Hand's famous dictum that one should not make a “fortress out of the dictionary”).

<sup>62</sup> *See* *Century Sur. Co. v. Casino W., Inc.*, 329 P.3d 614, 617–18 (Nev. 2014) (eschewing broad and literal construction of pollution exclusion because it would make “items such as soap, shampoo, rubbing alcohol and bleach” pollutants and would “be absurd and contrary to any reasonable policyholder's expectations” as well as considering drafting history and dictionary definition (from, perhaps unsurprisingly, Merriam-Webster's Collegiate Dictionary 11th ed. 2012) favorable to restricting exclusion to traditional environmental pollution).



construction of exclusions) to the pollution exclusion that one hopes is confined to the peculiarities of Covid coverage claims in which policyholders seldom seem to win. In addition, the *JGB* Court's approach essentially removes policyholder reasonable expectations from the analysis. Would a reasonable policyholder really think that adding the single word virus to a lengthy exclusion with the label "pollution" made it a virus exclusion as well?

Near the end of the opinion, *JGB* nodded toward the existence of the ISO virus exclusion and explained its rationale for finding the pollution exclusion sufficient to do the work of the more specific virus exclusion absent from the policy.

Also telling, many of the cases that *JGB* points to in arguing that COVID-19 causes "direct physical loss or damage" are often labeled "contamination" cases. *See New Appleman on Insurance Law Library Edition, supra* § 46.03[3][a] . . . The provision here is a contamination exclusion. Therefore, under *JGB*'s direct-physical loss-or-damage theory, arguing that the presence of SARS-CoV-2 physically affects the property, its "claims allege contamination and fall within this exclusion." [quoting *Lindenwood Female Coll. v. Zurich Am. Ins. Co.*, 61 F.4th 572, 574 (8th Cir. 2023)].

Finally, the International Organization for Standardization's (ISO)[meaning the Insurance Services Office or ISO] standardized "absolute virus exclusion" provides only tangential support for *JGB*'s position. Though ISO began recommending that insurers incorporate this exclusion following the 2006 SARS outbreak, its existence does not prove that the word "virus" in this policy must be limited to that stemming from pollution events. Instead, the ISO recommendation simply reveals a better practice for excluding a COVID-19-type claim than what the parties have done here. *See* ISO Form CP 01 40 07 06(C) ("With respect to any loss or damage subject to the exclusion in Paragraph B., *such exclusion supersedes any exclusion relating to "pollutants."* (italics added)). A more ideal approach, however, does not render the plain language used here moot or subject to a different interpretation. *See Restatement (Second) of Contracts* § 212 cmt. b (Am. Law Inst. 1981) ("[W]ords of an integrated agreement remain the most important evidence of intention."). We thus conclude that the exclusion stands as an independent basis warranting summary judgment in Starr's favor.<sup>63</sup>

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<sup>63</sup> *See Starr Surplus Lines*, 535 P.3d at 269 (footnote omitted).

This is a fair point but in addition to overlooking the pro-policyholder ground rules for construing exclusions, it commits an error the Court avoided in *Casino West*: adequate recognition of ambiguity. The *JGB* Court gave short shrift to the policyholder argument that a pollution exclusion including the word “virus” was meant not to bar infectious disease property damage coverage but to negate coverage for viral contamination taking place as part of a pollution event, such as wastewater runoff, effluent, or garbage impinging on the property. This construction of the virus-wording in a pollution exclusion not only is at least as reasonable as the insurer/Court view that a pandemic is pollution or contamination but also is more consistent with the development, rationale, drafting history, and intent of the absolute pollution exclusion and its cousins. It also has the practical effect of placing a virus exclusion in a policy that was not sold with a specific virus exclusion even though an ISO form exclusion was available and in wide use. At yet another opportunity, the *JGB* Court, like others before it, tacked toward insurers.<sup>64</sup>

#### IV. THE ERRORS OF THE PRO-INSURER CASCADE

The foregoing criticisms of the *JGB* decision largely apply to Covid coverage denials in general, with some caveats. *JGB*, however much one might dislike the result, is a sophisticated and nuanced opinion, considerably more so than many of the 800 or so that the Nevada Supreme Court referenced as part of the anti-coverage cascade of Covid business interruption litigation. It nonetheless remains subject to most of the general criticisms below. The judiciary’s embrace of a narrower concept of physical loss or damage favorable to insurers who wrote policies that failed to define these key terms remains a blotch on the courts.

That said, many of the Covid coverage denials are correct notwithstanding their problematic reasoning because the majority of the policies at issue contained express virus exclusions, either the 2006 ISO form exclusion or an equivalent, sometimes in even stronger language.<sup>65</sup> Absent highly specific idiosyncratic circumstances (e.g., fraud, an unusual casual chain), insurers deserved to prevail in these cases, a situation that once again makes puzzling the judiciary’s willingness to enter the insurer-provided rabbit hole of debating the metaphysics of physical loss/damage when an easier path to dispute resolution was available. Although this path would have reduced the number of insurer

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<sup>64</sup> Even to the point of citing the largely contextualist *ALI Restatement (Second) of Contracts* as if it were a more formalist, textualist document by focusing on that Restatement’s discussion of an “integrated” contract. Although insurance policies are often contracts of adhesion, it is far from clear that they qualify as integrated contracts discouraging application of extrinsic evidence and barring evidence of prior negotiations.

<sup>65</sup> See *Coverage Litigation Tracker*, *supra* note 5 (roughly 1,300 Covid coverage disputes involve policies containing a virus exclusion as compared to 800 cases involving policies with no such exclusion).

pretrial victories, it would have protected insurers with specific exclusions and avoided the coverage apocalypse insurers claimed to fear.

Even conceding that the ISO virus exclusion and its cousins were strong enough to defeat ordinary policyholder pandemic business interruption claims, the fact remains that much of the Covid coverage precedent is problematic, as reflected in *JGB*'s concept of physicality, loss, damage, policy trigger, and application of pollution exclusions. The body of anti-coverage precedent emerging from the pandemic has to date been analytically disappointing and raises concerns that the wrong turns on trigger of this body of law will adversely affect better reasoned doctrine that prevailed prior to Covid.

#### A. Defective Judicial Analysis of Covid Coverage Claims

##### 1. *The Canard that "Loss" or "Damage" Requires Permanent Structural Change to Property*

Many insurers have asserted and too many courts have accepted the notion that physical loss or damage requires permanent structural alteration of property. But the dictionary definitions of which courts are so fond do not say this or even imply it to any significant degree. There are readily available dictionary definitions that do not require permanent structural change, "deprivation," being a leading example. Caselaw also supports the view that "physical loss or damage" occurs when a property is transformed from "a satisfactory state to an unsatisfactory state."<sup>66</sup> In addition, the contention that property must suffer visible, palpable, permanent physical alteration or structural change to be "damaged" or "lost" to the owner is analytically incorrect as a matter of language, precedent, and the concept of insurance coverage for loss or damage to property.

A disturbing number of courts have erroneously imposed the permanent-physical-alteration-structural-change requirement onto the concept of physical loss or damage.<sup>67</sup> These portions of such decisions are not only

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<sup>66</sup> See, e.g., *North Am. Shipbuilding, Inc. v. S. Marine & Aviation Underwriting, Inc.*, 930 S.W.2d 829 (Tex. App. 1996); see also *Baylor Coll. of Med. v. XL Ins. Am., Inc.*, No. 14-22-00145-CV, 2024 Tex. App. LEXIS 929 (Tex. App. 14th 2024) (appeal from the 295th Judicial District Court of Harris County trial in which jury concludes that Covid virus causes actual physical injury to property).

<sup>67</sup> Among these cases is *Soc. Life Mag., Inc. v. Sentinel Ins. Co., Ltd*, No. 20-cv-3311-VEC, 2020 WL 2530721 (S.D.N.Y. 2020) (a case in which the trial court stated that the virus "damages lungs, not printing presses"); see Transcript of Trial at 3, *Soc. Life Mag., Inc. v. Sentinel Ins. Co., Ltd*, No. 20-cv-3311-VEC, 2020 WL 2530721 (S.D.N.Y. 2020) (No. 20); Gavin Souter, *Publisher Appeals COVID-19 Ruling Denying Coverage*, BUS. INS. (May 19, 2020), <https://www.businessinsurance.com/article/20200519/NEWS06/912334634/Publisher-appeals-COVID-19-ruling-denying-coverage-coronavirus>. Professor Erik

analytically incorrect but the cases themselves are also readily distinguishable because they typically involve defined risk (rather than all-risk) policies (such as the policy at issue in *JGB*), and commonly contained a specific virus exclusion as well.<sup>68</sup> In addition, in a substantial number of the cases rejecting Covid business interruption coverage, the policyholders did not allege the actual presence of the virus upon insured property<sup>69</sup>—a far cry from many of the policyholder claims, including cases like *JGB*.

## 2. *Assessing the Meaning of “Loss” or “Damage” According to Insurance Norms*

Insurers’ efforts to deem a narrow concept of loss or damage definitive as a matter of law run counter to the normal protocols of insurance policy construction in that it overlooks the insurers’ failure to define the terms upon

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Knutsen and I characterized this statement as glib and shallow as well as incorrect. See Stempel & Knutsen, *supra* note 1, at 252.

Unfortunately, a large number of courts, primarily federal courts, have denied business interruption coverage by accepting too readily the misleading concepts of loss or damage advanced by insurers failing to apply the ordinarily governing approaches used for determining insurance coverage. See *Covid Coverage Litigation Tracker*, *supra* note 5 (insurers have prevailed in more than 95% of federal decisions and nearly 75% of state court decisions).

<sup>68</sup> In the majority of Covid coverage cases where insurers have prevailed on the basis of a strained construction of the terms “loss” or “damage,” the policies in question also contained a virus exclusion. See *Covid Coverage Litigation Tracker*, *supra* note 5, as do an estimated 80% of all standard property insurance policies sold. See Susanne Scalafane, *How Policy Silence on Pandemics May Bedevil Insurers on Coronavirus Claims*, INS. J. (Mar. 26, 2020), <https://www.insurancejournal.com/news/national/2020/03/26/562166.htm>.

<sup>69</sup> See, e.g. *DZ Jewelry, LLC v. Certain Underwriters at Lloyds London*, 525 F. Supp. 3d 793, 795, 799–800 (S.D. Tex. 2021) (dismissing policyholder claim without prejudice, which presents possibility that more specific allegations of actual presence of virus on premises would survive motion to dismiss) (policyholder “does not allege that COVID-10 was found on any store surface or lingered in the air.”) (policyholder “does not allege that COVID-19 changed the property so as to make it unusable or uninhabitable.”); *Wakonda Club v. Selective Ins. Co. of Am.*, 973 N.W.2d 545, 547, 549–50, 553 (Iowa 2022) (finding no coverage if inability to use business is from government order only but stating that presence of virus on premises could constitute covered physical damage to property) (“We reject Wakonda Club’s argument that loss of use, without something more, is enough.”) (“Wakonda Club does not dispute that its physical property was not damaged but argues ‘loss of’ or ‘damage to’ must be read to mean different things and that the loss of its ability to use its premises due to the shutdown order constitutes ‘direct physical loss of’ its property.”) (requiring more physicality for coverage than government order alone but favorably citing cases in which physical damage has been found due to asbestos fibers in buildings, adulteration of cereal or soft drinks, and odor on premises).

which they now seek to deny coverage. The insurance industry could have easily defined the terms “direct” or “physical” or “loss” or “damage” in their policies but did not. Consequently, the range of meaning of the words must be determined according to the ordinary understanding of layperson policyholders, with uncertainty resolved against the insurers that drafted the policy and used undefined terms in the insuring agreement of the policies.

An ordinary layperson views his or her property as lost to them or diminished in value if forbidden to use it. They view their property as damaged when the presence of a dangerous virus in the air or on surfaces renders the property unusable or less useful and in need of correction. As a matter of conventional English speech, it would seem unlikely to find laypersons seriously contending that the property-made-unsuitable concept of loss or damage is not a reasonable understanding of physical loss or damage.

Where two or more definitions of a document’s word, phrase, or provision are reasonable, the text is by definition ambiguous and subject to the longstanding legal rule and insurance claims handling custom of *contra proferentem* ambiguity analysis. This legal rule and industry norm provides that unless an ambiguous term can be resolved by reference to extrinsic evidence, the term is construed against the party that supplied the unclear term. If such extrinsic information is lacking or supports the non-drafter, insurance custom and practice is to provide coverage, a result consistent with general legal principles of contract construction.

This approach to construing insurance policies (and contract language generally) is not only well-established law but also reflects insurance industry custom and practice—at least when insurance industry participants are not directly involved in resisting payment. One frequently hears claims adjusters state that they are trained to “look for coverage” and not for means of avoiding coverage. Non-lawyer adjusters are well aware that if policy language is ambiguous, interpretative questions should be resolved in favor of the policyholder unless the ambiguous text is clarified by extrinsic information or contextual factors.

The background of property insurance and business interruption coverage, as well as the drafting history of the ISO virus exclusion undermines insurer arguments against coverage. This background shows that insurers understood that something like the presence of a virus on insured property can be reasonably viewed as physical damage to the property as well as imposing a loss of such property upon the policyholder.

Consequently, insurers with policies lacking a specific virus exclusion cannot successfully invoke drafting history, industry intent, policy purpose, or insuring objective to effectively dispute the reasonable interpretation of “direct physical loss or damage” as including the diminishment of property use, value, or suitability. If insurers could produce background information and extrinsic evidence supporting their coverage position, they surely would have done so by now. Instead, insurers defend Covid coverage denial by asserting a narrow and extreme concept of loss or injury, terms the insurers themselves failed to define in their policies.

Reference to standard interpretative tools such as dictionaries, usage in media, or treatment in prior disputes reflects a view that loss or damage need not require permanent, structural, palpable, or visual injury. Consequently, an insurer that has failed to define these terms in the policy should not be able to self-servingly deny coverage based on the insurer's preferred construction of these undefined terms.

A reasonable construction of the words "direct physical loss or damage," even if not everyone's preferred construction, can obviously encompass the presence of a dangerous virus. Both physical surfaces and air that must be reasonably safe for occupancy are damaged by the virus. The property involved is made less useful and perhaps even worthless (or of negative value), at least temporarily. The property owner is constructively, and perhaps even literally, deprived of the use and enjoyment of the property where there is a government-imposed deprivation of a facility. This is also "loss" of the property for the time such an order is in effect).

Consequently, even if an insurer-proffered definition requiring permanent structural change is deemed reasonable, policyholders should have received the benefit of the *contra proferentem* ambiguity approach to contract litigation. Even if the text interpretation of the insurers was reasonable, there would still exist two or more reasonable constructions of an insuring agreement using the loss-or-damage terminology. This in turn requires application of a long-standing insurance norm of construing ambiguous policy language in favor of the policyholder (that did not write the policy) and against the insurer (which did). But instead of honoring this rule of law, Covid coverage courts effectively embargoed it in response to a perceived crisis, favoring the insurance industry over policyholders.

At a minimum, ambiguity in policy language precludes denial of coverage unless an insurer/drafter can proffer extrinsic evidence that resolves the ambiguity. But in the cases to date, it appears that insurers have not introduced any evidence to support the view that the insurance industry intended the loss-or-damage language to require permanent structural change in the character of property.

Even if such evidence was produced, it would under norms of fair claims handling be ineffective unless it was also shown that the policyholder was made aware of this intent or that the information was in the public domain and not merely known to insurers. An insurer cannot deny coverage based on its own idiosyncratic view of a term that is not widely known to or shared by policyholders.

Another norm overlooked by many Covid coverage decisions, including *JGB*, is that the objectively reasonable expectations of a policyholder should be honored. Under the strongest version of the doctrine, admittedly a minority approach, policyholder reasonable expectations can convey coverage even in the facts of clearly contradictory policy language. Under the moderate version of the reasonable expectations approach that is the majority rule, unclear policy terms are resolved in favor of policyholder expectations.

Although insurer counsel and public relations personnel have been very effective in arguing that a policyholder should not have reasonably expected Covid coverage, this represents an unduly hostile attitude toward the concept. Insurers have long sold “business interruption” coverage without any discernible warning to purchasing policyholders that the coverage may not apply unless there is permanent structural damage to property. Policyholder businesses were undeniably interrupted by the Covid pandemic, many never to operate again.

When purchasing insurance, some policyholders, perhaps on broker advice, certainly bought policies without a virus exclusion (and presumably paid a higher premium) rather than a policy with the express virus exclusion. Under these circumstances, policyholder expectations would seem to be at least a question of fact rather than a question that can be decided via summary judgment in favor of a contract drafter that despite total control over contract language never bothered to define the words “physical,” “loss,” or “damage.”

3. *A Segment of the Couch on Insurance Treatise Frequently Cited in Support of the Insurers’ Position is Flawed in Its Discussion of Pre-Pandemic Case Law*

Although courts have on occasion disturbingly cited a portion of the *Couch on Insurance* treatise to support the claim that loss or damage requires physical alteration of property or permanent structural change in property, persuasive scholarship has demonstrated that this segment of *Couch* is in error, something effectively conceded by its primary author/editor in other writing. In addition, a wealth of judicial decisions predating the Covid pandemic have rejected the insurers’ contention.

Unfortunately, a portion of *Couch* is misleading regarding a crucial aspect of many Covid coverage disputes. In particular, a segment of the Third Edition of *Couch* incorrectly describes the existence of a supposed established majority rule requiring that there be “distinct, demonstrable, physical alteration” and permanent structural change to property before it can be considered physically damaged for purposes of insurance coverage.<sup>70</sup>

Because this language in the *Couch* treatise assists their arguments against coverage, insurers have cited the section frequently and courts have often cited it in decisions denying coverage on the ground that the presence of a virus on property does not constitute sufficient physical alteration of property to constitute property damage. Unfortunately,

*Couch’s* apparent conclusion – that “direct physical loss” requires a “distinct, demonstrable, physical alteration” – is wrong. It was wrong when *Couch* first made it in the 1990s, and it is wrong today.

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<sup>70</sup> See 10A COUCH ON INSURANCE 3D § 148:46.

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A review of the three editions of *Couch* shows that this statement first appeared in the third edition. As originally published, it supported its assertion by citing to five cases for support and two cases holding to the contrary, presenting the former as “widely held,” and thus the majority rule.

But none of these cases used the “distinct, demonstrable, physical alteration” test that *Couch* presents, and it was far from the majority rule. As of March 2020 [prior to the onset of COVID-19 coverage decisions], there were at least *thirty-five* cases adopting a broader rule (including many binding appellate decisions and several rulings by state high courts), and significantly fewer following the *Couch* test. The “physical alteration” rule gained traction only because courts relied on *Couch*’s initial mischaracterization in 1998—inferred from a single district court opinion that was disapproved three years later by the governing Court of Appeals, rather than from the thirteen extant cases then holding to the contrary.

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Until *Couch* reckons with this error, busy trial and appellate judges cannot, and should not, trust it to give them the straight answer on this foundational question.<sup>71</sup>

As these authors note, a competing multi-volume insurance law treatise takes a substantially different view of the matter, stating that “[w]hen 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.”<sup>72</sup>

The *Couch* contention that caselaw clearly supports a “physical alteration” or “permanent structural change” concept of property damage or loss is simply incorrect. For decades prior to the 2020 Covid pandemic, judicial decisions had frequently taken the position that there is physical loss or damage triggering property/business interruption coverage when property is made unsafe, less useful, or unable to function (even temporarily) in its normal fashion and when the owner is deprived of the normal productive use of the property. Further, the lead author of the *Couch* treatise (Steven Plitt, Esq., a prominent

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<sup>71</sup> Richard P. Lewis et al., *Couch’s “Physical Alteration” Fallacy: Its Origins and Consequences*, 56 TORT, TRIAL & INS. PRAC. L. J. 621, 622 (2021).

<sup>72</sup> 3 ALLAN D. WINDT, INSURANCE CLAIMS & DISPUTES § 11:41 (6th ed. 2013) (cited in Lewis et al., *supra* note 71, at 622, n. 4); see also Donald S. Malecki, *Risk Management/Troubled Terminology: “Risks of Direct Physical Loss” Wording Currently Read Broadly by Courts*, ROUGH NOTES CO. (June 2008), [https://roughnotes.com/rnmagazine/search/commercial\\_lines/08\\_06p100.htm](https://roughnotes.com/rnmagazine/search/commercial_lines/08_06p100.htm).



attorney representing insurers in litigation and frequently serving as an expert witness retained by insurers) has stated in a separate article that “[t]he modern interpretative trend is liberalizing the meaning of direct physical loss to focus upon loss of use as opposed to direct physical loss involving physical alteration.”<sup>73</sup>

In this article, *Couch* editor/author Plitt cited *Port Authority of N.Y. & N.J. v. Affiliated FM*,<sup>74</sup> for the proposition that “a distinct, demonstrable, and physical alteration” of property structure or appearance was the common understanding of physical damage (in effect continuing to promote the misleading *Couch* treatment of the issue).<sup>75</sup> But he also conceded that *Port Authority* followed the analysis of *Western Fire Ins. Co. v. First Presbyterian Church*,<sup>76</sup> which found that “physical damage to a building as an entity by sources unnoticeable to the naked eye” could constitute property damage. Mr. Plitt also noted that *Western Fire* “concluded that ‘coverage was triggered when authorities ordered a building closed after gasoline fumes seeped into a building structure and made its use unsafe, noted that “[a] Although neither the building nor its elements were demonstrably altered, its function was eliminated.””<sup>77</sup>

*Couch* author Plitt also conceded that “[f]ire, water, smoke and impact from another object are typical examples of physical damage from an outside source that may demonstrably alter the components of a building and trigger coverage.”<sup>78</sup> But he then adds, without a supporting citation, the contention that

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<sup>73</sup> Steven Plitt, *Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alteration*, CLAIMS J. (April 15, 2013), <https://amp.claimsjournal.com/magazines/idea-exchange/2013/04/15/226666.htm>.

<sup>74</sup> *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2002) (applying N.J. law).

<sup>75</sup> Plitt, *supra* note 73.

<sup>76</sup> *Id.*; see *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (concluding that coverage was triggered when authorities ordered a building closed after gasoline fumes infiltrated the property making it uninhabitable and making “further use of the building highly dangerous”). The gasoline fumes did not cause concrete structural damage to the building, but the court held that the loss of use resulting from infiltrating the fumes into the building was a physical loss. Colorado state courts applying Colorado law have relied on *Western Fire Ins. Co. v. First Presbyterian Church*, holding that COVID-19 can cause physical loss or damage by preventing insureds from using the insured property. See *Regents of the Univ. of Colo. V. Factory Mut. Ins. Co.*, No. 2021CV30206, 2022 WL 245327, at \*4 (Colo. Dist. Ct. Jan. 26, 2022).

<sup>77</sup> Plitt, *supra* note 73.

<sup>78</sup> *Id.* (The manner in which a virus renders property unusable, limits its use, or diminishes its value is akin to the manner in which smoke from a fire precludes or limits the use of property even if there has not been a physical, structural alteration of the property. Clogging of pipes obstructed or infected air passages, or disease in cattle provide similar illustrations of situations in which property has suffered damage (and is at least temporarily lost to the owner or user) even if the property is

“proof of physical damage to a building as an entity by sources unnoticeable to the naked eye may need to meet a higher threshold.” Even if this “higher threshold” were required, which it is not,<sup>79</sup> proof of the impact of Covid upon insured property has been established by many policyholders.

Properly understood, the *Couch* claim that there can only be covered property damage when the insured property has been physically altered in a structural, visible, or palpable manner is clearly incorrect—and the error has been effectively conceded by the editor/author of the treatise. Consequently, although this segment of *Couch* has been cited by many courts, it does not accurately describe the law or the apt approach to determining property loss or damage.<sup>80</sup>

4. *Problematic Insurance Industry Contentions That the Presence of COVID-19 Cannot Constitute Physical Damage Because It May Be Cleaned or Disinfected Mischaracterize Both the Nature of Damage and the Actual Properties and Tenacity of the COVID Virus*

A common trope of insurer briefs too often accepted by courts posits that Covid cannot actually cause damage to covered property because it can be “wiped off” as part of ordinary cleaning and maintenance. There are two major flaws in this argument. First, it is not factually accurate. Second, it fails to understand that even if the property can be restored to function, this hardly means that the property was not physically damaged in the first instance. In an amicus brief submitted to the New Hampshire Supreme Court, medical professionals labeled the insurer perspective “junk science.”<sup>81</sup>

Insurers argue that the presence of the SARS-CoV-2 [virus] “does not render a structure uninhabitable.” That was not true in 2020 during the initial period of the emergence of COVID-19 before the advent of widely available vaccines and treatments when COVID-19 was often a death sentence for

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not physically altered or structurally changed.)). It bears some emphasis that treatise author Plitt, who generally holds views favorable to insurers, appears to reject the *JGB* Court’s requirement that property damage be inherent in the property itself (*see supra* text and accompanying notes 51–52) rather than from an outside source.

<sup>79</sup> *Id.* (There is logically no higher standard of proof imposed upon policyholders seeking coverage due to fouled air or the presence of dangerous material on insured property and no such heightened standard of proof is included in the typical insurance policy. Proof is proof. It is clear that the Covid virus was on the premises of most policyholder premises during Spring 2020).

<sup>80</sup> *See* P. Lewis et al., *supra* note 71, at 634–39.

<sup>81</sup> *See* Ben Zigterman, *NH Medical Society Denounces Insurers’ COVID-19 Science*, LAW360 (June 24, 2022), <https://www.law360.com/articles/1505947/nh-medical-society-denounces-insurers-covid-19-science>; *see also* Brief for New Hampshire Medical Society as Amici Curiae Supporting Respondents, *Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co.*, 302 A.3d 67 (N.H. 2023).

high-risk victims. During that time, the only way to avoid it was to shut down public property.

Nor, contrary to assertions by the Insurers and the APCIA [American Property Casualty Insurance Association, an insurance trade group that submitted an amicus brief], were essential businesses habitable or their property fully useful as they remained open as the virus raged. In fact, essential workers staffing those businesses were infected with, and died from, COVID-19 at rates much greater than the general public. In short, just because the government allowed a business to remain open did not mean it was habitable. Rather, the government decided that the political or economic reasons for the business staying open outweighed the often-grave risk to life and health.<sup>82</sup>

Merely to skim the headings of the Medical Society Brief is to see how negatively medical professionals and scientists regard the insurance industry's glib dismissal of the property damage wreaked by Covid.

SARS-Co-V-2 Cannot Be Removed or Eliminated with Routine Surface Cleaning and The Insurers' and APCIA's [American Property Casualty Insurance Association's] Arguments to the Contrary Break with Science.

The Insurers' Overemphasis on Surface Cleaning Ignores COVID-19's Primary Transmission Vector – The Presence of SARS-CoV-2 in Indoor Air.

Far From Being “Evanescant,” the Presence of SARS-CoV-2 is Persistent Because Its Continuous Reintroduction into Business Premises Remaining Open to the Public Renders Cleaning, Disinfection or Dissipation Ineffective at Removing It.

The Presence of SARS-CoV-2 Rendered Property Uninhabitable or Less Functionally Useful in 2020 as Demonstrated by the Elevated COVID-19 Infection and Death Rates of Essential Workers.

Contrary to the Insurers' Callous Claims, COVID-19 is Not Comparable to the Common Cold.<sup>83</sup>

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<sup>82</sup> Brief for New Hampshire Medical Society, *supra* note 81, at 9.

<sup>83</sup> *Id.* at 2.

In sharp contrast to the assertions of insurers attempting to dismiss the injury wrought by Covid on premises, the Medical Society Amicus Brief cites an array of scientific studies supporting its assessment of the spread and resilience of the virus.<sup>84</sup>

The inevitable conclusion is that the actual medical science of viral injury to premises lends considerable support to policyholder claims for coverage and refutes the “just wipe it off” defense to coverage proffered by insurers failing to acknowledge the broad coverage they sold to insurers through the all-risk policies they drafted. Regarding the science of Covid infiltration of property and remediation, medical authorities have established that the virus is a tenacious one that resists removal through ordinary cleaning. For example, one study at an intensive care unit attempting the highest levels of protection and disinfection found that even these measures could not fully prevent presence of the virus.<sup>85</sup>

Results like these in the highly controlled environment of a medical facility strongly suggest that attempting to keep a bar, restaurant, grocery store, clothing shop, livestock show, rodeo, sporting event, entertainment venue, and related activity Covid-free was a losing battle from March 2020 to at least late Spring 2021 and probably beyond. Contrary to insurer assertions, the Covid-19 virus cannot merely be wiped away as if it was a beverage spill. Although the medical understanding today finds the virus most communicable by air, its presence on surfaces is known to transmit disease and that presence on surfaces as well as in the air makes the property in question less suitable for use.

Further, because Covid is so readily transmitted through the air, the presence of even a few infected persons on insured property results in substantial viral presence in the air and correspondingly restricts the utility of the property in question. A social/recreational gathering or commercial activity could readily become a self-regenerating breeding ground for Covid infection. This was particularly true during the first weeks and months of the 2020 pandemic when resistance among the public was low (because few persons had contracted the disease and developed natural immunities during recovery), and no vaccine had been developed to combat the disease. Even with the advent of effective vaccination and a more resistant public, the virus remains highly transmissible and continues to infect people, including the vaccinated. Older people continue

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<sup>84</sup> See generally *id.* (citing various sources in support of the Medical Society’s position that Covid does indeed cause palpable property damage).

<sup>85</sup> See, e.g. Zarina Brune et al., *Effectiveness of SARS-Co-V-2 Decontamination and Containment in a COVID-19 ICU*, 18 INT’L J. ENVIRON. RES. PUB. HEALTH 2479, 2479 (2021) (finding substantial presence of the virus “[D]espite the construction of a swinging door barrier system, implementation of contact precautions, and installation of high-efficiency particulate air filters” and that decontamination reduced but did not eliminate presence of the virus). (“While chemical decontamination effectively removes detectable viral RNA from surfaces, our approach to droplet/contact containment with an antechamber was not highly effective. These data suggest that hospitals should plan for the potential of aerosolized virions when creating strategies to contain SARS-Co V-2.”).

to be particularly vulnerable. Some victims have “long Covid,” ongoing or lingering illness not found with common colds or flu.

In addition to the empirical incorrectness of the “just wipe it off” characterization of Covid as not constituting damage, the core contention of insurers that remediable damage does not trigger coverage is incorrect to the point of absurdity. Even the type of visible, tangible, permanent, structural alteration, and palpable physical change in property insurers view as triggering property damage can be remediated by repair, replacement, or rebuilding. Insurance policies providing business interruption coverage themselves concede this by providing for a “period of restoration” that delimits the time period for providing coverage. One might just as well try to deny coverage for water damage (it can “just be dried off”), a sewage backup (it can just be disinfected), or even a fire (it can just be rebuilt).

More closely analogous to viral inspection is the type of property damage that occurs when the structural integrity of property remains intact but the property has become unusable due to the intrusion or presence of injurious material. For example, pipes or air ducts may become clogged. The metal of the pipes or ducts remains as solid as ever but they have become less useful or even unusable until the clogs have been removed.<sup>86</sup> Another example is infection of livestock. The animals remain structurally sound, even unchanged, but if infected, the livestock have lost suitability for human consumption and sale. In these situations, the property has suffered damage that is not only non-structural but also resists correction other than euthanasia of the herd.<sup>87</sup>

5. *The Insurance Industry Development of a Virus Exclusion Reflects an Understanding the Absent Such an Exclusion, Virus-Related Injury Can Trigger Coverage*

The background “drafting history” of property insurance reflects an insurance industry understanding that the loss-or-damage language common in property policies could be construed to cover business interruption caused by the presence of a virus on policyholder property. This is why the Insurance Services Office (“ISO”), an organization serving the insurance industry, developed a virus exclusion in response to the SARS epidemic of 2003–04.<sup>88</sup> Describing the derivation of its Virus Exclusion, ISO stated:

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<sup>86</sup> See generally *Widdows v. State Farm Florida Ins. Co.*, 920 So. 2d 149 (Fla. Dist. Ct. App. 2006) (drainpipe with abnormality impeding water flow is sufficient physical damage).

<sup>87</sup> See generally *Customized Distribution Services v. Zurich Ins. Co.*, 862 A.2d 560 (N.J. App. Div. 2004) (failure to rotate stock resulting in product remaining in the warehouse after “sell by” date that diminished value constituted physical loss to coverage property).

<sup>88</sup> See Larry Podoshen, *New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria*, ISO CIRCULAR (July 6, 2006), <https://uphelp.org/wp->

This filing introduces new endorsement CP 01 40 07 06 – Exclusion of Loss Due to Virus Or Bacteria, which states that there is **no coverage for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.**

\* \* \*

Commercial Property policies currently contain a pollution exclusion that encompasses contamination (in fact, uses the term *contaminant* in addition to other terminology). Although the pollution exclusion addresses contamination broadly, viral and bacterial contamination are specific types that appear to warrant particular attention at this point in time.

In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.

The amendatory endorsement presented in this filing states that there is **no coverage for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.** The exclusion (which is set forth in Paragraph B of the endorsement) applies to property damage, time element and all other coverages; introductory Paragraph A prominently makes that point. Paragraphs C and D serve to avoid overlap with other exclusions, and Paragraph E emphasizes that other policy exclusions may still apply.<sup>89</sup>

Both ISO, in issuing the virus exclusion, and insurers have argued that the general pollution exclusion adopted by the insurance industry during the mid-1980s also operates as a virus exclusion. But, this assertion is belied by ISO's promulgation of the more express and specific virus exclusion and incorporation of a virus exclusion and its purported use by an estimated 80 percent of insurers. An examination of the derivation and purpose of the pollution exclusion and its application by most courts indicates that it was designed to exclude traditional environmental pollution of wide scope that produced correlated, long-tail losses

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content/uploads/2022/10/JGB-United-Policyholders-Amicus-Motion-for-Leave-Nevada-Supreme-Court.pdf) [hereinafter ISO VIRUS CIRCULAR].

<sup>89</sup> *Id.*

quite different than the business interruption losses occasioned by a viral pandemic.

Exchanges between ISO staff reflect their understanding that at minimum the general pollution exclusion was ambiguous and insufficient to preclude coverage for virus presence on covered property. In 2004, the Commercial Property Panel of ISO met to discuss a new exclusion for “Biological Contamination and Errors in Production.”<sup>90</sup> The draft Biological Contamination and Errors in Production exclusion noted that one prescient example of contamination of property – “Contamination of office equipment and/or products by anthrax or by a virus such as SARS.”<sup>91</sup>

ISO determined that, in light of the SARS outbreak, “Virus and bacterial contaminations are specific types that appear to warrant particular attention at this time . . .” Which is to say the broad pollution exclusion and the “Biological and Chemical Materials Exclusions” that existed prior to the 2003 SARS outbreak were obviously insufficient to exclude coverage for SARS-created property damage and business interruption. The ISO circular acknowledges that the presences of SARS on a property can damage the property and trigger business interruption or time-element coverage. Therefore, insurance companies that seek to exclude losses related to property damage caused by viruses could do so with the new “Virus Exclusion.”<sup>92</sup>

Instead of moving forward with this Biological Contamination and Errors in Production Exclusion, ISO decided in 2006, to instead issue a virus and bacteria exclusion.<sup>93</sup> The resulting Exclusion of Loss Due to Virus or Bacteria was submitted to state insurance regulators in 2006.<sup>94</sup> Which is to say, the broad form exclusions did not adequately exclude coverage prior to the creation of the “laser-focused” virus exclusion.<sup>95</sup>

The ISO virus exclusion was widely known to and used by insurers prior to the Covid pandemic. It (ISO Form CP 01 40 07 06, which was in circulation more than a decade prior to the 2020 Pandemic), states that the insurer “will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.”<sup>96</sup>

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<sup>90</sup> See Digest of Agenda – Commercial Property Panel – Teleconference of December 9, 2004, Exhibit 10 to the Brief of Amicus Curiae Francois, Inc.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 4–5.

<sup>93</sup> See Email from Loretta F. Newman to Thomas Gibboney, dated April 18, 2006, Exhibit 14 to the Brief of Amicus Curiae Francois, Inc.

<sup>94</sup> See Podoshen *supra* note 88.

<sup>95</sup> See Exhibit 11 to the Brief of Amicus Curiae Francois, Inc.

<sup>96</sup> ISO Form CP 01 40 07 06 (2008). ISO has subsequently authored other versions of a specific virus exclusion, including ISO Form CP 01 40 07 06 (Copyright ISO 2015), which is not only consistent with the 2008 version of the virus exclusion but also predates the Covid pandemic.

6. *Denying Covid Coverage in the Absence of a Virus Exclusion is Particularly Inconsistent with the Design, Nature, Purpose, and Intended Operation of All-Risk Policies*

Policies without a virus exclusion clearly provide broader coverage and have greater value than policies barring coverage for virus-related losses. Insurance policies without such exclusions were (according to basic economic and business theory) presumably priced higher than policies without virus coverage. More sophisticated policyholders most likely appreciated the differences in coverage and based their insurance purchasing and risk management decisions on these differences. A judicial ruling equating the two types of policies (those with and those without virus exclusions) and essentially rewriting policies to include a virus exclusion that was never part of the policies when sold would also rewrite the operation of the insurance marketplace.

The development and deployment of “all-risk” property policies further expanded coverage for losses even if not expressly promising coverage for disease or cancellation-related losses. The all-risk insurance product, the subject of a significant segment of Covid coverage litigation, provides significantly broader coverage than the standard form specified perils property insurance policy comprising the bulk of Covid coverage litigation.

Property insurance, at least for standard personal lines, is often written on a “named perils” basis, in which the insuring agreement covers only the types of losses specifically listed in the policy. The intimation is that anything not specifically listed is not covered (the reverse of the liability norm since the introduction of commercial general liability (“CGL”) policies in the 1940s). A hornbook rule of insurance policy construction is that the policyholder has the burden to prove that a loss is within the coverage of the insuring agreement. If this is accomplished, the insurer has the burden to prove the applicability of exclusionary language. The traditional named perils format of property insurance makes it at least marginally more difficult for policyholders to establish coverage because the policyholder has the burden of showing that the loss in question came from a specified peril.

By contrast, “all-risk” policies do not impose such a specific burden of proof on the policyholder. This type of policy has become increasingly popular, particularly in commercial property lines. Under an all-risk property policy, the insuring agreement gives a broad grant of coverage, and the policy then specifically enumerates the types of costs or losses that are excluded from coverage. Anything not specifically excluded is considered within coverage. Although a named perils policy with a long list of covered perils is technically not an all-risk policy, it may function like an all-risk policy as a practical matter.

As its name implies, an all-risk policy provides greater protection to a policyholder than a specified perils policy in that the all-risk policy provides that any fortuitous physical loss or damage to covered property is insured, while a specified perils policy provides coverage only if the policyholder first meets the burden of demonstrating that the loss in question resulted from one of the specified perils. Although named-peril policies cover losses arising out of



specific circumstances (e.g. hurricanes, tornados, fires, earthquakes, etc.), “all-risk” policies are a “special type of coverage in which the insurer undertakes the risk for all losses of a fortuitous nature that, in the absence of the insured’s fraud or other intentional misconduct, is not expressly excluded in the agreement.”<sup>97</sup> The policyholder’s burden under an all-risks insurance policy is limited—it needs only show that a loss occurred and that it was fortuitous.<sup>98</sup>

Insurers, by promoting the comprehensive, all-risk coverage concept in first-property insurance, have sought to profit (and in fact have profited) from representing to policyholders that property losses are covered by the insurance they purchased unless there is a clear and express exclusion from coverage. To the extent there is any uncertainty or doubt, one can persuasively argue that coverage is provided – particularly under an all-risk policy. But courts have resisted this contention. Despite this, holding insurers, particularly all-risk insurers, to a promise of coverage regarding an admittedly difficult risk, is not unfair as a matter of insuring intent, policy language, and risk management public policy.

All-risk insurers also profit from the comprehensive coverage sold because this policy design militates against adverse selection by the policyholder. The policyholder cannot insure only property loss thought to be a significant risk (and thereby pay a lower premium). Instead, the policyholder purchases all-risk insurance, not only so that the policyholder may obtain “peace of mind” but also because it is offered by the insurer so that the insurer may price the product accordingly as all-risk insurance and insist on charging a higher premium, even if the policyholder would have preferred to purchase narrower coverage at a lower cost. The most widely perceived advantage, however, is the avoidance of gaps in coverage: As courts have noted: “losses that would otherwise fall within the gaps of specified-risk coverage will be indemnified if a policy is deemed to be all-risk.”<sup>99</sup> and “where the cause of a loss is difficult to identify and prove, an all-risk policy can be highly beneficial to the insured.”<sup>100</sup>

7. *ISO’s Widely Used Pollution Exclusion Is Not a Virus Exclusion and Should Not Be Expansively Read to Operate As a Virus Exclusion*

The pollution exclusion contained in the typical property insurance policy, like all exclusions in an insurance policy, is by custom and practice as well as universally applicable law construed narrowly and strictly against the insurer because it seeks to take away coverage provided by the insuring agreement, a particularly broad insuring agreement in the case of an all-risk

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<sup>97</sup> SMI Realty Mgmt. Corp. v. Underwriters at Lloyd’s, 179 S.W.3d 619, 627 n.3 (Tex. App. 2005).

<sup>98</sup> *Id.* at 627 n.3. Conversely, the insurer has a heavy burden to show that such loss is excluded as a matter of law. *Id.* at 622; *see also* JAW the Pointe, LLC v. Lexington Ins. Co., 460 S.W.3d 597, 604 (Tex. 2015).

<sup>99</sup> 1 NEW APPLEMAN ON INS. L. LIB. EDITION § 1.06[4] (2019).

<sup>100</sup> *Id.*

policy. For similar reasons, the burden of proof to establish the applicability of an exclusion falls upon the insurer.

Insurers generally cannot satisfy this burden in light of the origin, design, intent, and purpose of the pollution exclusion. “Absolute” pollution exclusions were widely adopted in the 1980s by insurers seeking to avoid coverage for long-tail, widespread but correlated environmental and pollution remediation claims. They were never intended to apply to losses with merely tangential involvement of any of the items listed as “pollutants” in the definition employed as part of the insurance industry’s effort to avoid coverage for large, multi-year groundwater damage claims.<sup>101</sup>

Insurers themselves tacitly acknowledged this when they developed the virus exclusion early in the twenty-first century. If insurers had viewed the generalized pollution exclusion to preclude virus loss claims, they would not have developed the virus exclusion, which was thought necessary to prevent coverage of such claims.

There is a logical distinction between contamination by a virus and a pollution event. “The terms “irritant” and “contaminant,” when viewed in isolation, are virtually boundless. ,

To take but two simple examples, reading the clause broadly would bar coverage for bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injury caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants or contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution.

Federal statutory law implicitly contradicts insurers’ efforts to apply a general pollution exclusion as if it were the virus exclusion that the Insurers did not include in their policies. Federal laws defining contaminants and pollutants, such as the ones included in the Lexington and National Fire policies’ definition of pollutant and contaminant, do not include viruses as part of these definitions. Policyholder reading of the exclusion as not including the Covid virus is at least reasonable even if not definitive, making the insurance norm of contra proferentem construction applicable and precluding the use of the exclusion to defeat coverage. For example, the federal Water, Pollution Control Act (commonly known as the Clean Water Act) does not mention the word “virus.” Similarly, the federal Clean Air Act does not mention the words “virus” or “bacteria.” CERCLA (the Comprehensive Environmental Response, Compensation and Liability Act, better known as Superfund) defines “hazardous substances” by referring to Clean Air Act §112 (“CAA Hazardous Air Pollutants”) and provides a list of “pollutants” that does not include any viruses.

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<sup>101</sup> See Jeffrey W. Stempel, *Reason and Pollution: Construing the “Absolute” Pollution Exclusion Context Light Its Purpose and Party Expectations*, 34 TORT & INS. L. J. 1, 2 (1998) [hereinafter Stempel, *Reason and Pollution*]; see also Jeffrey W. Stempel, *Unreason in Action: Case Study Wrong Approach to Construing the Liability Insurance Pollution Exclusion*, 50 FLA. L. REV. 463, 499–50 (1998) [hereinafter Stempel, *Unreason in Action*].

Likewise, RCRA (the Resource Conservation and Recovery Act of 1976), does not mention virus or bacteria. It defines hazardous waste as a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may — cause or significantly contribute to an increase in mortality or an increase in serious injury. The RCRA focus is on irreversible or incapacitating reversible, illness that poses a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. This concept of pollution is quite distinct from viral infection.

Many of the orders shutting down businesses state that the government acted pursuant to its “prevention and control of disease” powers and not its “sanitation and environmental quality” powers.<sup>102</sup> And many expressly state that they are based on health and safety codes rather than environmental regulatory laws or rules. This is unsurprising in that Covid is a communicable disease and not a pollution event.

In addition, the manner in which Covid damaged policyholders strongly suggests it does not fall within the Pollution Exclusion. Standard form insurance policies require that any excluded contaminant come to the property or injure third parties (in the case of liability policies) by particular means, specifically discharge, dispersal, seepage, migration, release or escape. Without one of these means being responsible for the presence of the substance, the pollution exclusion does not apply even if the substance is a pollutant.

A normal speaker of English does not speak of Covid or other viruses as being “discharged” (unless talking about biological warfare), “released,” “escaping,” “seeping,” or “dispersed.” Rather one speaks of a virus being “transmitted” or “spread” or “picked up” through breathing or by hand-to-mouth transmission.

An attempt to deny coverage pursuant to the pollution exclusion would be particularly at odds with insurance axioms because the inapt terms attempted to be applied by the Insurers (e.g., “release,” “discharge,” etc.) are contained in

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<sup>102</sup> See, e.g., California Executive Order N-33-20 (Mar. 19, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf> (closing non-essential business and government offices for reasons of public health, characterizing Covid virus as disease and not pollutant); *Executive Order 2020-21: Temporary Requirement to Suspend Activities That Are Not Necessary to Sustain or Protect Life – RESCINDED*, GOV. GRETCHEN WHITMER, MICH. (Mar. 23, 2020), <https://www.michigan.gov/whitmer/news/state-orders-and-directives/2020/03/23/executive-order-2020-21> (describing Covid as a “respiratory disease” with no mention of pollution or contamination); see also Vermont Dept. of Public Health, COVID-19, <https://www.healthvermont.gov/disease-control/covid-19> (last visited Apr. 24, 2024) (describing Covid as a “disease” and not a pollutant but noting that the droplets or particles containing the virus may “contaminate surfaces they touch”).

an exclusion, a provision of an insurance policy that is strictly and narrowly construed against the insurer that drafted the policy, with unclear text construed against the insurer and in favor of the policyholder.

This is particularly the case when dealing with the pollution exclusion, which was developed by the insurance industry to deal with the widely dispersed, correlated, long-tail losses occasioned by traditional air, earth, and water pollution. Although the literal language of the ISO-developed pollution exclusion can be read to apply to almost any loss involving a solid, liquid, or gas (which would violate the norm of strict and narrow construction of exclusions), this was not the object intended by the insurance industry when developing the exclusion, even though some insurers have opportunistically attempted to seize upon its literal language to deny traditionally covered claims.<sup>103</sup>

Statements by insurance industry spokespersons confirm the limited intended reach of the pollution exclusion. A telling illustration of the intended limits of the pollution exclusion took place before the Texas Insurance Board when insurers were seeking approval for use of the exclusion. When the absolute pollution exclusion was debated before the Board, one questioner asked an industry representative whether a carrier could invoke the exclusion against a grocery store policyholder that was sued by a customer injured by bleach that spilled at the store. Insurer representatives assured regulators that this would not take place and that the pollution exclusion, although using overly broad language as a means of overcoming adverse precedent, was nonetheless a *pollution* exclusion rather than an exclusion cutting back on traditionally available insurance coverage.<sup>104</sup>

The Louisiana insurance department has formally considered the meaning and background of the exclusion and concluded that it was not designed to reach so-called toxic torts or product liability claims involving pollutants. Rather, the department concluded that the pollution exclusion was intended to preclude pollution coverage, as the term is commonly understood. Faced with the Louisiana department's investigation, the insurance industry was unable to present persuasive proof to support its current stance that the pollution exclusion was designed to reach anything other than pollution claims. Rather, the Louisiana department, based on the investigation of a specially appointed task force, concluded that there was substantial evidence that the current pollution exclusion was not designed to preclude coverage for product liability claims and ordinary

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<sup>103</sup> See generally Stempel, *Reason and Pollution*, *supra* note 101 at 2, 7; Stempel, *Unreason in Action*, *supra* note 101 at 467.

<sup>104</sup> See Texas State Board of Insurance, *Transcript of Proceedings: Hearing to Consider, Discuss, and Act on Commercial General Liability Policy Forms Filed by the Insurance Services Office, Inc.*, Board Docket No. 1472 (Oct. 30, 1985), Vol. 1 at 6–10. The Insurance Services Office in a May 15, 1986, circular stated that the exclusion does not apply to bodily injury or property damage caused by a hostile fire and drafted clarifying endorsements (Nos. CG 00 41 [ed. 5-86] and CG 28 40 [ed. 5-86]).

negligence claims incidentally involving chemical irritants, even when the irritants played a role in bringing about harm.<sup>105</sup>

Evidence of record such as the colloquy before the Texas Board and the Louisiana Insurance Department investigation tends to refute quite dramatically Insurer efforts to transform the pollution exclusion into a catchall, comprehensive exclusion of any claim involving an element or particle, which is what some insurers have done when seeking to use the exclusion to bar claims involving carbon monoxide poisoning, a backyard fire, bat guano in an attic, or the smell of Indian curry. Although these extreme efforts occasionally succeed where courts look myopically at the “trees” of the long definition of pollutants rather than the “forest” of the intent, purpose, and function of the pollution exclusion, such decisions are inconsistent with the overall structure and purpose of basic liability or property insurance. Application of the exclusion as suggested by the JGB Insurers would create an exclusion that swallows the insuring agreement of the policy in direct contravention of the ground rules of all-risk property insurance.

ISO itself recognized that the inclusion of the Virus Exclusion or Pandemic Exclusion was necessary to eliminate the possibility of policyholders recovering for virus or pandemic-related losses under the standard policy language, even with the Pollution Exclusion in place. As a result, ISO petitioned New York state regulators in 2010 to make virus exclusion mandatory in commercial property policies.<sup>106</sup> However, certain insurers objected and asked whether regulators would allow them to omit the virus exclusion and make it optional so that they could continue to offer their policyholders coverage for virus-related losses. Clearly, ISO knew that pandemic-related claims exposed “holes” in the exclusionary language typically used in all-risk policies, such as the Pollution Exclusion, and that the inclusion of the Virus Exclusion was necessary to eliminate the possibility of recovery for these types of losses. Without the Virus Exclusion, the standard policy language and Pollution Exclusion, in the eyes of ISO, are not enough to exclude coverage for pandemic-related losses.

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<sup>105</sup> See James H. Brown, Commissioner of Insurance, *Louisiana Department of Insurance, Advisory Letter No. 97-01* (June 4, 1997) (addressed to “All Property and Casualty Insurers” regarding “Use of Pollution Exclusions”); Koorosh Talieh, *Louisiana Cautions Insurance Industry Against Overuse of Pollution Exclusion*, 3 BANKING ON INS. 3, at 1 (Summer 1997) (newsletter published by Anderson Kill law firm); C. Noel Wertz, *Role of Regulators Environmental Claims*, 7 COVERAGE 6, 27 (1997) (attorney with Louisiana department describes investigation into background of absolute exclusion, task force report, department ruling, and argues that insurance departments and policyholders are entitled to rely on industry representations and conduct in assessing meaning of policy provisions).

<sup>106</sup> See *Explanatory Memorandum – Response to Objection 1 Dated 4-30-2010*, attached as Exhibit B to Complaint in *Belnord Hotel Corp. d/b/a Belnord Hotel v. Greater N.Y. Mut. Ins. Co.*, in Supreme Court of the State of N.Y., County of N.Y., Index No. 651185/2022 [hereinafter *Explanatory Memorandum*].

8. *Pre-Pandemic Precedent Supports the Policyholder Position on Physical Loss or Damage Claims*

Pre-Pandemic case law on loss or damage strongly contradicts the arguments against coverage made by insurers. Insurers typically argue that property is not damaged unless structurally altered. Notwithstanding the erroneous characterizations of *Couch* noted above, this position was widely rejected by courts prior to the 2020 Covid Pandemic. Case law predating the 2020 Pandemic is thus instructive. A review of the cases shows that policyholders do not need visible, palpable physical damage to trigger coverage and certainly were not generally required to demonstrate permanent structural change to covered property to obtain coverage such as tangible structural harm to property in order to trigger the coverage clause.

A virus need not “wreck” property; it just has to be sufficiently present to make property less usable and valuable to the policyholder. This reasoning tracks the better-reasoned decisions of courts interpreting “direct physical loss” in other property insurance contexts. Prior to the Pandemic, courts have held that covered “direct physical loss or damage” included injury from many sources that fell well short of permanent change in the property, structural alteration, visibility, palpability, or a condition of the property itself as opposed to an intruding force precluding or diminishing use of the property. Examples include unpleasant odors, animal urine, radioactive dust, radon, emissions from drywall, smoke from wildfires, asbestos in carpeting, walls, or tile, sewage, ammonia, carbon monoxide, organisms in food, chemicals in salad dressing, lead in other metal, insect infestation, and pesticide residue on food.<sup>107</sup>

The reasoning reflected in these cases finding coverage for temporary or remediable loss or damage tracks the better-reasoned decisions in recent cases involving coverage for cyber-losses under property policies.<sup>108</sup> The more reasonable approach has been to find that data is capable of being covered as a “direct physical loss” under a property policy when that data’s integrity is interfered with (i.e. corrupted, lost or damaged). Many courts have found that, although data cannot be seen or touched, it nevertheless exists in some fashion electronically and microscopically as property and can suffer a direct physical loss.<sup>109</sup> Some courts have made the salient point that it would be foolish to have

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<sup>107</sup> See Stempel & Knutsen, *supra* note 1, at 241–243 (citing cases).

<sup>108</sup> See STEMPEL & KNUTSEN, *supra* note 26, at Ch. 23; Erik S. Knutsen & Jeffrey W. Stempel, *The Techno-Neutrality Solution to Navigating Insurance Coverage for Cyber Losses*, 122 PENN ST. L. REV. 645, 646 (2018).

<sup>109</sup> See, e.g., *Ashland Hospital Corp. v. Affiliated FM Ins. Co.*, Civil Action No. 11–16–DLB–EBA, 2013 WL 4400517, at \*8 (E.D. Ky. Aug. 14, 2013) (recovery for loss of data due to excessive temperatures because data had a “direct physical loss” at a microscopic level); *SE Mental Health Ctr., Inc. v. Pac. Ins. Co.*, 439 F. Supp. 2d 831 (W.D. Tenn. 2006) (power loss corrupted data at pharmacy and was a covered “direct physical loss”).

a property policy cover data loss if it were stored in hard copy in some paper filing system and destroyed, but then not cover a similar loss if the data exists in electronic form. Such would make for perverse record-keeping incentives in the business world, to say the least.

Holding that a virus like Covid can damage property makes sense in this regard. The virus does render surfaces unusable to humans for a period of time. It is highly transmissible, potentially deadly and spreads quickly, with a mere touch or through the air. To take the cyber-loss incentive analogy, one would assume insurers would not want business owners putting employees and customers in infected stores if such would vastly increase the risk of an even larger claim if a person became ill or died, (albeit such a claim would be visited on a different line of insurance—liability insurance).

The long list of cases that have considered various external forces' impact on property as a "direct physical loss" demonstrates that courts are willing to find coverage if the force is a disease-causing agent or poisonous, if it is purely airborne, and if it does not permanently affect or even alter in any way the physical property insured. At least that was the case prior to the Covid coverage litigation. Prior case law supports the conclusion that physical damage from a virus does not have to be permanent; it can be transient but affect a business significantly and for a significant time.<sup>110</sup> In some instances, coverage has been found when loss or damage is merely an imminent threat, as when a policyholder must deal with evacuation from an imminent building collapse, imminent landslide, an impending hurricane, government shutdown due to impending riots, **and** imminent threat of release of asbestos fibers.<sup>111</sup>

Further examples of court decisions rejecting the contentions of insurers show that along a timeline running for nearly 70 years, there is substantial judicial support for a concept of physical loss or injury that does not require the type of visible, tangible, physical structural alteration urged by the Insurers.<sup>112</sup>

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<sup>110</sup> See, e.g., *Phibro Animal Health Corp. v. National Union Fire Ins. Co. of Pittsburgh*, A-5589-13T3, 2016 WL 3884255 (NJ App. Div. 2016) (medicine given to chickens stunted their growth; although change in diet would mean chickens' original conditions would return, court held that "property damage" need not be permanent for coverage to attach).

<sup>111</sup> See *Stempel & Knutsen*, *supra* note 1, at 245–46.

<sup>112</sup> See, e.g., *American Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957) (finding that the policyholder that manufactured instruments used in measuring radioactivity had suffered property damage from a release of radon dust and gas that made the building unsafe, and made it impossible to calibrate the instruments prior to sale because of background radiation); *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 98 N.W.2d 280, 296, 300 (Minn. 1959) (finding that egg powder, which had been exposed to smoke, was physically damaged because it suffered a loss of market value even without actual change in shape or composition); *Western 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"); *Blaine Richards & Co. v. Marine Indem. Ins. Co.*, 635 F.2d 1051, 1055–56 (2d Cir. 1980) (finding policyholder could recover lost value of beans exposed to chemical not accepted in the United States but not actually harmed); *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); *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"); *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"); *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); *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").

This view of physical injury or loss continued into the 2000s, as reflected in cases such as: *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"); *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (oats rendered unsalable by FDA regulation suffered "direct physical loss"); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. 01-1362, 2002 U.S. Dist. LEXIS 20387, at \*26–27 (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 U.S. Dist. LEXIS 29085, at \*7 (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, 1269–70 (Wash. Ct. App. 2002) (holding that the presence of methamphetamine vapors could constitute physical loss or damage); *S. Wallace Edwards & Sons, Inc. v. Cincinnati Ins. Co.*, 353 F.3d 367, 374–75 (4th Cir. 2003) (affirming finding that meat exposed to ammonia and thus less valuable even though not actually inedible had suffered property damage); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 824, 826–27, 824–26 (3d Cir. 2005) (*E. coli* contamination); *PepsiCo, Inc. v. Winterthur Int'l Ins. Co.*, 24 A.D.3d 743, 744 (N.Y. App. Div. 2005) (unmerchtable product); *Schlamm Stone & Dolan LLP v. Seneca Ins. Co.*, 800 N.Y.S.2d 356 (N.Y. Sup. Ct. 2005) (finding that "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"); *Federal Ins. Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, No. 02-70236, 2007 WL 1007787, at \*11 (E.D. Mich. Mar. 31, 2007) (finding that food in cardboard containers exposed to ammonia was physically injured, despite the fact the food was judged fit to eat); *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399,



## B. The Remaining Covid Road and Implications for Insurance Jurisprudence

Despite Nevada's joining in the cascade of pro-carrier decisions regarding standard form property damage business interruption policies, the Covid Coverage saga remains ongoing. Despite *JGB*'s discouraging pronouncements on the requirements for triggering physical loss or damage, some suits continue for policyholders able to distinguish the facts of their Covid-related injuries from those of policyholder *JGB*. Although the road to recovery in such cases may be rocky, some cases involving relatively standard policies remain ongoing.

For casinos and other businesses with specialized policies, the *JGB* precedent may have little impact. Disputes involving policies expressly covering event cancellation or contamination-related disruption were often resolved during the 2020–2023 period prior to the Nevada Supreme Court's entry into the fray. Although these cases, as is typical of seven-figure (or larger) coverage disputes, may have been hotly contested and presented other difficult issues (e.g., applicable policy limits, issues relating to procurement or damages calculation), they typically did not involve debates over whether loss or damage took place and, as might be expected of such policies, had no virus exclusion.

In Nevada at least, the most significant impact of *JGB* and the Supreme Court's coverage jurisprudence will likely be in the application of the decision to future disputes not involving Covid. At a minimum, the decision should prompt brokers, consultants, and risk managers to advise their clients to at least consider purchasing particularized event cancellation and contamination coverage. No longer will it be reasonable for policyholders or their advisors to anticipate coverage for disease related events when possessed of only a basic form commercial property policy with business income endorsement.

Emboldened by the industry's Covid coverage victories, insurers in future disputes will surely push the envelope arguing for narrow concepts of physicality, loss, and damage as well as arguing for broad constructions of pollution and contamination exclusions. The success of these efforts will hinge on the degree to which the *JGB* Court meant what it said about not shredding prior precedent in the course of ruling against Covid loss policyholders. *JGB* and the body of anti-coverage case law emerging from Covid proves to be a *Bush v. Gore*<sup>113</sup> of insurance coverage litigation, a *sui generis* situation regarded as

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406 (1st Cir. 2009) (unpleasant odor in home); *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); and *Mellin v. Northern Sec. Ins. Co.*, 115 A.3d 799, 806 (N.H. 2015) (rejecting “tangible alteration” rule and holding that pervasive odor of cat urine was “physical loss” to condominium).

<sup>113</sup> See generally *Bush v. Gore*, 531 U.S. 98 (2000).

problematic and unlikely to have significant future influence,<sup>114</sup> or it could be the harbinger of a more restrictive approach favoring insurers and reversing gains made by policyholders during the previous half-century.

Although the rise of problematic textualism<sup>115</sup> and the increased availability of pre-trial and even pre-discovery dismissal of cases has empowered insurers in recent years, the period from 1950 to the present has generally been one of doctrinal change favoring policyholders. Examples include:

- The defanging of warranties into representations;<sup>116</sup>
- The requirement of prejudice to the insurer for enforcement of breach of conditions precedent such as prompt notice and cooperation;<sup>117</sup>
- Clear establishment of a subjective test for determining expected or intended injury;<sup>118</sup>

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<sup>114</sup> The decision, which effectively declared George W. Bush the winner over Al Gore, has been widely criticized even by Republicans and conservatives for its weak analysis inconsistent with precedent and jurisprudential norms. *See, e.g.*, Mark S. Brodin, *Bush v. Gore: the Worst (or at Least Second-to-the-Worst) Supreme Court Decision Ever*, 12 NEV. L. J. 563 (2012) (liberal law professor criticizes the opinion).

<sup>115</sup> Textualism is typically defended as a means of judicial constraint based on the comforting but inaccurate notion that restricting analysis the text of a document limits judicial discretion. The *JGB* opinion itself refutes that notion and displays the inconsistency and result orientation of textualism. On one hand, the Court is enshrining (as a matter of law) the notion of physical damage viewed as most common (visible, palpable breaking) but a few paragraphs later adopting a characterization of “pollution” far afield from ordinary meaning. People affected by disease do not think of it as a pollution event. People with colds, flu or Covid do not described themselves as polluted.

<sup>116</sup> *See* JEFFREY W. STEMPEL ET. AL., PRINCIPLES OF INSURANCE LAW §§ 4.08–09 (5TH ED. 2020) (historically, inconsistency with statements of fact or intention in insurance policies historically were deemed breach of the policyholder’s “warranty” and defeated coverage even in the absence of intentional wrongdoing or harm to the insurer; modern trend has been to treat such statements as representations that defeat coverage only where the insurer can demonstrate materiality of misstatement or fraudulent intent by policyholder).

<sup>117</sup> *See* RANDY MANIOFF, JEFFREY STEMPEL & MARGO META, *General Liability Insurance Coverage: Key Issues in Every State* 160 (5th ed. 2021) (all but a handful of states require the insurer to demonstrate prejudice from late notice before that will defeat coverage; traditional rule was late notice standing alone was sufficient bar to coverage); *see, e.g.*, *Metro. Police Dep’t v. Coregis Ins. Co.*, 256 P.3d 958, 960 (Nev. 2011); *see also* STEMPEL & KNUTSEN, *supra* note 26, at § 9.02 (same approach generally prevails regarding policyholder’s failure to adequately cooperate).

<sup>118</sup> *See* AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW, LIABILITY INSURANCE § 32 (2019).

- Elevation of the ambiguity approach in construing policy language;<sup>119</sup>
- recognition that insurance policies are (for most policyholders) contracts of adhesion<sup>120</sup> and differ from other contracts in ways supporting more comprehensive review;<sup>121</sup>
- other expanded liability (often in tort and permitting punitive damages for conscious disregard of policyholder rights) for breach of the insurance contract and its covenant of good faith and fair dealing;<sup>122</sup>
- the enactment of state Unfair Claims Settlement Practices Acts,<sup>123</sup> and

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<sup>119</sup> See STEMPEL & KNUTSEN, *supra* note 26, at § 4.08 (describing ambiguity approach or contra proferentem approach, its development and deployment in insurance contract disputes).

<sup>120</sup> See Edwin W. Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919) (generally credited with introducing the concept as well as applying it in the insurance context); see also Friedrich Kessler, *The Contracts of Adhesion – Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943) (insurance policies and many other commonly standardized contracts are contracts of adhesion making complicating traditional notions of freedom of contract). See generally W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 540, 549 (1971) (noting exponential increase in use of adhesion contracts effectively eliminating bargaining power for many consumers and small businesses).

<sup>121</sup> See Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489, n. 50 (2010) (noting that key role of insurance in socioeconomic system distinguishes it from ordinary contracts); see also Jeffrey W. Stempel, *The Insurance Policy as Statute*, 41 MCGEORGE L. REV. 203 (2010) (noting that insurers through collective action and organizations like ISO effectively have created private legislation regarding insurance availability and coverage); see also Jeffrey W. Stempel, *The Insurance Policy as Thing*, 44 TORT, TRIAL & INS. L.J. 813, 819 (2009) (insurance policies offered in standard form as adhesion contracts are functionally similar to products and should be interpreted in light of intended function as well as policy text).

<sup>122</sup> See STEMPEL & KNUTSEN, *supra* note 26, at § 10.01[B] (summarizing law of bad faith and extra-contractual liability for insurers, which generally expanded during 20th Century in part due to concern that policyholders were highly vulnerable to sharp practices by insurers).

<sup>123</sup> See generally Gerald M. Sherman & Richard R. Cowl, *The Judicial Response to Unfair Claims Practices Laws: Applying the National Experience to Minnesota*, 12 WM. MITCHELL L. REV. 45 (1986) (reviewing development and case law concerning state acts modeled after model Unfair Claims Practices Act developed by the National Association of Insurance Commissioners); see also Victor Schwartz &

· respect (so long as contrary policy language is not sufficiently clear) for the objectively reasonable expectations of policyholders where policy language is unclear.<sup>124</sup>

It would be disappointing if these positive developments become another casualty of the Covid pandemic. In addition to creating traps for unwary policyholders, such a retrenchment of insurance jurisprudence holds significant potential to undermine the risk management and protection goals of the insurance system.

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Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 AM. U. L. REV. 1477, 1525–26 (2009) (prominent lawyers representing insurers argue that courts have been too aggressive in applying the Act).

<sup>124</sup> See Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions – Part I*, 83 HARV. L. REV. 961, 967 (1970) (introducing concept of policy construction to vindicate the objectively reasonable expectations of the policyholder regarding coverage even if close reading of the language would have negated those expectations); see also Yong Q. Han, *Policyholder Reasonable Expectations* Ch. 1 (2016) (sweeping review of status of the approach and finding it has considerable force in explaining judicial decisions even in jurisdictions such as England that are generally regarded as highly textualist).