No. S278481

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOHN'S GRILL, INC., *et al.*,
Plaintiffs and Appellants,

v.

THE HARTFORD FINANCIAL SERVICES GROUP, INC., *et al.*,
Defendants and Respondents.

After a published decision by the Court of Appeal, First Appellate District, Division Four, Case No. A162709, affirming in part and reversing in part a judgment entered by the Superior Court for the County of San Francisco, Case No. CGC-20-584184, the Hon. Ethan P. Schulman presiding

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ANSWER TO PETITION FOR REVIEW

Nanci E. Nishimura (SBN 152621)
nnishimura@cpmlegal.com
*Brian Danitz (SBN 247403)
bdanitz@cpmlegal.com
Andrew F. Kirtley (SBN 328023)
akirtley@cpmlegal.com
COTCHETT, PITRE & McCARTHY, LLP
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: (650) 697-6000
Fax: (650) 697-0577

Attorneys for Plaintiffs-Appellants:
John's Grill, Inc., and John Konstin

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

The Court should deny the Petition for Review because the insurance policy provisions at issue are highly unusual, are offered by only one property insurer (Hartford companies), and the coverage at issue is limited to $50,000. Additionally, the Court of Appeal correctly applied the illusory coverage doctrine by surgically striking the one condition at issue, and by making clear that all the other conditions of obtaining coverage remain in effect. The decision below was unanimous and consistent with precedent.

II. ISSUES PRESENTED

This first-party insurance coverage action asks whether insured John's Grill (a San Francisco restaurant) is entitled to any coverage under an endorsement titled "Limited Fungi, Bacteria or Virus Coverage" ("Limited Virus Coverage"), which promises a maximum of 30 days of business interruption coverage up to a $50,000 limit. The Superior Court sustained petitioner Sentinel Insurance Company's ("Sentinel") first demurrer without leave to amend, and a unanimous Court of Appeal decision reversed based on legal error (i.e., holding that one of the four conditions for obtaining the Limited Virus Coverage is unenforceable because it renders the coverage illusory) and abuse of discretion (in denying leave to amend). *See John's Grill, Inc. v. Hartford Fin. Servs. Grp., Inc.*

(2002) 86 Cal.App.5th 1195, 1216, 1220 *as modified* (Jan. 23, 2023) ("*John's Grill*").

The Limited Virus Coverage endorsement is unusual. It appears only in Hartford policies offered by Sentinel and other Hartford affiliates, and its provisions are unique in the industry, for multiple reasons. One is that 98% of commercial property policies require but do not further define "direct physical loss of or damage to property" (or similar language), whereas the Limited Virus Coverage here expressly defines that phrase as "including the cost of removal of the … virus." *See id.* at 1212 (holding this language is "capacious enough to include cleaning the surfaces of the property"). The endorsement is also poorly drafted; the Court of Appeal found it was "indecipherable when applied to viruses." *Id.* at 1221.

The issues presented are:

1. Whether this Court should review a unanimous Court of Appeal decision about an "indecipherable" Limited Virus Coverage endorsement that is used by only one major insurer, where the outcome turns on provisions that are unique in the industry?

2. Whether the Court of Appeal erred in holding that Sentinel could not defeat a well-pleaded illusory coverage argument by offering the court only "freakish" and "oddball" hypothetical scenarios, based on "unsubstantiated speculation[] untethered to the insured's actual business circumstances," of when coverage might exist—such as Sentinel arguing

that the Limited Virus Coverage is not illusory because a rural pig farmer could obtain coverage if his insured swine herd were infected by a virus due to a tornado picking up infectious pigs from another property and carrying them onto his farm?

III. STATEMENT OF THE CASE

A. Key Policy Provisions

The policy at issue is a "Spectrum Business Owner's Policy" (the "Policy") issued by Sentinel. AA 262-483 (Policy). The Policy has a one-year term, from November 1, 2019, to November 1, 2020. AA 262, 270. The Policy contains business interruption coverage, including coverage for lost business income and extra expense, up to a $4 million limit of insurance. AA 273 (declarations); AA 392-93 (business interruption coverage endorsement titled "Actual Loss Sustained Business Income & Extra Expense - Specified Limit Coverage," which modifies business interruption coverage provisions in the "Special Property Coverage Form" at AA 301-302).

With respect to losses caused by virus, however, the Policy provides only limited coverage, including 30 days of business interruption coverage, up to a $50,000 limit of insurance. AA 272 (declarations); AA 395-97 (the "Limited Fungi, Bacteria or Virus Coverage" endorsement). The Limited Virus Coverage is presented in the Policy declarations as follows:

PROPERTY OPTIONAL COVERAGES APPLICABLE TO THIS LOCATION	LIMITS OF INSURANCE
* * *	
LIMITED FUNGI, BACTERIA OR VIRUS COVERAGE: **FORM SS 40 93** **THIS IS THE MAXIMUM AMOUNT OF INSURANCE FOR THIS COVERAGE, SUBJECT TO ALL PROPERTY LIMITS FOUND ELSEWHERE ON THIS DECLARATION.**	$ 50,000
INCLUDING BUSINESS INCOME AND EXTRA EXPENSE COVERAGE FOR:	30 DAYS

AA 272. The endorsement reiterates the $50,000 coverage limit, and references the business income and extra expense coverage (which the endorsement refers to as "Time Element Coverage"). AA 396-97 (§§ B.1.c, B.1.f). This Limited Virus Coverage endorsement, which is copyrighted "2005, The Hartford," is used by only Hartford affiliates, such as Sentinel. AA 395-97; *John's Grill*, 86 Cal.App.5th at 1225 n.18.

The endorsement's terms provide that obtaining the Limited Virus Coverage requires the insured to meet four conditions. Those conditions are that the insured not only suffer "[1] loss or damage[1] [2] by … virus," but also that the virus itself must be "[3] *the result of* … [a] 'specified cause of

[1] The endorsement goes on to expressly define "loss or damage" as "Direct physical loss or direct physical damage to Covered Property … *including the cost of removal of the … virus*." AA 396 (§ B.1.b) (emphasis added). The Court of Appeal held that the emphasized phrase is "capacious enough to include cleaning the surfaces of the property." *John's Grill*, 86 Cal.App.5th at 1212; *see generally id.* at 1214-16 (analyzing the "loss or damage" condition of obtaining coverage).

loss'[2] other than fire or lightning" or an "Equipment Breakdown Accident … to Equipment Breakdown Property,"[3] and that "[4] all reasonable means were used to save and preserve the property from further damage …." AA 396 (§§ B.1.a, B.1.b) (brackets, footnotes, and emphasis added). This litigation has focused on the first and third conditions.

It is only the third condition (concerning "specified cause of loss") that John's Grill has ever alleged, and that the Court of Appeal agreed, renders illusory Sentinel's promise of providing John's Grill Limited Virus Coverage. *See* AA 65-66, 95-97 (FAC ¶¶ 3, 128-31); *John's Grill*, 86 Cal.App.5th at 1212, 1220-24 (holding the third condition only "is unenforceable under the illusory coverage doctrine"). Thus, Sentinel mischaracterizes the decision below when it argues that the Court of

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[2] A "specified cause of loss" is defined 80 pages earlier in the Policy (without the endorsement or the Policy providing any indication of where to find it) as "Fire, lightning; explosion, windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage." AA 316; *accord John's Grill*, 86 Cal.App.5th at 1213.

[3] "Equipment Breakdown Accident" is defined 100 pages earlier in the Policy as "[m]echanical breakdown," "[a]rtificially generated electric current," "[e]xplosion of [certain] steam [equipment]," or damage to steam equipment or water-heating equipment from an internal condition. AA 295. "Equipment Breakdown Property" is defined as Covered Property that is "built to operate under vacuum or pressure, other than weight of contents, or used for the generation, transmission or utilization of energy," subject to numerous exceptions. AA 295; *accord John's Grill*, 86 Cal.App.5th at 1213-14 (providing a paraphrased version of these definitions).

Appeal "decided to *ignore* the [Limited Virus Coverage's] conditions to coverage and hold that Plaintiffs are entitled to coverage anyway," and insinuates that the Court of Appeal "eras[ed] the [Limited Coverage's] conditions to create unlimited coverage." Petition for Review ("Pet.") at 11, 14 (emphasis in original).

The endorsement further provides that Sentinel will not pay for any losses "caused directly or indirectly by … virus" beyond the Limited Virus Coverage's $50,000 limit of insurance—in other words, such losses are excluded from coverage. AA 395 ("We will not pay for loss or damage caused directly or indirectly by any … [p]resence, growth, proliferation, spread or any activity of … virus. … This exclusion does not apply: (1) When … virus results from fire or lightning; or (2) To the extent that coverage is provided in the Additional Coverage – Limited Coverage for 'Fungi', Wet Rot, Dry Rot, Bacteria and Virus" [which begins at the top of the subsequent page, AA 396]). The parties to this litigation have often referred to this provision as the Policy's "virus exclusion."

B. Sentinel's Denial of John's Grill's Claim

On March 19, 2020, in the first days of the Covid-19 pandemic, John's Grill filed a business interruption claim with Sentinel. AA 86 (FAC ¶ 77). A few weeks later, Hartford and Sentinel denied the claim by letter dated April 6, 2020. *See* AA 176-82 (FAC, Ex. G). In the letter, Sentinel states that it is denying John's Grill's claim under the Limited Virus

Coverage because John's Grill did not meet the third coverage condition: "As we understand your loss, the virus did not result from a specified cause of loss; therefore, there is no coverage for your claim based on the limited coverage for virus." AA 182. Sentinel also denied the claim under the Policy's virus exclusion. AA 181.

C. Procedural History

1. Superior Court Proceedings

On April 15, 2020, John's Grill filed suit against Sentinel in the Superior Court, County of San Francisco. *See* AA 12-61 (Complaint).[4] In October 2020, before any defendant responded, John's Grill filed the operative Amended Complaint ("FAC"). AA 62-182. The FAC brings seven causes of action, including those for breach of contract, bad-faith denial of insurance claim, violations of the Unfair Competition Law (Cal. Bus. & Prof. Code § 17200, *et seq.*), and declaratory relief. *Id.*

In the FAC, John's Grill specifically alleges that the Limited Virus Coverage's third condition (commonly referred to by the parties and the Court of Appeal as the "specified cause of loss" condition, even though it also includes an "Equipment Breakdown Accident" prong) renders the

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[4] John's Grill also sued its insurance broker and the Hartford Financial Services Group, Inc. (Sentinel's parent company), but neither are currently part of the case. *See John's Grill,* 86 Cal.App.5th at 1203 n.3, 1206 (noting John's Grill chose not to appeal the dismissal of the broker, and affirming the Superior Court's dismissal of Hartford).

Limited Virus Coverage illusory because it is actually or virtually impossible to satisfy. AA 65-66, 95-97, 101 (FAC ¶¶ 3, 128-31, 159).[5] The FAC alleges that John's Grill would otherwise be entitled to the Limited Virus Coverage due to the Covid-19 virus being in, on, and around its property, including "physical droplets containing COVID-19" being "suspended in the air" and landing on surfaces, and thereby rendered its business premises "unusable" due to the "substantial risk of people getting sick, transmitting infection to others, and possibly dying as a result." AA 75, 77, 84 (FAC ¶¶ 39, 43, 72); *accord John's Grill*, 86 Cal.App.5th at 1204.

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[5] *See, e.g.*, AA 65-66 (FAC ¶ 3) ("[T]he Policy specifically includes **Limited Virus Coverage** that Plaintiffs paid for and that is set forth prominently in the Policy Declarations. Located deep within the more than 200 pages of the Policy, however, is an absurd coverage requirement that renders this coverage illusory. The absurd coverage requirement provides that Insurance Defendants only have to pay out a claim under the Limited Virus Coverage if the policyholder's loss (e.g., property damage, property loss, or lost business income) was caused by a virus that was itself caused—impossibly —by explosion; windstorm; hail; smoke; aircraft; vehicles; riots; civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage; or an equipment breakdown accident. Simply put, these are not the kinds of things that cause a virus. The fact that this coverage requirement is impossible to satisfy renders the Limited Virus Coverage illusory." [emphasis in original]); AA 97 (FAC ¶ 130) (similar); AA 97 (FAC ¶ 131) ("Defendants knew or reasonably should have known all the foregoing about the Limited Virus Coverage's aforementioned absurd coverage requirement when they drafted, approved, issued, and sold the Limited Virus Coverage …. Additionally, upon information and belief, Defendants have paid out little if any money to policyholders over the years for claims under the Limited Virus Coverage ….").

In December 2020, Sentinel filed a demurrer to the FAC, arguing the Limited Virus Coverage is not illusory and that John's Grill simply does not meet the conditions of coverage. *See* AA 248-52. Sentinel relegated discussion of the Limited Virus Coverage's first condition (i.e., the "loss or damage" requirement), both in its demurrer and reply brief, to a footnote. *See* AA 248 n.6 (demurrer); AA 660 n.4 (reply).

In opposition, John's Grill argued that its FAC adequately "alleges that it meets all the elements or requirements for the Limited Virus Coverage … except for the … one requirement [i.e., the third coverage condition] that … is factually impossible to satisfy and, thus, renders the Limited Virus Coverage illusory." AA 621 (citing FAC ¶¶ 3, 130, 159). "For over a decade," John's Grill added, "it appears that Defendants have been marketing and selling to John's Grill and thousands of other policyholders Limited Virus Coverage that, because of this coverage requirement, will never cover a loss." AA 621 (referencing FAC ¶¶ 3, 131).[6]

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[6] Interestingly, Sentinel has never disputed or responded, whether by proffers of its counsel or otherwise, to John's Grill's repeatedly allegations, on information and belief, that Hartford and Sentinel have never paid out a claim for loss or damage caused by virus under the Limited Virus Coverage. *See* AA 66, 97 (FAC ¶¶ 3, 131); AA 621, 623 (demurrer opposition); Appellants' Opening Br. at 39; Appellants' Reply Br. at 22; *see also* Reporter's Tr. at 20:19-25 (demurrer hearing on Feb. 10, 2021) ("MR. KIRTLEY: … We have alleged that, upon information and belief, this limited virus coverage has never paid out a claim in the fifteen years

In February 2021, the Superior Court heard the matter and disposed of the case by adopting in full Sentinel's proposed order sustaining the demurrer without leave to amend. AA 743-47. Judgment was entered the following month, and John's Grill timely appealed. AA 778-79; AA 807.

2. Court of Appeal Proceedings

Before the First District Court of Appeal (Division 4), the parties briefed the question of whether the Limited Virus Coverage's "specified cause of loss" provision rendered coverage illusory. *See generally* Appellants' Opening Br. at 26-39 (Aug. 5, 2021); Respondents' Br. at 35-42 (Dec. 17, 2021); Appellants' Reply Br. at 15-22 (Mar. 7, 2022). The parties also addressed the question of whether John's Grill adequately had alleged it suffered "loss or damage." *See* Respondents' Br. at 44-46; Appellants' Reply Br. at 23-35.[7]

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that it has existed … [¶] THE COURT: To your client – to your client as an insured or to any insured? [¶] MR. KIRTLEY: To any insured ….").

[7] *See also* Appellants' Reply Br. at 23 n.3, 26 (noting the Limited Virus Coverage expressly defines "loss or damage" as "including the cost of removal of the … virus" [citing AA 396]); Oral Arg. at 13:20-13:33, 13:51-15:30, 15:47-16:15 (Sept. 29, 2022), *available at* https://jcc.granicus.com/player/clip/3120 (JUSTICE POLLAK: "What about the issue of whether or not there is a loss or damage to the property?" MR. KIRTLEY: "… [T]here's one big point I want to make. … [I]n the context of the Limited Virus Coverage, this is on Appendix 396, it defines it as expressly 'including the cost of removal of the fungi, wet rot, dry rot, bacteria or virus.' … [W]hich is to say that in the context of the Limited Virus Coverage, it includes cleaning, it includes remediation, it includes 'removal' because that's how the insurer has defined the term 'direct physical loss or direct physical damage.' It defined it as including 'the cost

On November 8, 2022, the Court of Appeal requested supplemental briefing on how Paragraph B.1.f of the Limited Virus Coverage endorsement (*see* AA 396-97), which refers to the availability of "Time Element Coverage," related to John's Grill's business interruption claims. The parties filed their respective supplemental briefs on November 21, 2022. John's Grill's supplemental brief argued that the referenced Paragraph B.1.f merely operationalized the Policy declarations' representation that the Limited Virus Coverage "INCLUDE[ES] BUSINESS INCOME AND EXTRA EXPENSE COVERAGE FOR: 30 DAYS" (AA 272), which John's Grill has referenced throughout the litigation. *See, e.g.*, AA 101 (FAC ¶ 159); AA 625, 627 (demurrer opposition); Appellants' Opening Br. at 27, 36, 38; *contra* Pet. at 22 (Sentinel alleging "the Panel ordered the parties to file supplemental briefs addressing a new theory of coverage which Plaintiffs, to that point, had never even mentioned, let alone pleaded").

On December 27, 2022, the Court of Appeal issued a unanimous decision in favor of John's Grill on the illusory coverage issue. *John's Grill*, 86 Cal.App.5th at 1228. Although the parties had a filed on Notice of Settlement and Stipulation of Dismissal with the Court of Appeal two

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of removal of the … virus.' … [I]f one has dug into the case law much about physical damage or loss … that distinguishes all of those cases that are looking at policies where physical damage or loss is not defined in this way or, indeed, defined at all.").

weeks earlier on December 12, the Court of Appeal explained in its decision that dismissal was not mandatory but discretionary under California Rule of Court ("Rule") 8.244(c)(2), and that the Court of Appeal had decided to "decline to dismiss at this late stage in the appellate proceedings and proceed to file our opinion" based on its conclusion that the appeal "raises issues 'of continuing public interest which are likely to recur.'" *Id.* at 1205 (quoting *Bay Guardian Co. v. New Times Media LLC* (2010) 187 Cal.App.4th 438, 445, n.2). The Panel reversed the judgment as to Sentinel,[8] and "remanded for further proceedings, if any are warranted following the reported settlement." *Id.* at 1128; *see also* Respondents' Answer to Post-Decision Amicus Br. of United Policyholders at 2 (Jan. 20, 2023) (Sentinel disclosing that the parties' settlement agreement "was expressly conditioned upon the [Court of Appeal's] dismissal of th[e] appeal," and "[t]hus, it is no longer the case that the parties have reached a settlement" [internal quotation marks omitted]).

Sentinel did not file a petition for rehearing, but instead proceeded directly to filing the Petition for Review on February 3, 2023. If this Court were to deny the Petition, this litigation would proceed in the Superior Court by John's Grill filing a further amended complaint. *See John's Grill*,

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[8] The Court of Appeal also affirmed the Superior Court's entry of judgment in favor of Hartford, *John's Grill*, 86 Cal.App.5th at 1205 (not certified for publication), but no party has sought review of that aspect of the decision.

86 Cal.App.5th at 1205, 1216 (holding that the Superior Court "erred in sustaining Sentinel's demurrer without leave to amend," and that John's Grill "should have been given leave to amend"). The litigation would then focus on whether John's Grill meets the remaining three conditions for obtaining the Limited Virus Coverage and, if so, how much coverage John's Grill can prove it is entitled to (subject to the Limited Virus Coverage's $50,000 annual limit of insurance).

IV. LEGAL STANDARD

A. Orders Sustaining Demurrers Without Leave to Amend

Unless there is no "reasonable possibility that the defect [in a complaint] can be cured by amendment," it is reversible abuse of discretion for a trial court to sustain a demurrer without leave to amend. *Brown v. Los Angeles Unified Sch. Dist.* (2021) 60 Cal.App.5th 1092, 1103; *see also* The Rutter Group, CAL. PRAC. GUIDE CIV. PRO. BEFORE TRIAL, Ch. 7(I)-A (when a demurrer is sustained, "[c]ourts are very liberal in permitting amendments, not only where a complaint is defective in form, but also where substantive defects are apparent."). This is particularly true where, as here, the court denies leave to amend upon sustaining the *first* demurrer filed in the case. *See Tarrar Enters., Inc. v. Assoc. Indem. Corp.* (2022) 83 Cal.App.5th 685, 688-89.

B. Interpretation of Insurance Contracts

The interpretation of insurance policies is generally a question of law. *Waller v. Truck Ins. Exch., Inc.* (1985) 11 Cal.4th 1, 18. If the policy language "is clear and explicit, it governs." *Yahoo Inc. v. Nat'l Union Fire Ins. Co.* (2022) 14 Cal.5th 58, 67 ("*Yahoo*") (quoting *Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495, 501); *see also* Cal. Civ. Code § 1638 ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."). If, however, "the terms are ambiguous [i.e., susceptible of more than one reasonable interpretation], we interpret them to protect the objectively reasonable expectations of the insured." *Yahoo*, 14 Cal.5th at 67 (brackets in original; internal quotation marks omitted). If this fails to resolve the ambiguity, then courts apply "the rule that ambiguities are to be resolved against the insurer." *Id.*

"When coverage is in dispute, the initial burden is on the insured … to prove that its claim falls within the scope of potential coverage." *Id.* at 68. "If the insured establishes that the policy provides at least the potential for coverage, the burden shifts to the insurer … to show the claim falls within one of the policy's exclusions." *Id.* "In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*."). *Id.* (emphasis in original) (quoting *Liberty*

Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co., Inc. (2018) 5 Cal.5th 216, 222).

C. Grounds for Supreme Court Review

Under Rule 8.500(b), this Court "may order review of a Court of Appeal decision," in relevant part, "[w]hen necessary to secure uniformity of decision" or "to settle an important question of law." Cal. R. Ct. 8.500(b)(1); *accord* Pet. at 43.

V. ARGUMENT

The Petition for Review should be denied for two main reasons. First, the potential impact of taking the case is minimal because the Limited Virus Coverage endorsement is used only by Hartford affiliates, exposes those insurers to limited liability, contains multiple provisions that are unique in the industry, and is plagued by poor drafting which the Court of Appeal found rendered it indecipherable when applied to viruses. *Infra* § V.A. Second, the decision below was careful, well-reasoned, and correctly decided, and there are no compelling grounds to grant review. *Infra* § V.B.

A. The Petition Should Be Denied Because the Potential Impact of the Case Is Minimal.

1. The Limited Virus Coverage is used only by Hartford affiliates, and it exposes them to minimal liability.

Many insurance policies, including commercial property policies, use standardized coverage forms and endorsements prepared by trade organizations, such as the Insurance Services Office ("ISO"). *See, e.g.*, *Hartford Fire Ins. Co. v. California* (1993) 509 U.S. 764, 772 (explaining the ISO is an "association of approximately 1,400 domestic property and casualty insurers" that "develops standard policy forms and files or lodges them with each State's insurance regulators").

For example, in Covid-19 business interruption litigation, by far the most common "virus exclusion" that courts in California and around the country have encountered is the 2006 ISO commercial property endorsement titled "Exclusion of Loss Due to Virus or Bacteria" (Form CP 01 40 07 06). *See, e.g.*, *Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.* (2022) 77 Cal.App.5th 753, 756, *rev. denied* (Aug. 10, 2022) ("*Musso & Frank*") (policy containing the 2006 ISO virus exclusion).[9] A

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[9] *See also Marina Pacific Hotel and Suites, LLC v. Fireman's Fund Ins. Co.* (2022) 81 Cal.App.5th 96, 112-13 (describing the 2006 ISO virus exclusion's history, widespread use, and "all-encompassing" language); *Inns-by-the-Sea v. California Mut. Ins. Co.* (2021) 71 Cal.App.5th 688, 708, *rev. denied* (Mar. 9, 2022) (same); Charles M. Miller, et al., *Covid-19 and Business-Income Insurance: The History of "Physical Loss" and What Insurers Intended It to Mean* (Fall 2022) 57 TORT TRIAL & INS. PRAC. L.J.

ruling interpreting the language of such an endorsement that is widely used in the industry could have a correspondingly broad impact.[10]

Here, by contrast, the Limited Virus Coverage endorsement is used by only a single insurer (i.e., Sentinel and other Hartford affiliates). *See John's Grill*, 86 Cal.App.5th at 1225 n.18; *see also* AA 395-97 (the endorsement is copyrighted "2005, The Hartford"). Moreover, the Limited Virus Coverage is subject to sharply reduced $50,000 limit of insurance, which, at least in the case of John's Grill, is one-eightieth (or 1.25%) of the regular $4 million limit for business interruption coverage. AA 272-73.

Based on this, Sentinel greatly exaggerates the purported market-disrupting consequences of the decision below. *See, e.g.*, Pet. at 13 (arguing that the "aggressive and unprecedented" decision below "could wreak havoc on the California insurance market if left standing"). Such exaggeration is especially apparent when one considers that Hartford and its affiliates could, for purposes of all future policies, simply rewrite the

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675, 693-95, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4130730 (same); ISO Circular, *New Endorsements Filed To Address Exclusion of Loss Due to Virus or Bacteria* (July 6, 2006), *available at* https://perma.cc/NXM6-36HM (ISO announcing its 2006 virus exclusion, explaining its contents, and including a copy of the endorsement).

[10] *Cf.* National Association of Insurance Commissioners, *NAIC Covid-19 Report for 2020: Year in Review* at 23 (Feb. 16, 2021), *available at* https://content.naic.org/sites/default/files/naic-covid-19-report-update3-eoy-2020.pdf ("Our analysis of business interruption insurance nationwide showed 83% of policies have exclusions for virus, bacteria and pandemics").

endorsement to correct the issues identified by the Court of Appeal—or use a different endorsement altogether. While such changes would presumably cause Hartford and Sentinel to incur some expense and inconvenience, these are the routine cost of doing business as a major insurer. It is not a reason to grant review.

2. The Limited Virus Coverage's relevant provisions are unique in the industry.

An even more compelling reason for denying review is that the case turns on the interpretation of highly unusual provisions that are unique to the Limited Virus Coverage in at least two ways.

First, most standard insurance policies either exclude losses caused by virus (i.e., contain a virus exclusion) or do not exclude such losses. *Cf.*, *supra*, note 10. By contrast, Sentinel's Limited Virus Coverage takes a hybrid approach. It provides an affirmative grant of coverage for losses caused by virus up to a $50,000 limit and excludes any virus-caused losses beyond that amount. AA 272, 395-97. Thus, issues such as whether to apply the Limited Virus Coverage's exclusion before applying its grant of limited coverage, or whether instead to apply the limited coverage grant before assessing whether and to what extent the virus exclusion applies, may prove significant to the proper interpretation of this particular endorsement. *See John's Grill*, 86 Cal.App.5th at 1212, 1227-28. But

resolution of such issues is unlikely to have much of a broader legal or market impact.

Second, whereas virtually all standard property policies require "direct physical loss of or damage to property" (or similar language) but do not further define any aspect of that phrase,[11] the Sentinel endorsement here *expressly defines* the phrase as "including the cost of removal of the …virus" (AA 396 [§ B.1.b]), a phrase that the Court of Appeal held is "capacious enough to include cleaning the surfaces of the property." *Id.* at 1212. As the Court of Appeal found, the Limited Virus Coverage's "special definition" of direct physical loss or loss or damage, *id.* at 1201, 1215, 1216, 1218, 1219, makes the vast majority of Covid-19 business interruption cases addressing the issue of physical loss or damage—including all such cases from the California Courts of Appeal and the Ninth Circuit—readily "distinguishable." *Id.* at 1211.

With respect to the "*Mudpie* line of cases" that "conclude that 'direct physical loss of or damage to property' requires a 'distinct, demonstrable, physical alteration of the property,'" *id.* at 1209, the Court of Appeal held they were all distinguishable:

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[11] *Cf.* National Association of Insurance Commissioners, *NAIC Covid-19 Report for 2020: Year in Review* at 23 (Feb. 16, 2021), *available at* https://content.naic.org/sites/default/files/naic-covid-19-report-update3-eoy-2020.pdf ("Our analysis of business interruption insurance nationwide showed … 98% [of policies] require a physical loss for a claim.").

> [I]n this case, the *Mudpie* line of cases may be dealt with in a [] straightforward way: It is distinguishable. Because the Limited Fungi or Virus Coverage Endorsement adds virus-specific language to the Policy that is not present in COVID-19 business interruption insurance cases involving form language without material modification, those cases involve "very different policy provisions" and are not controlling here. *Amy's Kitchen, Inc. v. Fireman's Fund Ins. Co.* (2022) 83 Cal.App.5th 1062, 1069, 299 Cal.Rptr.3d 885 (*Amy's Kitchen*).)

Id. at 1211.

Sentinel can rail against the Court of Appeal's conclusion that the Limited Virus Coverage covering "the cost of removal of the … virus" is "broad enough to encompass simply wiping and cleaning surfaces," but that is a common-sense interpretation of the phrase that Sentinel chose to use. *Cf,* Pet. at 8, 39 (Sentinel arguing the Court of Appeal "rewrote [the Policy] to provide coverage for the cost of 'simply wiping and cleaning surfaces'"); *id.* at 41 (arguing "it is obvious that the parties did not intend there to be coverage for the cost of 'wiping and cleaning surfaces'"); *id.* at 42 ("it cannot be that 'wiping and cleaning surfaces' *itself* constitutes 'loss or damage'"). And even if the Court of Appeal's interpretation were not *mandated* by the plain meaning of the endorsement's text, it is axiomatic in California insurance law that ambiguities in policy language are generally resolved against the insurer. *Yahoo*, 14 Cal.5th at 67; *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822. If Sentinel wishes its endorsement to not cover "the cost of removal of … virus," it is free to

rewrite the endorsement for future use, but it cannot ask the courts to rewrite it with respect to policies already issued, and for which the premiums have already been paid.

3. The Limited Virus Coverage's poor drafting, which the Court of Appeal found "indecipherable," also militates against review.

The Panel found that the Limited Virus Coverage was "indecipherable when applied to viruses." *John's Grill*, 86 Cal.App.5th at 1221. Specifically, the Court of Appeal found that the third condition that John's Grill alleges is illusory—i.e., that the virus must "be the 'result of' one of a number of enumerated causes"—did not make sense because "none of the listed causes has anything to do with the biological processes that actually cause a virus." *Id.* (quoting AA 396 [§ B.1.a]). While the Panel found it could make the language make sense by *changing* it ("Only if the words are taken to refer to circumstances in which a specified cause is a vector for transmission of a virus does the language begin to make any sense"), "that is not what the words say." *Id.* "The applicable principles for interpreting insurance contracts do not compel us to resolve the ambiguity by placing a gloss on the text of the Policy, friendly to Sentinel, so that Subparagraph B.1.a. makes sense as applied." *Id.* at 1222.

In petitioning for review of the decision below, Sentinel effectively seeks a ruling from this Court that the Court of Appeal got it wrong because the Limited Virus Coverage endorsement actually makes perfect sense. It

does not. Sentinel spends dozens of pages attempting to parse and explain the endorsement's language and show how all the puzzle pieces fit together, but it never succeeds. Its arguments are strained, difficult to follow, and even occasionally illustrate precisely why the Panel found the Limited Virus Coverage so indecipherable.[12] In short, the convoluted Limited Virus Coverage is not a promising vehicle for clarifying California insurance law.

Contrary to Sentinel's recurring insinuations, the decision below is a not a consequence of a unanimous Court of Appeal panel gone rogue. *See, e.g.*, Pet. at 9 (calling Panel's interpretation of the Limited Virus Coverage endorsement "frivolous"); *id.* at 13 ("aggressive and unprecedented"); *id.* at 22 (asserting, erroneously, that the Panel injected "a new theory of coverage" into the case after oral argument); *id.* at 38 (asserting Panel "ignored the plain meaning" of the Limited Virus Coverage endorsement). Rather, it is a consequence of Sentinel selling Limited Virus Coverage with terms that are so convoluted and poorly drafted that three out of three Court of Appeal justices, after full briefing and argument (and supplemental

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[12] One of the better examples of why the Limited Virus Coverage's "specified cause of loss" requirement makes no sense as applied to virus comes from Sentinel's own Petition, in which its attempt to draft a case parenthetical to match the syntax of the Limited Virus Coverage results in the parenthetical making no sense: "… *see generally Curtis O. Griess & Sons, Inc. v. Farm Bureau Ins. Co. of Nebraska* (Neb. 1995) 528 N.W.2d 329 (***pseudorabies virus resulting from windstorm*** caused physical damage to livestock)." Pet. at 12 (emphasis added).

briefing), still found it "indecipherable." *John's Grill*, 86 Cal.App.5th at 1221.[13]

* * *

In sum, the facts that the Limited Virus Coverage endorsement is used only by Hartford affiliates, has provisions that are unique in the industry, and makes little sense as applied to viruses, all militate against granting review.

B. There Are No Compelling Reasons to Take This Case.

1. The unanimous decision below correctly applied the illusory coverage doctrine.

In addition to the decision below being unanimous and extremely careful and well-reasoned in construing unusual policy provisions, it also has the benefit of having correctly applied the illusory coverage doctrine. The Court of Appeal held that the "specified cause of loss" condition of obtaining the Limited Virus Coverage rendered that coverage little more than an "empty promise," and the condition was therefore "unenforceable under the illusory coverage doctrine." *John's Grill*, 86 Cal.App.5th at 1202; *see also id.* at 1124 (holding that, by including the specified-cause-of-loss

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[13] *See also* AA 625 n.5, 628 (demurrer opposition) (John's Grill arguing that the Limited Virus Coverage endorsement "appears to have been written originally only for fungus and mold" (which can be "the result of" a specified cause of loss), and that virus (which cannot be "the result of" a specified cause of loss) was "added later").

condition in the endorsement, "Sentinel has, 'through sweeping language,' rendered the Policy's virus coverage terms 'virtually illusory.'" [quoting *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 760]). In reaching this conclusion, the Panel carefully considered, but ultimately rejected, each of Sentinel's arguments.

First, the Panel rejected Sentinel's argument that, because the Limited Virus Coverage endorsement applied to multiple perils, the illusory coverage doctrine does not apply so long as there is a possibility of coverage under some combination of perils and specified causes of loss (e.g., wet rot caused by water damage). *See id.* at 1222. The Court rejected that because "[i]t not only flies in the face of the principle that we must give effect to all the words of the Policy," but also because "[i]nsurers cannot take in premium for a coverage grant that names a specifically covered risk—here virus contamination—and then justify denying coverage for it under all circumstances because some other risk may be covered under the same coverage grant." *Id.*; *contra* Pet. at 33 (Sentinel rehashing the same argument).

Second, the Panel rejected Sentinel's "fallback argument" that "if we squint hard enough, the Limited Virus Coverage grant, as narrowed by the Specified Causes Clause, does indeed provide for a sliver of coverage." *Id.* Throughout this litigation, Sentinel's lead example of when this sliver of coverage might exist comes from a single case, Curtis *O. Griess & Sons,*

Inc. v. Farm Bureau Ins. Co. of Nebraska (Neb. 1995) 528 N.W.2d 329 ("*Griess*"). In *Griess*, a rural policyholder contended that a tornado had picked up virus-infected pigs from another property and carried them onto his farm, resulting in loss and damage to his insured swine herd. *Id.* at 331.[14] Based largely on this one hypothetical example, Sentinel has repeatedly argued that its promise to indemnify John's Grill, a restaurant in downtown San Francisco, against losses caused by virus was non-illusory. *See, e.g.*, Pet. at 34; *see also John's Grill*, 86 Cal.App.5th at 1223 (discussing an Iowa case, on which *Griess* relied, in which insured cows were infected with a virus due to be attacked by wild animals).

The Court of Appeal, however, rejected this argument, bluntly stating: "We fail to see what these oddball scenarios have to do with this case." *Id.*; *see also id.* at 1222 (noting that Sentinel's arguments relied on "exceedingly rare, even freakish" circumstances in which coverage might exist). Citing this Court's decision in *Julian v. Hartford Underwriters*, the

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[14] Moreover, *Griess* indicates that tornado-transport may have never even been litigated or decided. *See* 528 N.W.2d at 331 (stating "Defendant does not dispute that the pseudorabies virus was transmitted to plaintiff's farm by the windstorm," and thereafter treating this as a conceded fact). But even if it had been, a purported fact does not become subject to judicial notice merely because it appears in a court opinion. Rather, a court can only use a judicial opinion to "take judicial notice of a court's action, but may not use it to prove the truth of the facts found and recited." *O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, 1405; *accord Kilroy v. California* (2004) 119 Cal.App.4th 140, 145-48; *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 885.

Panel noted that "[i]t takes more than a "a mere drafting fiction" to overcome a well-pleaded illusory coverage argument. *Id.* at 1224 (quoting *Julian v. Hartford Underwriters Ins. Co.*, 35 Cal.4th at 760); *see also id.* ("Imaginary exercises involving pigs caught in windstorms and cows encountering wild animals will not do."); *id.* at 1223 (noting that Sentinel "suggested no [] scenario in which 'Equipment Breakdown Accident' might lead to virus-caused loss or damage").

Ultimately, the Court of Appeal correctly held:

> Where an insured properly raises the issue of illusory coverage, as John's Grill has done here, unsubstantiated speculation, untethered to the insured's actual business circumstances as underwritten by the insurer, is not enough to defeat the argument. [citation] Because Sentinel has not proffered enough to demonstrate a realistic prospect of John's Grill ever benefitting from the Limited Virus Coverage based on events the parties might reasonably have anticipated during the Policy period, we agree that Sentinel has, "through sweeping language," rendered the Policy's virus coverage terms "virtually illusory."

Id. at 1224 (quoting *Julian*, 35 Cal.4th at 756).

In an attempt to overcome the well-reasoned decision below, Sentinel resorts in its Petition to repeated and inappropriate reliance on extra-record and never-previously-raised "facts" about lobsters, oysters, and decorative plants being on John's Grill's premises, and using such "facts" to argue that the Limited Virus Coverage is not illusory after all. *See* Pet. at 13 n.2, 34; *see also Lafferty v. Wells Fargo Bank* (2013) 213 Cal.App.4th 545, 566 (courts may not rely on non-record evidence, not properly the

subject of judicial notice, that contradicts the allegations of a complaint at the pleading stage); Cal. R. Ct. 8.500(c)(1) ("As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal"). This only highlights the insufficiency of Sentinel's argument and why review is unwarranted.

Sentinel also asserts that the Court of Appeal's consideration of "the insured's actual business circumstances" will "dramatically expand the scope of the illusory-coverage doctrine" and "wreak havoc on the California insurance market." Pet. at 13, 31. This greatly exaggerates the effect of the decision below, which simply requires that an insurer faced with a well-pleaded illusory coverage argument must do more than offer "freakish" scenarios such as "[i]maginary exercises involving pigs caught in windstorms and cows encountering wild animals." *John's Grill*, 86 Cal.App.5th at 1224. Contrary to Sentinel's overwrought argument, nothing about the decision requires insurers to abandon form coverage and to "tailor every policy to each particular customer's business." Pet. at 14. It simply means an insurer must do more than collect premiums for coverage that is nothing more than "an empty promise." *John's Grill*, 86 Cal.App.5th at 1202

2. Sentinel identifies no grounds for granting review under Rule 8.500(b).

Sentinel also makes little attempt to identify or explain why any factor under Rule 8.500(b) provides grounds for review. For example, Sentinel identifies no split in authority among the Courts of Appeal, because there is none. And while this Court may accept review to "settle an important question of law," the illusory coverage doctrine rarely comes up in insurance coverage disputes.

Further, this particular case arises in an obscure corner of the illusory coverage doctrine. As Sentinel repeatedly emphasizes, illusory coverage issues arise more commonly emerge in cases where application of an *exclusion* arguably renders the policy's promise of any coverage illusory. By contrast, this case involves a *condition* of coverage that renders the promised coverage illusory because the condition is actually or virtually impossible for the policyholder to satisfy. As a result, virtually all the Court of Appeal case law relied on by Sentinel arises in the former scenario involving exclusions. *See, e.g.*, Pet. at 25, 31, 32-33 (citing *Safeco Ins. Co. of Am. v. Robert S.* (2001) 26 Cal.4th 758, 764-65; *Energy Ins. Mut. Ltd. v. Ace Amer. Ins. Co.* (2017) 14 Cal.App.5th 281, 306; *Blackhawk Corp. v. Gotham Ins. Co.* (1997) 54 Cal.App.4th 1090, 1097; 2 CAL. INS. LAW DICTIONARY & DESK REF. § 12:2 (2022)).

* * *

In sum, the decision below turns on unique policy language and Sentinel's offering only far-fetched hypotheticals to respond to the illusory coverage argument. *See John's Grill*, 86 Cal.App.5th at 1222, 1223. Sentinel's disagreement with the Court of Appeal decision does not mean the sky is falling; it simply means that Sentinel might finally have to make good on their promise of paying out a maximum of $50,000 in Limited Virus Coverage to those California policyholders with Hartford policies who timely submitted Covid-19 business interruption claims, filed suit within the limitations period, and still have live claims before the courts.

VI. CONCLUSION

For the foregoing reasons, John's Grill respectfully requests that the Petition for Review be denied.[15]

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[15] John's Grill is aware that, on February 6, 2023, the U.S. Court of Appeals for the Ninth Circuit issued an Order Certifying Question to the California Supreme Court in *French Laundry Partners, LP v. Hartford Fire Ins. Co.*, which involves a similar Hartford limited virus coverage endorsement and references the *John's Grill* decision below. 58 F.4th 1305, 1306 (9th Cir. 2023), *transferred*, No. S278492 (Cal. Sup. Ct.). In the event this Court decides to take either matter (i.e., accept the Certified Question or grant the Petition), John's Grill respectfully requests that the Court also accept the other matter so that all affected parties may have the opportunity to be heard.

Respectfully submitted,

February 23, 2023 **COTCHETT, PITRE & McCARTHY, LLP**

By: */s/ Brian Danitz*
BRIAN DANITZ

Attorneys for plaintiffs-appellants John's Grill, Inc., and John Konstin

CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c), I certify that this Answer to Petition for Review, including footnotes, contains 7,080 words, as calculated by the Microsoft Word software used to prepare it.

February 23, 2023 **COTCHETT, PITRE & McCARTHY, LLP**

By: */s/ Brian Danitz*
BRIAN DANITZ

Attorneys for plaintiffs-appellants John's Grill, Inc., and John Konstin

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of California, over the age of 18 years, and not a party to this action. My business address is the Law Offices of Cotchett, Pitre & McCarthy, LLP, San Francisco Airport Office Center, 840 Malcolm Road, Suite 200, Burlingame, California, 94010. On February 23, 2023, I served the following documents:

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Anthony J. Anscombe
aanscombe@steptoe.com
STEPTOE & JOHNSON LLP
One Market Plaza
Steuart Tower, Suite 1070
San Francisco, CA 94105
Telephone: (415) 365-6700
Fax: (312) 577-1370

Tadhg Dooley
tdooley@wiggin.com
Evan Bianchi
ebianchi@wiggin.com
WIGGIN AND DANA LLP
265 Church Street
New Haven, CT 06510
Telephone: (203) 498-4400

Attorneys for Defendants-Respondents The Hartford Financial Services Group, Inc., and Sentinel Insurance Company, Ltd.

Clerk's Office
California Court of Appeal
First Appellate District (Div. 4)

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/s/ Brian Danitz
BRIAN DANITZ

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