No. 21-3245

IN THE

United States Court of Appeals for the Sixth Circuit

DAKOTA GIRLS, LLC, ET AL.,

Plaintiff–Appellants,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,
Defendant–Appellee

On Appeal from the United States District Court for the Southern District of Ohio
The Honorable Sarah Daggett Morrison
No. 2:20-cv-02035

BRIEF FOR UNITED POLICYHOLDERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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INTRODUCTION

Dakota Girls,[1] like many businesses, cannot generate meaningful revenue unless children, caregivers, and teachers are physically present on its property. In response to the Covid-19 pandemic, state officials issued orders that rendered Dakota Girls' property useless, because caring for children there was too dangerous.

Dakota Girls insured against this hazard. Marketed as "business-interruption insurance," Philadelphia Indemnity Insurance Company ("PIIC") sold a policy promising to replace Dakota Girls' business income if it suffered "physical loss of or damage to" its property. But PIIC denied Dakota Girls' claim, asserting that they had to show tangible damage to the property in order to prevail. This has been the groundless claim of the insurance industry in hundreds of cases since March 2020.

Beginning in the 1960s, courts warned insurers that "physical loss of or damage to," and its variants, cover loss-of-use claims. *See, e.g.*, *Hughes* v. *Potomac Ins. Co.*, 18 Cal. Rptr. 650 (Cal. Ct. App. 1962). In case after case, appellate courts rejected a "tangible damage"

[1] There are seventeen appellants in this case, all seeking the same relief. For convenience, we refer to them all by the lead plaintiff, "Dakota Girls."

requirement, holding this language provides coverage where risks make property too dangerous for its intended use. Courts also "begged carriers to define the phrase to avoid the precise issue before the Court now"—pandemic-induced closures. *E.g.*, *Cherokee Nation* v. *Lexington Ins. Co.*, 2021 WL 506271, *3 (Cherokee Cnty., Okla., Jan. 14, 2021).

Those pleas fell on deaf ears. Insurers are still using the same broad language. They are still insisting that it does not mean what it says—they add text here, delete text there, and claim that this is not what insurance is "for." Those arguments are unpersuasive. Insurers had decades of fair warning that "physical loss" includes "loss of use" and is not limited to "tangible damage." PIIC chose not to heed those warnings. Instead, PIIC continued selling broad coverage that applied regardless of any "tangible alteration." The courts lack power to alter that choice, and it was error for the district court to do so here. PIIC, like everyone, ought to be held to the words it used—not the words it now wishes it had used.

The judgment should be **REVERSED**.

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INTEREST OF *AMICUS CURIAE*[2]

United Policyholders ("UP") is a non-profit organization whose mission is to serve as an effective voice and a source of information and guidance for insurance consumers around the country. UP is funded by donations and grants. It does not sell insurance or accept money from insurance companies.

Unlike insurers, individual policyholders are not repeat players on insurance-coverage issues. UP works to provide an intellectual counterweight to the claims of the insurance industry, in order to help facilitate the evenhanded development of the law. During the pandemic, UP's commitment to advocating for policyholders' rights to coverage for their devastating Covid-19 losses is more vital than ever. Here, UP seeks to assist the Court on an issue of immense public importance—coverage for Covid-19 losses—by identifying arguments and authority that has escaped the lower courts' attention to date.

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[2] The parties have consented to the filing of this brief. No party or their counsel has authored this brief in whole or in part, nor has any party or its counsel contributed money intended to fund preparing or submitting this brief. No person—other than UP, its members, and its counsel—has contributed money intended to fund the preparation and submission of this brief.

STATEMENT OF THE CASE

UP will leave it to the parties to set out the facts, but it reprints the relevant policy terms here for reference. PIIC's policy promises the following:

> We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a [direct physical loss unless the loss is excluded or limited in this policy].[3]

[R. 1-1, PID 114 (emphasis added).] The terms "direct physical loss of or damage to" and "loss or damage" are not defined. [*Id*.]

[3] The bracketed language substitutes "Covered Cause of Loss" with the definition for that term. [R. 1-1, PID 128.]

ARGUMENT

This case presents a basic lesson in textualism. PIIC promised to insure business income if Dakota Girls suffered "physical loss of or damage to" its property. [R. 1-1, PID 114.] The disjunctive "or" shows that there are two bases for coverage: "physical loss of" the property or "physical damage to" the property. When a deadly pandemic prevents someone from physically using the property as it was intended, ordinary people would describe that as a "physical loss of" the property.

Unhappy with the policy's ordinary meaning, PIIC argues that the policy requires tangible alteration to trigger coverage. PIIC is wrong. The policy nowhere uses that (or any other) more specific term to displace the broad, ordinary meaning of "physical loss." Despite this, the district court accommodated PIIC request to narrow coverage to tangible alteration. The Court needs to correct this error.

The basic rule of textualism is that words are given their natural meaning, not a narrow or contrived one. A. SCALIA & B. GARNER, READING LAW §62, at 355-58 (2012) (explaining that courts "have only to say what the very words mean"). This is crucial for insurance cases. Insurers write all of the forms and, as a result, terms are strictly construed against

them, not in their favor. The text must control, even if the insurer can contrive a narrow reading of broad language. Courts are not authorized to construe language in the insurer's favor based on a conviction that the insurer could not have meant what it said. *See id.*

What PIIC said in its policy of insurance is clear: It insured "physical loss of" Dakota Girls' property and not just "tangible damage to" that property.

I. Decades of case law warned insurers that this language is broad and not limited to tangible harms.

A few years ago, this Court noted that "direct physical loss" is exceptionally broad. *K.V.G. Props., Inc.* v. *Westfield Ins. Co.*, 900 F.3d 818, 820-21 (6th Cir. 2018). In the Court's words, "one would struggle to think of damage not covered by this language." *Id.* That case involved an illicit marijuana farm, but the comment was prescient.

Before the pandemic, precedent from at least sixteen jurisdictions addressed insurers' "tangible damage" argument. In all of those states, the courts ruled against the industry—in some or all circumstances. Despite this consensus, insurers insist that the weight of authority tilts

their way. They do so by citing a swath of unpublished or trial-level decisions (both pre- and post-pandemic).

Virtually all of those cases did not face, or have not yet faced, appellate scrutiny. It is not accurate to equate the (relatively recent) rulings of trial courts with decades of judgments from state and federal appellate courts. And the bulk of published appellate law cuts against PIIC.

A. The overwhelming weight of published authority gives "physical loss" its broad, ordinary meaning.

Insurance coverage is a matter of state law. *Telxon Corp.* v. *Fed. Ins. Co.*, 309 F.3d 386, 391 (6th Cir. 2002). Before the pandemic, five states' high courts[4] and eight other states' intermediate appellate courts[5]

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[4] *W. Fire Ins. Co.* v. *First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (gasoline fumes); *Sentinel Mgmt. Co.* v. *Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 822 (Minn. 2000) (asbestos); *Mellin* v. *N. Sec. Ins. Co.*, 115 A.3d 799 (N.H. 2015) (urine odor); *Dundee Mut. Ins. Co.* v. *Marifjeren*, 587 N.W.2d 191 (N.D. 1998) (power outage); *Murray* v. *State Farm Fire & Cas. Co.*, 509 S.E.2d 1 (W. Va. 1998) (threat of rockfall).

[5] *Hughes* v. *Potomac Ins. Co.*, 18 Cal. Rptr. 650 (Cal. Ct. App. 1962) (erosion of land beneath a house); *Azalea, Ltd.* v. *Am. States Ins. Co.*, 656 So. 2d 600 (Fla. Ct. App. 1995) (death of bacteria colony in treatment plant); *Bd. of Educ.* v. *Int'l Ins. Co.*, 720 N.E.2d 622, 625-26 (Ill. Ct. App. 1999) (presence of asbestos); *Widder* v. *La. Citizens Prop. Ins. Corp.*, 82 So. 3d 294 (La. Ct. App. 2011) (lead contamination); *Wakefern Food Corp.* v. *Liberty Mut. Fire Ins. Co.*, 968 A.2d 724 (N.J. App. Div. 2009) (power

held in binding decisions that "physical loss" and its variants included risks that rendered property unsafe or unusable, even without visible, tangible, or structural damage. Federal appellate courts reached the same conclusion applying the law of four other states—including this one, under Ohio law.[6]

Ohio law (which governs this case) provides coverage unless the policy is limited to "physical injury." *Alliance*, 248 F.2d at 925 (radium contamination triggered business-income coverage); *Mastellone* v. *Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130, 1143 (Ohio Ct. App. 2008) (construing "physical injury" as requiring structural damage).[7]

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outage); *Pepsico, Inc.* v. *Winterthur Int'l Am. Ins. Co.*, 24 A.D.3d 743, 744 (N.Y. App. Div. 2005) (unsalable product). *Farmers Ins. Co.* v. *Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993) (meth fumes); *Graff* v. *Allstate Ins. Co.*, 54 P.3d 1266 (Wash. Ct. App. 2002) (meth residue).

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

[7] There is variation in some other states as well. *Compare Hughes*, 18 Cal. Rptr. at 655 (rapid erosion rendering house uninhabitable caused "physical loss" to the house) *with MRI Healthcare of Glendale, Inc.* v. *State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766 (2010) (no "physical loss" when MRI machine would not "ramp up" due to inherent defect); *compare*

If PIIC wants to keep score, then sixteen jurisdictions have binding precedent taking Dakota Girls' side. The district court cited zero jurisdictions holding to the contrary. Thus, it is false to claim, as PIIC may do on appeal, that all (or even most) states require "tangible alteration" to trigger the broader term "physical loss" in a business-interruption policy. That is simply not the case.

There is no reason to believe that the Ohio Supreme Court would buck this consensus if presented with this case. The sheer weight of authority makes it impossible to discuss each case in detail. But the key decisions illustrate why PIIC's position has persuaded few appellate judges.

Start with *Hughes* and *Murray*. Both policies promised to pay for "direct physical loss to the property." *Murray*, 509 S.E.2d at 16; *Hughes*, 18 Cal. Rptr. at 655. In *Hughes*, erosion swept away the building's support, causing cosmetic damage but making it unsafe to inhabit. 18

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also General Mills, Inc. v. *Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (FDA ban on selling contaminated oats caused "physical loss") *with Source Food Techs., Inc.* v. *U.S. Fidelity & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006) (Minnesota law) (USDA ban on importing contaminated beef did not cause "physical loss").

Cal. Rptr., at 655. In *Murray*, unstable rocks above a house prompted an evacuation order from the government. 509 S.E.2d at 16-17.

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

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

Id. (quotations omitted).

Both courts stressed that the property was not safe—giving weight to perhaps the most important characteristic of physical property. *Id.* *Hughes* reasoned that "[i]t goes without question that [the homeowners]' 'dwelling building' suffered real and severe damage when the soil beneath it slid away and left it overhanging a 30-foot cliff." 18 Cal. Rptr. at 655. *Murray* echoed this, pointing out that the houses beneath the cliff

"could scarcely be considered 'homes' in the sense that rational persons would be content to reside there." 509 S.E.2d at 17. That was a "physical loss."

Other cases include *First Presbyterian*, where the Colorado Supreme Court held that loss of use can be a "physical loss." 437 P.2d at 55. There, "the accumulation of gasoline around and under the church building . . . ma[de] further use of the building highly dangerous" and caused a "direct physical loss." *Id.* And in *Wakefern*, the court rejected "the narrowly-parsed definition of 'physical damage' which the insurer urges us to adopt" and held that "loss of function" sufficed. 968 A.2d at 735-38.

This discussion could go on for pages, but UP will stop here. The Court should review the many other pre-Covid cases that found coverage. *See, e.g.*, *Motorists Mut. Ins. Co.* v. *Hardinger*, 131 F. App'x 823, 827 (3d Cir. 2005) (e-coli contamination); *General Mills*, 622 N.W.2d at 152 (FDA rule that harmless oats were nonetheless "adulterated"); *Manpower Inc.* v. *Ins. Co. of Pa.*, 2009 WL 3738099 (E.D. Wis., Nov. 3, 2003) (police order forbidding access to unstable building); *TRAVCO* v. *Ward*, 2010 WL 2222255 (E.D. Va., June 3, 2010) (toxic gas); *Or. Shakespeare Festival*

Ass'n v. *Great Am. Ins. Co.*, 2016 U.S. Dist. LEXIS 74450 (D. Or., June 7, 2016) (wildfire smoke), *vac'd as a condition of settlement*.

Having failed to "defin[e] direct physical loss or damage as they (and others before them) have argued it should be interpreted," PIIC must honor its broad promise of coverage. *Cherokee Nation* v. *Lexington Ins. Co.*, 2021 WL 506271, *4 (Cherokee Cnty., Okla., Jan. 14, 2021). The Court of Appeals is not in the business of rescuing insurance companies who regret their choice to sell broadly worded insurance policies.

B. *Couch on Insurance* cannot bear the weight the insurers put on it.

The district court relied heavily on a single treatise section that purports to summarize the law. 10A STEVEN PLITT, ET AL., COUCH ON INSURANCE §148:46 (3d ed., 2020 update). That section of Couch distorts the state of things. It cites only *First Presbyterian* and *Hampton Foods* as pro-policyholder cases, despite the fact that there are many, many more. *Id.* It then cites five cases as supporting the insurers' restrictive view: two from New York (both of which conflict with *Pepsico*), the *MRI* case from California (which dealt with inherent defect rather than external forces, a fact pattern controlled by *Hughes*), an Oregon federal

district court opinion (abrogated three years later in *Trutanich*, *supra*), and this Court's unpublished decision in *Universal Image*. *Id.*

This is a markedly incomplete survey. Yet insurers cite it as authoritative. The Court should be skeptical of such assertions. Indeed, even Couch's attempt to reconcile the split supports Dakota Girls. Couch posits that the key factor in the "physical loss" analysis is whether a fortuitous, external force changed the condition of the property. *Id.* That test is met here. The pandemic was fortuitous, and it made Dakota Girls' property unsafe—a real, material change in condition.

Another telling indictment of this section is that a district court in Oregon rejected it last year—despite Couch's assertion that Oregon follows the "majority," pro-insurer rule. *James W. Fowler Co.* v. *QBE Ins. Corp.*, 474 F. Supp. 3d 1149, 1155-59 (D. Or. 2020) (Oregon law). The insurer argued that Couch supported its tangible-damage argument, but the court disagreed. Instead, as instructed by Oregon law, the court held that "physical loss" occurs when the property, "while intact and undamaged, is rendered useless to [the policyholder]." *Id.* at 1158. That is the majority rule.

II. The better-reasoned Covid-19 cases follow the pre-pandemic consensus.

The insurers' refusal to pay Covid-19 claims generated a flood of litigation. PIIC may claim that most trial-level decisions favor insurers. But those orders contain serious errors, unexplained departures from the text, or both. Given existing law, appellate benches may well invert that count. In any event, a growing number of trial courts are staying faithful to the text of the policies and the consensus established by the appellate courts. This Court should adopt their reasoning.

A recent ruling in the Covid-19 MDL litigation is representative.[8] *In re Soc'y Ins. Co. Covid-19 Bus. Interruption Prot. Ins. Litig.*, MDL No.

[8] There are many other Covid-19 decisions that the Court should review, including one by Judge Polster. *Henderson Rd. Rest. Sys.* v. *Zurich Am. Ins. Co.*, 2021 U.S. Dist. LEXIS 9521 (N.D. Ohio, Jan. 19, 2021); *see also Susan Spath Hegedus, Inc.* v. *ACE Fire underwriters Ins. Co.*, 2021 U.S. Dist. LEXIS 88041 (E.D. Pa., May 7, 2021); *Serendipitous, LLC* v. *Cincinnati Ins. Co.*, 2021 U.S. Dist. LEXIS 86998 (N.D. Ala., May 5, 2021); *Ungarean* v. *CNA Ins.*, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2 (Mar. 22, 2021); *Derek Scott Williams PLLC* v. *Cincinnati Ins. Co.*, 2021 U.S. Dist. LEXIS 37096 (N.D. Ill., Feb. 28, 2021); *NECO, Inc.* v. *Owners Ins. Co.*, 2021 U.S. Dist. LEXIS 28761 (W.D. Mo., Feb. 16, 2021); *Choctaw Nation of Okla.* v. *Lexington Ins. Co.*, 2021 WL 714032 (Bryan Cty., Okla., Feb. 15, 2021); *Cherokee Nation*, 2021 WL 506271, *3-7; *Salon XL Color & Design Grp., LLC* v. *W. Bend Mut. Ins. Co.*, 2021 U.S. Dist. LEXIS 21298, *6-7 (E.D. Mich., Feb. 4, 2021); *Elegant Massage, LLC* v. *State*

2964, 2021 U.S. Dist. LEXIS 32351 (N.D. Ill., Feb. 22, 2021). *Society* analyzed the policy text in detail and concluded that coverage existed for Covid-19 losses. *Id.*, *15-16.

A. The text of the policy provides coverage for "physical loss of" property or "physical damage to" property.

Society Insurance started, as one should, with the text. "[T]he operative text is 'direct physical loss of or damage to covered property." *Id.*, *37. The court swiftly desiccated the "tangible alteration" claim:

> The disjunctive "or" in that phrase means that "physical loss" must cover something different from "physical damage." It is axiomatic that courts interpret contracts so as to give effect to all of their provisions. That interpretive principle refutes [the insurer]'s first argument: that the coronavirus could not constitute "direct physical loss of or damage to" the covered property because the virus "does not cause a tangible change to the physical characteristics of property."

Id. (cleaned up). This is not surprising; it's what the word "or" means. SCALIA & GARNER §12, at 116-17; *Sec. Ins. Co.* v. *Kevin Tucker & Assocs.*, 64 F.3d 1001, 1007 (6th Cir. 1995). So too in Ohio: "A policy's use of the disjunctive 'or' indicates that the two phrases were not intended to have

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Farm Mut. Auto. Ins. Co., 2020 WL 7249624 (E.D. Va., Dec. 9, 2020); *Studio 417* v. *Cincinnati Ins. Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020).

the same meaning." *Ohio Gov't Risk Mgmt. Plan* v. *Harrison*, 874 N.E.2d 1155, 1161 (Ohio 2007).

Other district courts within this Circuit are in accord. *Henderson Road*, 2021 U.S. Dist. LEXIS 9521, *26; *Salon XL*, 2021 U.S. Dist. LEXIS 21298, *6-7. As Judge Polster reasoned in granting summary judgment to the policyholder, "[t]he Policy's language *is* susceptible to [the policyholder's] interpretation:" that "they lost their real property when the state governments ordered that the properties could no longer be used for their intended purposes—as dine-in restaurants." *Id.*

Salon XL echoed this reasoning. There (as here) the policyholder "alleged that the COVID-19 particles have infected their property, exposed their staff and patrons," and rendered them "unable to use [the] property for its intended purpose." 2021 U.S. Dist. LEXIS 21298, *6. Judge Cox refused to dismiss the case, reasoning that "[t]his is enough to survive a motion to dismiss when the Policy states that it will cover 'direct physical loss or damage'" but "does not define 'loss' or 'damage' to exclude loss of use." *Id.* "The terms 'damage' and 'loss' in this contract are ambiguous, and ambiguities in an insurance contract are construed in favor of the insured." *Id.*

Society observed that the "more challenging interpretive question is whether the restrictions imposed on the [policyholders]' use of their premises count as *physical* loss." 2021 U.S. Dist. LEXIS 32351, *38. It concluded that they did. Although the restaurants could offer take-out services, the Covid-19 orders "impose a *physical* limit: the restaurants are limited from using much of their physical space." *Id.*, *39. "It is not as if the shutdown orders imposed a *financial* limit on the restaurants by, for example, capping the dollar-amount of daily sales the restaurant could make." *Id.* "No, instead the [policyholders] cannot use (or cannot fully use) the physical space." *Id.*

That is what happened to Dakota Girls. Responding to a pandemic, the Governor's edict caused Dakota Girls to lose the full use of its property. In every sense, that loss "relates to natural or material things." *Physical*, WEBSTER'S THIRD NEW INT'L DICTIONARY 1706 (Unabridged ed. 1966) (contrasting "physical" things with "things mental, moral, spiritual, or imaginary").

The virus is not mental, moral, spiritual, or imaginary. It is a physical thing, albeit invisible to the naked eye. It caused physical losses—prompting governments to dispossess people of their physical,

real property. The extreme danger caused by the pandemic "ma[de] further use of the building highly dangerous," no less than the gasoline fumes in *First Presbyterian*, 437 P.2d at 55, or the rocks in *Murray*, 509 S.E.2d at 16-17. In both cases, the government subordinated the owners' property rights to its compelling interest in protecting human life. *See id.*

It did not matter that the policies insured property, and not people. The government barred the use of physical property in response to a physical threat, and that was enough. *Id.* Churches, houses, or daycares that are unsafe for human use can "scarcely be considered [churches, houses, or daycares] in the sense that rational persons would be content to reside there." 509 S.E.2d at 17.

B. The period-of-restoration terms do not apply and do not require the narrow interpretation offered by the district court.

The district court held that the policy's "period of restoration" terms compelled it to adopt PIIC's reading. *Society* addressed this argument in detail:

> Remember that Society promised to pay only for loss of business income during the "period of restoration" . . . . The definition of "Period of Restoration" says that coverage for loss of business income "ends . . . when the property at the described premises should be repaired, rebuilt, or

> replaced with reasonable speed and similar quality; or the date when business is resumed at a new permanent location." In Society's view, "repaired, rebuilt, or replaced" implies that covered "physical loss or damage" is necessarily tangible, requiring a physical injury to the covered property rather than mere loss of use.

2021 U.S. Dist. LEXIS 32351, *40-41 (cleaned up). The court rejected this point for two main reasons.

1. *The "repair," "rebuild," and "replace" terms simply cut short the period of restoration when they apply; they are not a condition to all coverage.*

The first problem with this argument is that it ignores the context in which these terms appear. The "period of restoration" "describes a *time* period during which loss of business income will be covered, rather than an explicit definition of coverage." *Id.*; *Ungarean*, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2, *21-22. This key concept eluded the district court. The district court construed these terms as a condition of coverage—rather than a limit on the insurer's exposure, in certain cases, once coverage is triggered.

The period of restoration begins a set number of hours after "the time of direct physical loss or damage." [R. 1-1, PID 122, §F.3.a.] Like the coverage grant, this language is triggered by a loss of use and provides

no textual basis for limiting coverage to alterations or impacts. The terms "repair, rebuild, or replace" have no bearing on when the "period of restoration" begins—and consequently, they do not control whether coverage arises.

Instead, they mark when the "period of restoration" (and the insurer's liability) may end. [*Id.* §F.3.b.] *Society*'s interpretation of this language is sound and reasonable—it provides one of many ways the insurer can limit its exposure after coverage is triggered. But inherent in the nature of a condition subsequent, or a limit of liability, is that they do not apply in every single case. That does not make them meaningless; it just makes them inapplicable to these facts.

Thus, the district court was incorrect when it held that Dakota Girls' interpretation would render these terms "nonsensical." [R. 71, PID 10865.] It plainly does not. The terms are perfectly sensical when there is physical damage to the property—they end the insurer's exposure in those cases when the property is (or can be) repaired, rebuilt, or replaced. [*Id.*] But the whole point of this litigation is that "physical damage" is not the only way to get coverage under a business-income policy—"physical loss" works too.

Terms that govern a "physical damage" case may quite logically fail to apply in "physical loss" cases. As one court observed in rejecting this precise argument, "[the insurer] cannot avoid providing coverage that is otherwise available simply because the end point with regard to the 'period of restoration' may be, at times, slightly more difficult to pinpoint in the context of the COVID-19 pandemic." *Ungarean*, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2, *21-22.

This does not mean that the insurer's coverage is unlimited in a "physical loss" case. The policy reduces or eliminates existing coverage in other ways, such as when payments hit the "monthly limit of indemnity," [R. 1-1, PID 121], when the policyholder stops suffering the "actual loss of Business Income," or when "operations" are no longer "suspen[ded]," to name just a few arrows in the insurer's quiver. [*Id.* at 114.]

Another means of exposing the period-of-restoration fallacy is by keeping the rules of construction straight. The "presumption against surplusage" and the "construction as a whole" canons are related, but distinct, ways of drawing meaning out of a text. The surplusage canon does not support the district court's argument because the language does have a function—just not in this case.

As *Society* correctly observed, the real thrust of the insurers' argument is that "it is generally true that the policy language must be considered as a whole so that all of its parts fit together." *Society Insurance*, 2021 U.S. Dist. LEXIS 32351, *41. But this is not an inflexible principle. It is one of many "textual clues" that a court may draw upon when interpreting language. *Id.* It is sensitive to context, and the context of this language does not support the insurers' position. SCALIA & GARNER §24, at 167 ("Context is a primary determinant of meaning."). The canon also "lend[s] itself to abuse," since widening the "context" lens too far simply reduces the analysis to what the judge thinks the "purpose" of the text is. *Id.* Using the canon is "a subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of [a text] becomes [authorship] itself." *King* v. *Burwell*, 576 U.S. 473, 497-98 (2015) (quotations omitted).

In considering this canon, *Society Insurance* got it right: the canon applies, but "too many textual clues point the other way." 2021 U.S. Dist. LEXIS 32351, *41. Chief among them is that parts of the coverage grant would become surplusage under the insurers' reading—which requires

physical damage in every case. That leaves the words "physical loss" and "or" without any meaningful function.

A court cannot avoid this problem by reading "loss of" as meaning only a total loss, as some insurers have argued. *Santo's Italian Café* v. *Acuity Ins. Co.*, 6th Cir. No. 21-3068, ECF #26 (Acuity Br.), at 28-35. PIIC defined "suspension" (a trigger of coverage) to include partial losses. [R. 1-1, PID 122.] "Suspension" means either "[t]he slowdown or cessation of your business activities" or "[t]hat a part of or all of the described premises is rendered untenantable." [*Id.* (emphasis added).] The policy also requires Dakota Girls to mitigate its damages (by resuming partial operations if it can). [*Id.* at 119.]

This is a promise that PIIC will pay for the partial loss of or the partial damage to Dakota Girls' property. That inference is more reasonable than any inference generated by the back half of the period-of-restoration definition. But at best, the two inferences are at loggerheads, and this is an insurance case. The tie must go to the policyholder. *Kevin Tucker*, 64 F.3d at 1007; *Harrison*, 874 N.E.2d at 1161. The district court erred in abusing the construction-as-a-whole

canon to subordinate all competing inferences under its own view of the policy's purpose. SCALIA & GARNER §24, at 167-69.

2. *The terms "repair" and "replace" are susceptible to other, broader readings that are consistent with Dakota Girls' argument.*

The second problem with the district court's reading is that that "repair" and "replace" need not be construed narrowly. *Id.* "Repair," for example, means "to restore to a sound or healthy state." *Repair,* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1055 (11th ed. 2003). "Replace" means "to restore to a former place or position." *Replace*, MERRIAM-WEBSTER ONLINE DICTIONARY (https://www.merriam-webster.com/dictionary/replace).

"There is nothing inherent in the meanings of those words that would be inconsistent with characterizing the [policyholders]' loss of their space due to the shutdown orders as a physical loss." *Society*, 2021 U.S. Dist. LEXIS 32351, *40-41. "If, for example, the coronavirus risk could be minimized by the installation of partitions and a particular ventilation system, then the restaurants would be expected to 'repair' the space by installing those safety features." *Id.* Or if the policyholder could expand

into an adjacent banquet hall to make up for the capacity restrictions, that would "replace" the space lost. *Id.*

Other courts agree. *Derek Scott Williams*, 2021 U.S. Dist. LEXIS 37096, *12 ("'Repair,' however, is not inherently physical; one need only consider common references to repairing a relationship or repairing one's health.") (citing Merriam-Webster); *see also NECO*, 2021 U.S. Dist. LEXIS 28761, *19-20; *Cherokee Nation*, 2020 WL 506271, *7-8 & n.15; *Choctaw Nation*, 2021 WL 714032; *Ungarean*, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2, *18-21.

The insurance industry knows full well this is what the language means. In *Factory Mutual Ins. Co.* v. *Federal Ins. Co.*, 1:17-cv-00760-GJF-LF, 2019 U.S. Dist. LEXIS 191769 (D.N.M., Nov. 5, 2019), a lightning strike caused a power outage and a mold infestation at an antibiotics manufacturing facility, forcing it to shut down. *Id.* at *1-2. As part of this case, Factory Mutual ("FM") (perhaps the most sophisticated property insurer in the world) brought a motion seeking to establish that this was a physical loss. *Id.*, ECF# 127, at 1. It did so to shift some of its liability to another insurer (Federal). *Id.*

In doing so, FM cited to the same consensus UP identified above. *Id.* at 3-6. Most importantly, FM argued that the premises "was damaged by stringent requirements of [the policyholder's] customers to the same extent as it was damaged from the mold infestation itself, as the facility was unusable as the result of a covered loss." *Id.* at 4 (citing *First Presbyterian* and *Trutanich*). But as a result, the property was not restored simply because the mold was removed—it was not fully "restored" until it was, once again, usable for its intended purpose. *Id.* at 4-6. That same sense of "restore" is applicable here.

III. *Mastellone* and *Universal Image* are not persuasive.

The district court relied on two cases in denying coverage. *Mastellone* v. *Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130, 1143 (Ohio Ct. App. 2008); *Universal Image Prods., Inc.* v. *Federal Ins. Co.*, 475 Fed. App'x 569, 573 (6th Cir. 2012). Neither case is persuasive.

A. *Mastellone* construed "physical injury," not "physical loss."

Mastellone addressed different language. In denying coverage, the court stated that "we construe the term 'physical injury' to mean a harm to the property that adversely affects the structural integrity of the

house." 884 N.E.2d at 1143. But PIIC did not insure against "physical injury." It promised to pay for "physical loss of or damage to" the property. [R. 1-1, PID 114.] Those are different terms, with different meanings.

An Ohio court has already rejected the argument that *Mastellone* controls. *McKinley Dev. Leasing Co.* v. *Westfield Ins. Co.*, 2021 Ohio Misc. LEXIS 17, *5-10 (Stark Cnty., Ohio, Feb. 9, 2021). So has Judge Polster. *Henderson Road*, 2021 U.S. Dist. LEXIS 9521, *23-24, 27. This Court should follow suit.

The only commonality between this case and *Mastellone* (the word "physical") does not compel the same result. The district court plucked one entry for "physical" from a single online dictionary and declared that was the "ordinary meaning" of the word. [R. 71, PID 10863 (defining "physical" as "having material existence : perceptible especially through the senses and subject to the laws of nature.").] That sort of singular reliance on one dictionary is not persuasive. SCALIA & GARNER at 417-18.

A broader selection of more authoritative dictionaries shows that the word has a much broader sense. *Id.* at 417 ("[A] comparative weighting of dictionaries is often necessary" to avoid their misuse and manipulation). In the unabridged edition of Webster's, the current

version of the authoritative *Oxford English Dictionary*, the current version of the *American Heritage Dictionary*, and the current edition of *Black's Law Dictionary*, the word "physical" simply means "of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary." *Physical*, WEBSTER'S THIRD NEW INT'L DICTIONARY 1706 (Unabridged ed. 1966);[9] *Physical*, THE AMERICAN HERITAGE DICTIONARY (5th ed. 2011) (same); *Physical*, BLACK'S LAW DICTIONARY (11th ed. 2019) (same); *Physical*, II COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 2161 (2d ed. 1986) ("Of or pertaining to material nature . . . as opposed to *psychical, mental, spiritual*").[10]

A "physical" loss, then, is simply a "loss" of something "physical," as opposed to the loss of some sentimental or intangible value. The adjective "physical" does real work here because English speakers quite frequently use the word "loss" in the "mental, moral, spiritual, or imaginary" sense.

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[9] The enormous and scholarly 1966 unabridged edition should not be confused with the 1961 version of the same title that has been so heavily criticized. SCALIA & GARNER at 416-18.

[10] The online dictionaries list this sense as well, but the district court inexplicably did not address it. *Physical*, MERRIAM-WEBSTER ONLINE DICTIONARY (www.merriam-webster.com/dictionary/physical) ("of or relating to material things").

Loss, WEBSTER'S THIRD NEW INT'L DICTIONARY 1338 (offering usage examples such as "loss of reputation," "loss of his wife's affections," and "her death was a loss to all who knew her."). Indeed, one of *Oxford*'s entries for "loss" defines the word as "perdition, ruin, [or] destruction" in the spiritual sense, drawing from John Milton's *Paradise Lost*. *Loss*, I THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 1666.

Thus, the line between the physical and nonphysical is not where the district court drew it. All-risk insurance for "physical" losses would cover a stolen but undamaged car ("physical loss") or provide compensation if the thief "totals" the car ("physical damage"). But it will not pay extra because the car was a gift from a dearly beloved parent, spouse, or friend. Nor will it pay for esoteric or sentimental losses, such as the change in the "character" of a golf course. *Crestview Country Club, Inc.* v. *St. Paul Guardian Ins. Co.*, 321 F. Supp. 2d 260 (D. Mass. 2004). The latter things are certainly "losses" in the ordinary sense—but they are not physical losses.

The ordinary person—to whom one looks to find ordinary meaning—would simply understand the word "physical" as drawing this sort of a line. Dakota Girls is not seeking coverage because of a decline in

property values, because people believe the property is haunted, or because the décor has gone out of style. Dakota Girls could not physically use the property because doing so would expose (and indeed, had already exposed) employees and customers to a lethal physical peril. That is a real difference. And it presents a solid, bright-line distinction between what property insurance covers and what it does not.

Mastellone was not asked to construe the word "physical" writ large. Neither is this court. *Mastellone* did so in the narrow context of the term "physical injury." 884 N.E.2d at 1143 ("[W]e construe the term 'physical injury' . . . ."). This Court must construe it in the context of the term "physical loss." The different adjective–noun combination forbids the rote application of *Mastellone* to this case; it requires a careful, thoughtful, and independent textual analysis. That analysis leads to coverage.

B. *Universal Image* misconstrues Michigan law and is under scrutiny in another appeal.

PIIC may also rely on *Universal Image*, an unpublished disposition from this Court. That case involved Michigan law and held that "physical loss" required "tangible damage." *Universal Image*, 475 F. App'x at 573-74. It referred to *Mastellone* in dicta, but otherwise did not address that

case. *Id.*; *Henderson Road*, 2021 U.S. Dist. LEXIS 9521, *29. Regardless, *Universal Image* is not binding and does not support the decision below.

First, *Universal Image* lacks the textual analysis Michigan (and Ohio) law requires. It predicted that the Michigan Supreme Court would require "tangible damage" based on an inference from an unpublished Michigan Court of Appeals case that did not address "physical loss." 475 F. App'x at 573-74. It drew support for that conclusion from a case that ruled against the insurer on the "physical loss" issue. *Id.* (discussing *de Laurentis* v. *United Servs. Auto. Ass'n*, 162 S.W.3d 714 (Tex. Ct. App. 2005)).

Second, *Universal Image* involved different facts. There, the policyholder abandoned the property after conceding it was safe. 475 F. App'x at 570-71. That is not true here, where the state forcibly barred Dakota Girls from using part of its property due to a deadly pandemic.

Finally, *Universal Image* is under scrutiny in a Covid-19 appeal governed by Michigan law. *Kirsch* v. *Aspen Am. Ins. Co.*, 6th Cir. No. 21-1038. UP has filed a brief in that case explaining that *Universal Image* misconstrued Michigan law and should not be followed. *See id.*, ECF#22

(Brief of UP as *Amicus Curiae*). The Court should not rely on *Universal Image* here.

CONCLUSION

The judgment should be **REVERSED**.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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/s/ *Christopher E. Kozak* /

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I certify that on May 10, 2021, I served a copy of the foregoing on all counsel of record using the Court's CM/ECF filing system. Parties can access this filing through the Court's system.

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