**S278481**

# IN THE SUPREME COURT OF CALIFORNIA

**JOHN'S GRILL, INC. ET AL.,**
*Plaintiffs & Appellants,*

*v.*

**THE HARTFORD FINANCIAL SERVICES GROUP, INC. ET AL.,**
*Defendants & Respondents.*

AFTER A DECISION BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION FOUR
CASE NO. A162709

# CONSOLIDATED ANSWER BRIEF TO AMICI CURIAE BRIEFS

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**THE HARTFORD FINANCIAL SERVICES GROUP, INC. & SENTINEL INSURANCE COMPANY, LTD.**

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## Introduction

Helpful amicus briefs typically present new social science or historical perspectives, describe public policy ramifications, or provide background data. Plaintiffs' amici briefs do none of those. Instead, they repeat and repackage plaintiffs' legal arguments with string citations to out-of-state cases. But amicus briefs are not an opportunity for lawyers with similarly situated clients to reargue the case. The briefs submitted by plaintiffs' amici offer little that is new, and they are most notable for the absence of *any* authority on several critical points.

Amici cite no case supporting the Court of Appeal's unprecedented use of the illusory coverage doctrine to rewrite conditional coverage to mean unconditional coverage. They cite no new case holding that each peril in a multi-peril provision

must have a realistic possibility of being triggered before the court will enforce the contract as written – they cite only the same unpublished Pennsylvania federal district court decision that plaintiffs cited. And they make no attempt to address the second issue before this Court, even though reversal is independently warranted because plaintiffs suffered no covered loss or damage.

Amicus United Policyholders attempts to draw the Court into the speculative and theoretical debate about when, where, and how a virus could cause damage at John's Grill. Although the Court of Appeal grappled with these arguments, this Court should not, and need not, similarly engage. It has never been the rule in California that an insurer must identify coverage hypotheticals before a court will enforce a clearly worded condition of coverage. Nor is it the rule that an insured or insurer must foresee a particular factual scenario for a condition on coverage to be enforceable. The fact that a particular policyholder is unlikely to benefit from coverage for one peril within a standard policy provision does not mean that the coverage is illusory or should be rewritten.

In any event, viruses *can* result from "specified causes of loss" and cause physical damage to covered property, even at restaurants like John's Grill. While amicus United Policyholders asks this Court to remand to permit plaintiffs to conduct discovery on this issue, plaintiffs have not requested this relief, and an amicus generally cannot assert issues or request relief not sought by the parties. More importantly, this request has no

support under California law and would create an entirely new – and unwarranted – layer of insurance litigation in the trial courts.

Finally, French Laundry's amici brief suggests there would be few negative consequences from ruling for plaintiffs because the illusory coverage doctrine applies in only "rare" circumstances and has a very "limited nature." (French Laundry et al. Amici Br. ("FL Br.") 22-23). But the application of the illusory coverage doctrine has been limited because – until this case – the doctrine itself has been limited. To side with plaintiffs, the Court would need to expand the doctrine by applying it in at least new four ways: to conditions of coverage, to unambiguous terms, to specific perils within a multi-peril provision, and to specific individual terms in a standard form agreement.

This Court has described illusory coverage in narrow terms. Amici urge this Court to adopt expansive new standards and set out broad ways that insurance policies can be found illusory. The Court should decline this invitation. California courts already have the tools to construe insurance policies; there is no need for a broad new rule.

## Argument

### I. Amici have failed to identify any case applying the illusory coverage doctrine to a condition on coverage

Both French Laundry and United Policyholders cite illusory coverage cases from around the country – presumably the best cases they could find for their positions. Yet in none of those cases did a court strike down a *condition of coverage* as illusory.

Instead, the cases typically involve policies where an *exclusion* took away promised coverage. As Sentinel's merits briefs explained, California courts have never applied the illusory coverage doctrine to strike or rewrite an express *condition* of coverage, such as the specified cause requirement at issue here. (OBOM 30-39; RBOM 12-16.) Neither plaintiffs nor their amici have refuted this point, which is no mere matter of semantics. Where an insuring clause contains an express condition to coverage, there is no illusion of coverage when the condition is not satisfied. Instead, the promise *itself* is conditional.

Indeed, French Laundry admits that the illusory coverage doctrine has been applied "only" where an insurer responds to a coverage claim by "contending that *another term* in the policy effectively eliminates . . . reasonably expected coverage." (FL Br. 22, italics added.) Sentinel did not rely on "another term" in the policy to take away expected coverage. Rather, Sentinel denied coverage because the coverage grant is expressly conditioned on the occurrence of an event that plaintiffs concede did not occur.

## II. Amici's proposed illusory coverage standards conflict with California law

This Court has referred to illusory coverage as coverage that is "practically meaningless" (*Safeco Ins. Co. of America v. Robert S.* (2001) 26 Cal.4th 758, 764), and said the doctrine applies where an exclusion " 'could render a policy valueless almost at random' " (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 756).

Plaintiffs' amici urge the Court to expand the meaning of illusory coverage and create broad new ways that policies can be found illusory. These new standards are unnecessary, inconsistent with settled California law, and would allow courts to rewrite policies well beyond their intended scope. And even if these standards applied, they are satisfied in this case.

### A. An insured's "reasonable expectations" are relevant only if the policy is ambiguous, and in any event plaintiffs had no reasonable expectation of unconditional virus coverage

United Policyholders argues that the illusory coverage doctrine applies whenever "a limitation on coverage in an insurance policy would deprive a policyholder of the coverage that a reasonable insured would expect to receive," suggesting this rule derives from *Yahoo Inc. v. National Union Fire Ins. Co. of Pittsburgh* (2022) 14 Cal.5th 58, 67. (United Policyholders Amicus Br. ("UP Br.") 17.) This argument misinterprets *Yahoo* and skips a fundamental step in California's insurance policy analysis. And even if this test applied, plaintiffs cannot meet it because they could have no reasonable expectations of coverage in this case.

#### *1. The Court need not assess the insured's claimed expectations*

As this Court recently held in *Yahoo*, "while insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply. . . . If contractual language is clear and explicit, it governs." (*Yahoo*,

*supra,* 14 Cal.5th at p. 67, citations and internal quotation marks omitted.) This Court has recognized this principle for more than a century: If an insurance provision is unambiguous, it must be enforced without evaluating reasonable expectations. (*Ibid.*; see *First Nat. Bank of Monrovia v. Maryland Casualty Co.* (1912) 162 Cal. 61, 70 ["where the terms of the policy are plain and explicit, the court can indulge in no forced construction of the contract to cast a liability upon the insurance company which it has not assumed"]; *Ogburn v. Travelers' Ins. Co.* (1929) 207 Cal. 50, 54 [same].)

An insured's reasonable expectations are relevant *only* "[i]f the terms are ambiguous [i.e., susceptible of more than one reasonable interpretation]." (*Yahoo*, *supra*, 14 Cal.5th at p. 67, original brackets, internal quotation marks omitted.) *If and only if* the terms are ambiguous, the courts "interpret them to protect ' "the objectively reasonable expectations of the insured." ' " (*Ibid.*; *Montrose Chemical Corp. v. Superior Court* (2020) 9 Cal.5th 215, 230; *Forecast Homes v. Steadfast Ins. Co.* (2010) 181 Cal.App.4th 1466, 1480 [insured's "lengthy discussion of its reasonable expectations . . . would be relevant only if the [policy] endorsement is ambiguous. It simply is not."].)

United Policyholders cites two other California Supreme Court decisions to suggest the illusory coverage doctrine is (or should be) a "reasonable expectations" based standard, but neither case supports this assertion. (UP Br. 17-18, citing *Safeco*, *supra*, 26 Cal.4th 758, 761, 764, and *Steven v. Fidelity & Casualty Co. of New York* (1962) 58 Cal.2d 862, 872.) *Safeco*

considered the insured's reasonable expectations only *after* expressly finding that the "illegal act" language in the exclusion provision was ambiguous. (*Safeco*, at p. 763.) Likewise, *Steven* upheld insurance coverage only after finding the policy purchased in a vending machine was ambiguous and failed to "plainly and clearly" inform the insured of the policy exclusions and limitations. (*Steven*, at pp. 868-884.) The court emphasized the "special and unique circumstances" where the insured did not have the opportunity to view the policy before the purchase. (*Id.* at p. 884.)

United Policyholders also cites *Julian* and two Court of Appeal decisions, but they likewise do not support amici's proposed standard. (*Julian*, *supra*, 35 Cal.4th at p. 760 [dicta concerning scope of coverage in proximate cause analysis]; *De Bruyn v. Superior Court* (2008) 158 Cal.App.4th 1213, 1222 [same]; *Maryland Casualty Co. v. Reeder* (1990) 221 Cal.App.3d 961, 978 [declining to interpret policy to mean insured purchased no insurance whatsoever].)[1]

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[1] Although United Policyholders cites a few cases from other jurisdictions applying a reasonable or settled expectations test, it does not explain why California courts should adopt this standard. Moreover, the cited decisions concern coverage issues vastly different from here. (See, e.g., *O'Connor v. Proprietors Ins. Co.* (Colo. 1985) 696 P.2d 282 [refusing to interpret an exclusion in an airplane owner's policy so broadly as to effectively remove all promised coverage for aircraft damage]; *Western Reserve Mutual Casualty Co. v. Holland* (Ind.Ct.App. 1996) 666 N.E.2d 966 [finding illusory an underinsurance motorist provision that offers no possibility of coverage].)

*(footnote continues on following page)*

In this case, the Limited Coverage provision is not ambiguous; it states there is coverage for virus loss "only" if it was "the result of" a specified cause of loss. (2AA 396.) These sorts of preconditions on coverage are typical in insurance policies and are regularly enforced. (E.g., *Penn-America Ins. Co. v. Mike's Tailoring* (2005) 125 Cal.App.4th 884, 887-888 ["Specified Causes of Loss" condition in exception to exclusion].)

United Policyholders repeats plaintiffs' argument that the phrase "the result of" is ambiguous because it might refer to the biological process that causes a virus or a vector of transmission. (UP Br. 28.) But as many courts have recognized, the contractual phrase "as a result of" plainly imposes a causation requirement. (RBOM 19.) Under either of plaintiffs' proposed causal contexts (biological or vector-based), it is undisputed that no virus damage resulted from a specified cause of loss.

*2. Plaintiffs had no reasonable expectation of coverage because the limited exception to the exclusion of virus-related losses has not been satisfied*

Even if the Court were to apply a reasonable expectations standard, in this case a policyholder would have reasonably expected to be covered for virus damage *only* if the losses were

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United Policyholders also argues that insurance policies cannot be construed in a way that renders coverage illusory, and supports this with a string cite of out-of-state decisions. (UP Br. 20 & fn. 2.) This point is uncontroversial. Sentinel does not argue that the illusory doctrine can *never* apply to an insurance policy. The doctrine is inapplicable here, though, and amicus's citations do not counter this fact.

caused by a specified cause of loss. There is a *conditional* promise of coverage for loss or damage caused by a virus "*only if*" the virus results from a specified cause of loss. (2AA 396, italics added.) Plaintiffs admit they did not satisfy this condition.

Thus, plaintiffs could not have had a reasonable expectation of coverage. (See *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265 [even assuming "ambiguous policy language," court "must first attempt to determine whether coverage is consistent with the insured's objectively reasonable expectations"]; *Mez Industries, Inc. v. Pacific Nat. Ins. Co.* (1999) 76 Cal.App.4th 856, 868-869 [even if a potential ambiguity exists, "insured will not be able successfully to claim coverage where a reasonable person would not expect it"].)

United Policyholders argues that "an objectively reasonable insured would expect to obtain coverage that the insuring agreements in the policy *expressly promise* to provide under realistic – not merely far-fetched – circumstances." (UP Br. 25, italics added.) But there is no "express" (or implied) promise of unconditional virus coverage. Even if it is "far-fetched" to think that a virus can result from a specified cause of loss (but see *post*, at Section IV), there can be no reasonable expectation of coverage if the very condition on which coverage is predicated has not been satisfied.

That is all the more true because here the conditional coverage is a "limited" *exception* to a broad exclusion for *any* loss or damage caused by virus. (2AA 395-397.) An insured cannot reasonably expect to receive the very coverage that is expressly

excluded from the policy when the conditions for a limited exception to that exclusion have not occurred.

The fact that the virus coverage is an exception to a broad exclusion is important. (See OBOM 47-49.) The Court of Appeal misunderstood this, reading the exception out of context and incorrectly assuming some new coverage must have been intended. (*John's Grill, Inc. v. The Hartford Financial Services Group, Inc.* (2022) 86 Cal.App.5th 1195, 1212.) Plaintiffs made no attempt to defend the court's analysis on this issue. And now French Laundry acknowledges that the Limited Coverage provision is an exception to an exclusion, rather than (as the Court of Appeal erroneously found) an independent coverage provision that must be considered before viewing the exception. (FL Br. 30-32.)

This matters because policy provisions must be understood in proper context (*Bank of the West*, *supra*, 2 Cal.4th at p. 1265), and "an exception to a policy exclusion does not create coverage not otherwise available under the coverage clause" (*Hurley Construction Co. v. State Farm Fire & Casualty Co.* (1992) 10 Cal.App.4th 533, 540; see *Old Republic Ins. Co. v. Superior Court* (1998) 66 Cal.App.4th 128, 145-146 [court's error in treating exception to exclusion as a coverage clause led to "an unfortunate rewriting of" the policy], overruled on another ground in *Vandenburg v. Superior Court* (1999) 21 Cal.4th 815, 841, fn. 13).

French Laundry complains that Sentinel did not expressly recognize that an exception to an exclusion is interpreted broadly in favor of coverage. (FL Br. 31, citing *Aydin Corp. v. First State*

*Ins. Co.* (1998) 18 Cal.4th 1183, 1192.) But it is the *insured's* burden to show the exception applies, as *Aydin* made clear, and in this case the result is the same whether the exception to the exclusion is viewed broadly or narrowly. Plaintiffs conceded their claimed virus damage did not result from a specified cause of loss. Plaintiffs had no reasonable expectation of coverage because their policy broadly excludes coverage for virus-related damage, and the express conditions for the limited exception to that exclusion were not satisfied.

### B. Express limitations on coverage are enforced without resorting to an inquiry about the "reasonably expected set of circumstances"

United Policyholders alternatively contends that this Court should hold a promise of coverage is illusory if a coverage provision does not encompass risks that will arise " 'under any reasonably expected set of circumstances.' " (UP Br. 22, emphasis omitted.) In support, it posits that companies purchase insurance to protect themselves only against reasonably expected harms, not " 'oddball scenarios' " or other types of risks that could not be foreseen at the time of the purchase. (UP Br. 22.)

Other than the Court of Appeal opinion below, it cites no supporting California cases. Nor does it explain any principled basis to expand the doctrine in this way. If this Court were to hold that insurance protects against harms only if that harm can be envisioned at the time of purchasing the insurance, this would require an examination of every policy provision and would ultimately limit the availability of insurance. It is also contrary

to the core principle in this state that a clear and explicit insurance provision must be enforced as written. (*Yahoo*, *supra*, 14 Cal.5th at p. 67; *Nat. Ins. Underwriters v. Carter* (1976) 17 Cal.3d 380, 386 [" 'insurance company has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected' "]; *Forecast Homes*, *supra*, 181 Cal.App.4th at p. 1482 ["our Supreme Court consistently admonishes against rewriting insurance policy language to deny parties their general freedom to contract"].)

Moreover, a scenario may be "oddball" because the risk has very little chance of occurring such that an insured would not conceive of it when it purchases insurance, but that does not mean an insured would not want to be covered in that very rare occurrence. Insurance policies identify categories of risks, not every single possible scenario that could occur.

Rather than identifying any California authority for its "reasonably expected set of circumstances" test, United Policyholders cites four out-of-state decisions, each of which *rejected* the insured's claim that the coverage was illusory. (UP Br. 22-23.) Three of the cited cases recognize that if a policy provides some coverage, it is not illusory even if there is no coverage for a certain risk. (*Fidelity and Guaranty Ins. Underwriters, Inc. v. Everett I. Brown Co., L.P.* (7th Cir. 1994) 25 F.3d 484, 490 [applying Indiana law, concluding that the coverage was not illusory because "the [policy] sold [to the insured] provides coverage in many different circumstances"]; *Haag v. Castro* (Ind. 2012) 959 N.E.2d 819, 824 [applying Indiana

law, and finding coverage was not illusory because there may be circumstances when coverage would be triggered]; *Hanover Ins. Co. v. Vemma Internat. Holdings Inc.* (D. Ariz., July 29, 2016, No. CV-16-01071-PHX-JJT) 2016 WL 4059606, at *8 [applying Arizona law, finding no illusory coverage where liability policy covered other types of claims].)

The fourth case United Policyholders cites undermines its position. (*Chase v. State Farm Fire and Casualty Co.* (D.C.Ct.App. 2001) 780 A.2d 1123.) In *Chase* the insured purchased a rider to cover a specific cause of damage, but when that damage occurred the insurer denied coverage based on a separate exclusion. (*Id.* at p. 1131.) The insured argued the policy was illusory or unconscionable because the exclusion would "always preclude coverage" under the rider and was contrary to the insured's reasonable expectations. (*Id.* at pp. 1131-1132.) The court noted that coverage under the rider "may be limited" but was not "non-existent or de minimis" (*id.* at p. 1131), and reasoned that the insured could have no "reasonable expectations" of coverage because the exclusion "is not ambiguous." (*Id.* at p. 1132.) "Nor can we say that [the insurer] owed [the insured] a greater duty of disclosure or warning than the duty it fulfilled by using clear and unambiguous language in drafting the exclusionary provision in the policy. [Footnote.] Our duty, therefore, is to enforce the insurance contract as written." (*Ibid.*) The court admonished that "the reasonable expectations doctrine is not a mandate for courts to rewrite insurance policies

and reallocate their assignment of risks between insurer and insured." (*Ibid.*)

French Laundry does not squarely address the "reasonably expected set of circumstances" issue, but it quotes *Karas v. Liberty Ins. Corp.* (Conn. 2019) 228 A.3d 1012, 1039, for the proposition that " 'virtually every other state' " has adopted this standard. (FL Br. 25.) This quote is misleading.

In *Karas*, the Connecticut court mentioned the "reasonably expected set of circumstances" standard, but did so only in *rejecting* the insured's reliance on a Rhode Island court decision that found a similar exclusion created illusory coverage. (*Karas*, *supra*, 228 A.3d at p. 1039.) In identifying the "reasonably expected" language, *Karas* cited decisions holding that an exclusion would not be deemed illusory unless " 'it would preclude coverage in almost any circumstance.' " (*Ibid.*, quoting *Great American E & S Ins. Co. v. End Zone Pub & Grill of Narragansett, Inc.* (2012) 45 A.3d 571, 576.) *Karas* also quoted with approval another appellate decision holding that an exclusion is not illusory unless it " 'eviscerate[s] all coverage under the policy.' " (*Id.* at p. 1038, quoting *Connecticut Ins. Guaranty Assn. v. Drown* (2012) 134 Conn.App.140, 153.) Applying these principles, *Karas* held the broad exclusion at issue was enforceable and did not create illusory coverage. (*Id.* at pp. 1038-1039.)

In a related contention, United Policyholders argues that a court must first find a "realistic prospect of coverage" as a predicate to enforcing the plain terms of the policy. (UP Br. 23.)

As with its prior argument, United Policyholders provides no reasoned explanation for the need to adopt this rule and cites no supporting California decisions. Instead, United Policyholders again relies on several out-of-state cases, none of which are helpful here. (UP Br. 23-24.)

Most of the cited cases involved the interpretation of an ambiguous exclusion that would have – if interpreted broadly in the insurer's favor – eliminated coverage that had previously been promised. (E.g., *Martinez v. Idaho Counties Reciprocal Management Program* (Idaho 2000) 999 P.2d 902, 904-908 [worker's compensation exclusion in "ambiguous" city insurance policy void as against public policy as it would eliminate promised coverage for city employees]; *Pressman v. Aetna Casualty & Surety Co.* (R.I. 1990) 574 A.2d 757, 759 [narrowly construing "obviously ambiguous" exclusion]; *Piper v. Nitschke's N. Resort Condo. Owner's Assn.* (Wis.Ct.App. 2009) 777 N.W.2d 677, 679-680 [construing "awkwardly worded exclusion" in insured's favor based primarily on a grammatical analysis].) In each case, the court looked to the scope of potential coverage as a factor when construing an ambiguity, but none suggested that the "realistic prospect" of coverage is (or should be) a prerequisite to enforcing a plainly worded exclusion.

Indeed, imposing this requirement would mire courts in endless fact-specific analyses of the extent to which coverage for each peril in each policy provision would benefit the individual insured. Under California law, a court has no authority to eliminate a precondition of coverage based on its own assessment

that the coverage would otherwise be unlikely to provide enough of a benefit to the specific policyholder.

Citing another group of out-of-state decisions, United Policyholders argues that a policy exclusion can create illusory coverage even if it does not "*completely* eliminate" potential benefits from the policy. (UP Br. 25-26.) These decisions do not stand for this broad proposition, and each arose in circumstances materially different from here. The cases involved situations in which denying coverage would "frustrate[ ]" and "thwart" a state legislative scheme (*Heller v. Pennsylvania League of Cities and Municipalities* (2011) 32 A.3d 1213, 1223-1228); the insurer would be receiving a "windfall" (*ibid.*) by taking in premiums "when realistically it is not incurring any risk of liability" (*O'Connor*, *supra*, 696 P.2d at p. 285); enforcing a broad exclusion would "negate virtually all coverage" under the policy (*Monticello Ins. Co. v. Mike's Speedway Lounge, Inc.* (S.D.Ind. 1996) 949 F.Supp. 694, 699-700); and interpreting an ambiguous exclusion would "afford[ ] the insured *some* coverage" (*Casey v. Smith* (Wis. 2014) 846 N.W.2d 791, 801, italics added).[2]

The circumstances here are different: There is no state legislative scheme requiring insurance coverage for COVID business losses; there was no windfall as plaintiffs received

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[2] Like plaintiffs, United Policyholders also cites *Great Northern Ins. Co. v. Greenwich Ins. Co.* (W.D.Pa., May 12, 2008, No. 05-635) 2008 WL 2048354. But, as discussed in Sentinel's reply brief (RBOM 27), that unpublished federal district court opinion applying Pennsylvania law is poorly reasoned and has never been followed on this point.

significant coverage in exchange for their premiums; and the policy was not ambiguous.

## III. The particular circumstances of an insured are irrelevant, and generally unknown, to insurers when providing standard form policies

French Laundry argues that in determining whether an insurance policy provides illusory coverage, the Court should interpret the contract in context, including the circumstances of the case. (FL Br. 14.) But one of the critical circumstances here is that plaintiffs' policy is a standard form policy meant to cover a wide array of businesses, not a policy tailored to plaintiffs.

Insurance is, by definition, the process of sharing and spreading risk. (See *Commercial Life Ins. Co. v. Superior Court* (1988) 47 Cal.3d 473, 478; *Metro. Life Ins. Co. v. State Bd. of Equalization* (1982) 32 Cal.3d 649, 654.) Different policyholders have different insurance needs, and some are more likely to benefit from particular coverage provisions than others. Because of this wide range of needs, standard form insurance policies are overinclusive, providing more coverage than is likely to benefit any individual policyholder. If these standard form policies were underinclusive – providing only coverage that benefits every insured – it would eliminate many coverage provisions that benefit some (but not all) policyholders.

Amici suggest that, for purposes of the illusory coverage doctrine, every standard form policy should be treated like a bespoke (custom) policy, so that every coverage provision should be assumed to provide some specific benefit to every policyholder.

This disregards the "circumstances" of the policy. For standard form policies all the approved forms must be included, and any modifications or omissions must be submitted to the Insurance Commissioner and approved in a lengthy process. (Cal. Dept. of Ins., *Prior Approval Rate Filing Instructions* (June 5, 2023) at pp. 6, 20 <https://www.insurance.ca.gov/0250-insurers/0800-rate-filings/0200-prior-approval-factors/upload/PriorAppRate-FilingInstr_Ed06-05-2023.pdf> [as of Jan. 22, 2024].)

And, as French Laundry acknowledges, its proposed rule could force insurers to individually tailor every policy, because any overinclusive coverage could be deemed illusory. French Laundry tries to cast this as a benefit, suggesting that requiring courts and insurers to engage in a factual analysis of the likelihood of coverage for each peril, condition, and exclusion will only improve underwriting and prompt insurers to "provide good customer service." (FL Br. 23.) This unsupported and unexplained assertion ignores the realities of the insurance market.

As explained in the amicus brief filed by the American Property Casualty Insurance Association ("APCIA"), most commercial property insurance policies are written on standardized policy forms, allowing the insurer to cover and price risks efficiently. While the largest insured companies can afford individually tailored policies, most businesses depend on the availability and affordability of these standard forms. Setting a rule of interpretation requiring an insurer to prove how each provision of a policy provides a material benefit to each insured

would interfere with the risk-spreading function; burden insurance companies and courts alike; and limit California policyholders' access to standardized coverages while simultaneously potentially increasing their premiums for bespoke coverage. (APCIA Br. 14-18.)

French Laundry cites several California decisions it says support a court considering a policyholder's particular circumstances in interpreting an insurance policy. (FL Br. 18-19, citing *Maryland Casualty*, *supra*, 221 Cal.App.3d 961, 977-978, *Oliver Machinery Co. v. United States Fidelity & Guaranty Co.* (1986) 187 Cal.App.3d 1510, 1514-1515, and *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 874.) But those cases do not suggest the standardized Sentinel policy should be interpreted as ensuring a likelihood of coverage for every single peril identified in the policy. In *Maryland Casualty* and *Oliver Machinery*, the courts found the insureds would never receive *any* benefit for their premiums based on a broadly worded exclusion; there would have been a total failure of consideration.[3] *Shade Foods* involved

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[3] In *Oliver Machinery* a distributor – who paid a premium to be an additional insured on a manufacturer's liability policy – sold only relabeled products received from the manufacturer. (*Oliver Machinery*, *supra*, 187 Cal.App.3d at p. 1514.) A policy exclusion precluded coverage for any relabeled product. (*Ibid.*) The court refused to enforce the exclusion, finding it would " 'nullify the very purpose of the vendor's endorsement, causing a forfeiture where the parties intended coverage' " and that "it is patently clear if we accepted the [insurer's] construction . . . 'the vendor's insurance covering [the distributor] would not be worth

*(footnote continues on following page)*

individually negotiated, non-standard provisions, and thus it was relevant for the court to consider the insured's intent (as expressed to the insurance agent) in purchasing the insurance. (*Shade Foods*, at pp. 872-873.)

The circumstances here are starkly different. Plaintiffs are not in a position similar to the insureds in *Maryland Casualty* and *Oliver Machinery*, where each insured paid for a policy with no possibility of coverage whatsoever. Here, plaintiffs admit they received material coverage for all manner of physical loss or damage in exchange for their premiums. And even limiting the inquiry to the Limited Coverage in particular, plaintiffs concede they had coverage for a broad range of perils, including damages caused by fungi, rot, and bacteria resulting from a specified cause of loss. Moreover, unlike *Shade Foods*, the Limited Coverage was not a bargained-for custom addition to the policy or a specifically

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the piece of paper on which it was printed.' " (*Id.* at p. 1515, ellipses omitted.)

In *Maryland Casualty*, a complex insurance coverage case involving multiple insureds under multiple liability and property insurance policies, the insurers moved for summary judgment arguing the claims made against certain insureds fell within a "premises alienated" exclusion. (*Maryland Casualty*, *supra*, 221 Cal.App.3d at p. 966.) One of the insureds had conveyed (i.e., alienated) his property *before* he purchased any of the insurance policies. Under this circumstance, the court stated that "[b]ecause we are counseled by general rules of contract interpretation to avoid a construction under which a contracting party receives no benefit from a contract [citations], we are unwilling to find [the owner's] 1979 conveyance gave rise to application of the alienated premises exclusion." (*Id.* at p. 978.)

requested form of coverage. There is no allegation that this policy was customized in any way.[4]

French Laundry's reliance on several out-of-state decisions is similarly misplaced. (FL. Br. 24-30.) Most of the decisions did not address whether a court can or should evaluate the insured's specific circumstance to assess whether a particular covered risk in a standardized policy is likely to occur. (E.g., *Farm Bureau Mut. Ins. Co. of Arkansas v. Sells* (Ark.Ct.App. 2010) 379 S.W.3d 605, 607.)

And in many of the cited cases, the courts reached conclusions based mainly on the applicable law and the insurance policy, rather than the specific factual circumstances. (*Great American E & S*, *supra*, 45 A.3d at p. 576 [determining policy is not illusory based on an evaluation of the law of assault and battery]; *Pena v. Viking Ins. Co. of Wisconsin* (2022) 169 Idaho 730, 734, 737 [evaluating illusory argument "as a question of law" in light of underinsured motor vehicle statutes]; *Monticello*, *supra*, 949 F.Supp. at pp. 697, 701 [finding policy illusory because certain broad language in an exclusion would essentially preclude coverage for any claim under the policy]; see also *TIG Ins. Co. v.*

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[4] French Laundry also cites to *Armstrong World Indus., Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1, 47, which concerned the date when coverage in an asbestos injury case would be triggered. The court stressed there was nothing in the policy language requiring any specific date to be used, and noted that a very late trigger date could render the coverage illusory since insurers had stopped issuing policies by that point. (*Ibid.*) That analysis has no applicability to the issues here.

*Tyco Internat. Ltd.* (2013) 919 F.Supp.2d 439, 461 ["interpretation of an insurance contract is a question of law for the court to decide"; broad exclusion did not mean policy was illusory because some claims would be covered].) Further, as French Laundry admits, courts in other jurisdictions state they look only to the policy language and governing law in resolving illusory claims. (FL Br. 29.)

In attempting to defend the Court of Appeal's approach, French Laundry relies on the legal principles governing an insured's late notice of a claim. (FL Br. 20.) Under California law, a lack of timely notice can support a claim denial only if the insurer was prejudiced by the delay, and a prejudice analysis generally depends on facts showing the extent of the harm from the delay. (*Pitzer College v. Indian Harbor Ins. Co.* (2019) 8 Cal.5th 93, 101, 105.) French Laundry says this Court should apply this prejudice analysis to an evaluation of an illusory coverage claim. There is no sound basis to do so. A factual prejudice analysis is materially different from the legal question about the meaning and scope of insurance policy terms.

## IV. The Court need not assess the "plausibility" of the scenarios where the Limited Virus Coverage would apply

Like plaintiffs' brief, the central thrust of United Policyholders' amicus brief is an attempt to draw the Court into

the speculative and theoretical debate about when, where, and how a virus could and would cause damage at John's Grill.

The Court need not and should not take this bait. Regardless of how "plausible" it is for a virus to cause physical loss or damage to John's Grill's property, it is undisputed that the policy provides material coverage for a wide range of other perils including fire, water, and wind, and the Limited Coverage itself provides material coverage for loss or damage from bacteria, rot, and fungus. (ABOM 25.) In other words, there is no question that John's Grill has received significant material coverage in exchange for its policy premium.

Amici urge the Court to consider each peril in the Limited Coverage individually, but no California court has engaged in this type of a peril-by-peril evaluation in considering an illusory coverage argument. (OBOM 39-44; RBOM 25-32.) And the federal courts have refused to expand the illusory coverage doctrine in this manner, finding no reasoned basis to do so. (RBOM 27-28.) Notably, neither amici nor plaintiffs cite *any case* – other than the unpublished *Great Northern* district court case from Pennsylvania – holding that each peril in a multi-peril provision must have a realistic possibility of being triggered before the Court will enforce the provision as written.

Even if the Court were to consider the plausibility of having covered virus damage at John's Grill, amici mischaracterize the relevant circumstances. United Policyholders suggests the chance of covered virus damage is inconceivable, arguing "Sentinel ignores the distinction between a harm that occurs rarely (e.g., a

lightning strike) and a harm that is so rare that its existence cannot even be conceived of by a reasonable insured." (UP Br. 22, italics omitted.) United Policyholders suggests that while coverage for a rarely occurring lighting strike is permissible (and, presumably, coverage that insureds *want* in their policy), coverage for damage from a virus resulting from a specified cause is so rare as to be inconceivable and thus illusory.

United Policyholders is simply wrong here. According to the CDC's "National Outbreak Reporting System," there were 22,463 cases of norovirus reported to the CDC at sit-down restaurants like John's Grill from 2011 to 2021. (Centers for Disease Control and Prevention, *National Outbreak Reporting System Dashboard* <https://wwwn.cdc.gov/norsdashboard/> [as of Jan. 19, 2024] [filtering for Etiology: Norovirus and Setting: Restaurant – Sit down].) Norovirus is the leading cause of food-borne illness in the United States, and outbreaks can bring nationwide negative publicity for restaurants, so John's Grill has almost certainly "conceived of" the risks of a norovirus outbreak at its premises – and indeed, John's Grill has presumably set up extensive protocols in an attempt to avoid norovirus, Hepatitis B, and similar virus outbreaks. (Centers for Disease Control and Prevention, *Common Settings of Norovirus Outbreaks* <https://www.cdc.gov/norovirus/outbreaks/common-settings.html> [as of Jan. 19, 2024].)

Of course, wiping down surfaces or cleaning equipment is not covered, as described in the merits brief here and in Vigilant's briefs in *Another Planet Entertainment v. Vigilant Ins. Co.* (No.

S277893). But norovirus can contaminate seafood, leafy greens, fruit, and indeed "any food served raw or handled after being cooked" (Centers for Disease Control and Prevention, *Common Settings of Norovirus Outbreaks*, *supra*), and if these were contaminated they could be covered as lost stock or business property when they need to be destroyed.

The policy's Virus Exclusion provides that most virus damage is excluded from coverage, so if a sick worker spread norovirus around the restaurant any loss or damage to property would generally not be covered. But one of the specified causes of loss that triggers the Limited Coverage is broken pipes that cause the "accidental discharge or leakage of water." (2AA 316, ¶ 19(c).) "Food, water, and surfaces contaminated with norovirus" can all spread norovirus. (Centers for Disease Control and Prevention, *Common Settings of Norovirus Outbreaks*, *supra*.) If contaminated water from broken pipes spread norovirus, any resulting physical loss or damage might be covered by the Limited Coverage.

## V. United Policyholders' request for a remand is improper and unnecessary

United Policyholders asks the Court to remand for discovery on the illusory coverage issue, even though plaintiffs did not request a remand or additional discovery in their Answer Brief. "[T]he rule is universally recognized that an appellate court will consider only those questions properly raised by the appealing parties. Amicus curiae must accept the issues made and propositions urged by the appealing parties, and any

additional questions presented in a brief filed by an amicus curiae will not be considered." (*Younger v. State of California* (1982) 137 Cal.App.3d 806, 813-814, citations and internal quotation marks omitted; Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2023) ch. 9-D, ¶ 9:210.1, ch. 13-C, ¶ 13:166.2.)

As United Policyholders notes (UP Br. 30, fn. 9), plaintiffs argued to the Court of Appeal that the question of illusory coverage was inappropriate for resolution on demurrer. But after they prevailed in that court, plaintiffs omitted this argument from their briefs to this Court. Given this strategic choice, the Court should not entertain amici's request for a remand even if plaintiffs were to belatedly adopt it. (*Younger*, *supra*, 137 Cal.App.3d at p. 813 [rejecting as untimely party's attempt to adopt argument in their reply brief after amici raised it].)

In any event, a remand is inappropriate and unnecessary. None of the California cases that United Policyholders cites (UP Br. 34-35) suggests that an illusory coverage issue *cannot* be resolved on demurrer. Rather, in those cases the issue appears not to have been raised until a later stage. Here, Sentinel successfully moved for a demurrer, and plaintiffs effectively concede that demurrer was proper unless the illusory coverage doctrine applies.

Amicus suggests that the illusory coverage decision necessarily requires discovery about whether the clause at issue "affords a sufficiently realistic prospect of protection." (UP Br. 30). This has never been the law in California. Generally, the

interpretation of an insurance contract presents a question of law, and this same rule should apply to the resolution of illusory claims. (E.g., *Perdue v. Crocker Nat. Bank* (1985) 38 Cal.3d 913, 923 [rejecting illusory contract argument at demurrer]; *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 808 [same]; accord, *Continental W. Ins. Co. v. Paul Reid, LLP, GPS, Inc.* (Wis.Ct.App. 2006) 292 Wis.2d 674, 678-679 ["Whether an insurance policy is illusory or ambiguous involves a question of law that we review independently"].)

United Policyholders cites only a single case that held a factfinder should decide the illusory coverage issue, the unpublished Pennsylvania district court case discussed in Sentinel's reply. (*Great Northern*, *supra*, 2008 WL 20483544, at *7.) That holding has never been followed and was poorly reasoned. (RBOM 27-29.) The California Supreme Court should not follow it.

United Policyholders cites two other cases for the related argument that the illusory coverage decision requires discovery and factual analysis, but those cases do not support its position either. (UP Br. 35-36; see *Casey*, *supra*, 846 N.W.2d at pp. 796, 798 [noting issue whether a repair was in furtherance of insured's commercial interest was a "fact-intensive inquiry," but interpreting the meaning and scope of the disputed policy provision as "a question of law" based on the policy language]; *Pressman*, *supra*, 574 A.2d at pp. 759-760 [court's interpretation of "obviously ambiguous" exclusion based on court's review of

specific language in insurance policy].) Amicus's request for a remand is irrelevant and unnecessary.

## VI. Amici's references to "public policy" do not support their points

Finally, many of amici's cited authorities expressly based their decision to apply the illusory coverage doctrine on "public policy" considerations. California does not recognize public policy as a basis for rewriting insurance policies. (See *Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1077 ["[i]n rewriting the coverage provision to conform to their notions of sound public policy, the trial court and the Court of Appeal exceeded their authority"]; *Underwriters of Interest v. ProBuilders Specialty Ins. Co.* (2015) 241 Cal.App.4th 721, 729; *Forecast Homes*, *supra*, 181 Cal.App.4th at p. 1482.) And there is no public policy recognized by the Legislature requiring insurers to compensate businesses for COVID losses.

To the contrary, expanding the illusory coverage doctrine as plaintiffs and amici propose would *undermine* public policy by giving courts new license to rewrite unambiguous insurance contracts, leading to uncertainty in the law and disruption of insurance markets in California. Further, as amicus APCIA shows, expansive application of the illusory coverage doctrine would mean any insurer issuing a policy in California would need to assess every mention of coverage in their policy to ensure there was a realistic chance of that coverage benefitting each particular insured. That would lead insurers to either raise premiums or reduce coverage. (APCIA Br. 14-18.) The Court should not

judicially transform a limited doctrine into a broad directive to rewrite insurance contracts contrary to their terms.

## Conclusion

Amici have added little to the analysis; the illusory coverage doctrine does not apply here for all the reasons explained above and in Sentinel's merits briefs. And neither amici nor plaintiffs provide any serious argument that plaintiffs suffered physical loss or damage under the terms of the policy, which is an independent reason for reversal. This Court should reverse the Court of Appeal's decision overturning the order sustaining Sentinel's demurrer, and affirm the judgment in all other respects.

Respectfully Submitted,

January 22, 2024

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**Certificate of Word Count**

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Dated: January 22, 2024

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- **Consolidated Answer Brief to Amici Curiae Briefs**

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San Francisco, CA 94102
*Trial Judge*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 22, 2024.

/s/ Stacey Schiager
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**STATE OF CALIFORNIA**
Supreme Court of California

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