S278481

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

AMICUS CURIAE BRIEF OF AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF THE HARTFORD FINANCIAL SERVICES GROUP, INC.

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INTEREST OF *AMICUS CURIAE*

American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto and business insurers. With a legacy dating back 150 years, APCIA promotes and protects the viability of private competition to benefit consumers and insurers. APCIA's member companies represent 63 percent of the U.S. property-casualty insurance market, including nearly 70 percent of California's commercial insurance market. APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits *amicus curiae* briefs in significant cases before federal and state courts.

Proper application of the illusory coverage doctrine has industrywide repercussions and concerns APCIA's members. The illusory coverage doctrine is concerned with whether the policy provides meaningful coverage to purchasers as a whole, not each individual policyholder's claim in isolation. If affirmed, the First District's decision - requiring each policy provision to benefit every policyholder - would upend current law by requiring illusoriness to be decided on an individual basis.[1] Accordingly, the Court's decision here will impact APCIA's members, its policyholders, and the insurance marketplace.

[1] APCIA submits that the First District was also wrong in its analysis of what constitutes "direct physical loss or property," including in its reading of the policy at issue. Having weighed in on that issue in *Another Planet*, another pending appeal before the Court, APCIA focuses its comments on the illusory-coverage issues raised in this case. *See* Amici Curiae Brief of American Property Casualty Insurance Association and National Association of Mutual Insurance Companies in Support of Respondent Vigilant Insurance Company, *Another Planet Ent., LLC v. Vigilant Ins. Co*., No. S277893 (Cal.) (Aug. 4, 2023).

APCIA seeks to fulfill the classic role of *amicus curiae* by providing greater background, context and perspective on the issues, including on how a ruling will impact the way insurance is written in the state of California.[2]

INTRODUCTION

The Court is asked to decide whether the "illusory coverage doctrine" applies to a limited coverage endorsement under a multi-line commercial insurance policy which excludes coverage for certain claims, and then carves out specified exceptions to that exclusion. (*See* 2AA 395-397 "Limited Fungi, Bacteria or Virus" Endorsement.)

The First District misconstrued the endorsement by interpreting the exclusion (¶A.2.i.) and its exceptions (¶A.2.i.2) under the limited coverage provision in reverse order to *create* coverage – thereby finding an obligation to pay for a policyholder's COVID-19-related business income losses in the absence of "direct physical loss of or damage to" property. Contrary to basic contract interpretation principles, the court then read the exceptions to the exclusion independently from the exclusion itself and from the policy as a whole. It erroneously applied the illusory coverage doctrine to the limited coverage provision even though it is undisputed that no reasonable interpretation of that provision eviscerates coverage.

Most concerning about the First District's decision, however, is its holding that the Limited Coverage Provision is unenforceable under the illusory coverage doctrine based

[2] No party or any counsel for a party in the pending appeal authorized the proposed amicus brief, in whole or in part, or made a monetary contribution intended to the fund the preparation or submission of the brief, other than the amici curiae or their members.

on this policyholder's "actual business circumstances as underwritten by the insurer." *John's Grill, Inc. v. The Hartford Fin. Serv. Grp., Inc.*, 86 Cal.App.5th 1195, 1224 (2022). Under the First District's rationale, the Limited Coverage Provision constituted an "empty promise" because the insurer did not "proffer[] 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." *Id*. *See also id*. ("unsubstantiated speculation, untethered to the insured's actual business circumstances as underwritten by the insurer, is not enough" to counter a policyholder's challenge that coverage is "illusory"). In other words, an insurer can prove that a particular coverage grant is not illusory only if it establishes that every individual policyholder had a "realistic prospect" of that particular type of loss.

The First District's analysis is wrong. It reflects a fundamental misunderstanding of the way multi-peril commercial insurance policies are written. In most cases, insurers do not specifically tailor policies to each policyholder, but rely on general forms affording coverage approved by the Insurance Commissioner. If this decision stands, insurers in California must ensure that every aspect of each policy provision is foreseeably beneficial to each individual policyholder, and cease providing limited and conditional coverages that may restore coverage for that insured in some, but not all, circumstances they encompass. In essence, the California marketplace would act like a specialized market for every risk underwritten, with significant implications for insurance affordability and availability.

The First District's improper application of the illusory coverage doctrine would require insurers to examine each policyholder's business and insurance needs to ensure that

every aspect of each coverage grant can reasonably be triggered—or risk courts determining after the fact that conditions and exclusions are unenforceable. While that kind of bespoke coverage is often sought out by Fortune 100 companies who are guided by sophisticated brokers and negotiate every term of their policies, middle market and smaller businesses rely on the availability and affordability of coverage provided by approved standard forms to meet their insurance needs. Impeding the use of standard forms by requiring an individualized assessment of the application of every policy term would upend the California insurance market, increase premiums, and potentially reduce available insurance options, to the detriment of California policyholders.

APCIA submits that the Court should reverse the decision below. This Court should make clear that the illusory coverage doctrine does not require that insurers test a condition on which an exception to an exclusion rests to ensure each particular insured will fall within every aspect of the restored coverage.

ARGUMENT

Plaintiff John's Grill, Inc. seeks coverage for COVID-19-related business income losses under a property insurance policy. John's Grill's policy covers only losses caused by "direct physical loss of or physical damage to Covered Property." AA292. Nearly 900 courts nationwide agree: COVID-19 related claims for business income losses do not meet the requirement for "direct physical loss of or physical damage" to property under insurance policies like this one. This includes nearly every U.S. Court of Appeal and the

highest courts of at least thirteen states.[3] Because the claim presented by John's Grill does not involve "direct physical loss of or physical damage to Covered Property," there is no coverage here.

Given the overwhelming consensus on direct physical loss, John's Grill tries to manufacture coverage by distorting the illusory coverage doctrine to apply to an endorsement provision that operates as an exception to the policy exclusion for loss caused by virus. It argued, and the First District agreed, that coverage under the Endorsement is illusory because it is impossible for a virus to result from one of the specified causes of loss *in the context of John's Grill's business*.

[3] *See, e.g., Legal Sea Foods, LLC v. Strathmore Ins. Co*., 36 F.4th 29 (1st Cir. 2022); *10012 Holdings, Inc. v. Sentinel Ins. Co*., 21 F.4th 216 (2d Cir. 2021); *Wilson v. USI Ins. Serv. LLC*, 57 F.4th 131 (3d Cir. 2023); *Uncork & Create LLC v. Cincinnati Ins. Co*., 27 F.4th 926 (4th Cir. 2022); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co*., 22 F.4th 450 (5th Cir. 2022); *Santo's Italian Café LLC v. Acuity Ins. Co*., 15 F.4th 398 (6th Cir. 2021); *Sandy Point Dental, P.C. v. Cincinnati Ins. Co*., 20 F.4th 327 (7th Cir. 2021); *Oral Surgeons, P.C. v. Cincinnati Ins. Co*., 2 F.4th 1141 (8th Cir. 2021); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am*., 15 F.4th 885 (9th Cir. 2021); *Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co*., 21 F.4th 704 (10th Cir. 2021); *Gilreath Fam. & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co*., No. 21-11046, 2021 WL 3870697 (11th Cir. Aug. 31, 2021); *Rose's 1, LLC v. Erie Ins. Exch*., 290 A.3d 52 (D.C. 2023); *Wakonda Club v. Selective Ins. Co. of Am*., 973 N.W.2d 545 (Iowa 2022); *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, 359 So.3d 922 (La. 2023); *Tapestry, Inc. v. Factory Mut. Ins. Co*., 286 A.3d 1044 (Md. 2022); *Verveine Corp. v. Strathmore Ins. Co*., 184 N.E.3d 1266 (Mass. 2022); *Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co*., 302 A.3d 67 (N.H. 2023); *Neuro-Commc'n Servs., Inc. v. Cincinnati Ins. Co*., 219 N.E.3d 907 (Ohio 2022); *Cherokee Nation v. Lexington Ins. Co*., 521 P.3d 1261 (Okla. 2022); *Sullivan Mgmt., LLC v. Fireman's Fund Ins. Co*., 879 S.E.2d 742 (S.C. 2022); *Crescent Hotels & Resorts, LLC v. Zurich Am. Ins. Co*., No. 211074, 2022 WL 1124493 (Va. Apr. 14, 2022); *Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co*., 515 P.3d 525 (Wash. 2022) (en banc); *Colectivo Coffee Roasters, Inc. v. Soc'y Ins*., 974 N.W.2d 442 (Wis. 2022).

I. THE ILLUSORY COVERAGE DOCTRINE DOES NOT APPLY.

The "Limited Fungi, Bacteria or Virus Coverage" Endorsement ("Endorsement")[4] at issue contains a virus exclusion that bars claims otherwise covered under the policy – *i.e.,* losses resulting from "direct physical loss of or damage" to property – if such loss was caused by a virus. (2AA 395.) The "Limited Coverage Provision" reinstates coverage for such losses if the virus results from a "specified cause of loss." (2AA 396-397.)

The illusory coverage doctrine does not apply to an unambiguous precondition to reinstate excluded coverage any more than it does to a precondition to coverage under the policy's basic insuring agreement. The First District's decision is out of line with California law, which has applied the illusory coverage doctrine only to support a narrow reading of a coverage exclusion or limitation, or where an exclusion would otherwise operate to effectively deprive the insured of *all* coverage.

First, the illusory coverage doctrine does not apply to clear conditions of coverage. This makes sense because a policyholder is not promised coverage that is "illusory" if the conditions of coverage are clear, and there is no dispute that those conditions have not been met.

The limited coverage provided in the Endorsement is expressly limited to "fungi, rot, bacteria, or virus" that results from a "specified cause of loss." A "specified cause of loss," in turn is defined as:

> Fire; lightning; explosion, windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment;

[4] The Endorsement amends the policy's "Special Property Coverage Form" (2AA 395). *See* Opening Brief on the Merits ("OBOM") at 17-18.

> sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; [and] water damage.

(2AA 316.)[5] John's Grill does not contend that COVID-19 resulted from a specified cause of loss, nor that the policy language is ambiguous. The Limited Coverage Provision establishes a precondition to reinstate coverage for physical loss or damage to property caused by a virus (*i.e.*, that the virus was caused by a specified cause of loss), and that precondition was not met. There is nothing illusory about it.

Second, the illusory coverage doctrine traditionally applies only when a broader reading of a policy exclusion would eliminate all coverage. In the policy before the Court, there is no question that the policyholder is afforded coverage in a wide array of circumstances — whenever there is physical loss or physical damage to property (where not otherwise excluded). *See* OBOM at 34-39. The Limited Coverage itself is also not illusory because *other* perils, like fungus and rot, often result from specified causes of loss, such as water damage.[6]

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[5] These are the perils traditionally included in a "named peril" policy, which covers an insured's losses to property resulting from a peril specifically named in the policy. With respect to risks excluded from coverage by the Endorsement, the Limited Coverage Provision here operates to reinstate coverage for specified risks only, similar to how a named peril policy extends coverage only to specified perils.

[6] *E.g.*, *Westside Head & Neck v. Hartford Fin. Servs. Grp., Inc.*, 526 F. Supp. 3d 727, 733 (C.D. Cal. 2021) ("There is no requirement that each peril potentially be the result of each and every specified cause of loss."); *Ultimate Hearing Sols. II, LLC v. Twin City Fire Ins. Co.*, 513 F. Supp. 3d 549, 563 (E.D. Pa. 2021), *aff'd sub nom. Wilson v. USI Ins. Serv. LLC*, 57 F.4th 131 (3d Cir. 2023) ("While it may be difficult to think of a hypothetical situation where a virus causes physical damage to a property, it is not difficult to imagine that wet rot, dry rot or fungi can cause damage that would satisfy the 'direct physical loss or direct physical damage' requirement"). Courts have also found that, while rare, a virus *can* result from a specified cause of loss, as occurred in a Nebraska Supreme Court case finding coverage when a windstorm caused insured livestock to

In an Illinois case decided earlier this week, the Appellate Court of Illinois rejected an argument that an exclusion in a commercial general liability policy rendered coverage illusory. *Nat'l Fire Ins. Co. of Hartford v. Visual Pak Co.,* No. 1-22-1160 at * 40-41 (Ill. App. Dec. 19, 2023). The court held that, although broad, the exclusion did not eviscerate coverage under the policy in its entirety, or eliminate coverage under the specific provision on which the insurer relied. The court emphasized the fundamental starting point for its analysis – that an insurance policy is not illusory simply because it provides coverage against some, but not all, possible liabilities. The court explained:

> If we stray from that doctrine, we would have to start asking such unanswerable questions as, "How broad an exclusion is too broad?" or "What percentage of the coverage can be excluded (51 percent? 80 percent?) before the coverage is deemed illusory?" And doing so will drag us into the dangerous zone of interfering with freedom of contract, for sometimes the insured knowingly obtains limited coverage, and the premiums are set accordingly.

Id. at 45.

In this case, the First District misapplied and improperly expanded the illusory coverage doctrine, applying it to an express condition which restored Limited Coverage

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become infected by a pseudorabies virus. *See Curtis O. Griess & Sons, Inc. v. Farm Bureau Ins. Co. of Neb.*, 528 N.W.2d 329 (Neb. 1995).

Nor is this an instance in which the policy as a whole allegedly provides only illusory coverage. *See, e.g.*, *Sweetberry Holdings LLC v. Twin City Fire Ins. Co.*, No. 20-08200, 2021 WL 3030269, at *7-9 (D.N.J. July 19, 2021) ("Applying a similar interpretation here does not 'nullify the insurance' obtained by Plaintiff . . . or otherwise 'render [the Policy's] undertakings meaningless. Rather, it delivers to Plaintiff simply the bargained-for coverage") (citations omitted); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, 506 F. Supp. 3d 854, 861 (N.D. Cal. 2020) (finding a mere *possibility* of *some* coverage will defeat an argument that the Limited Coverage provision is illusory).

for loss or damage caused by "'fungi', wet rot, dry rot, bacteria or virus," even though all acknowledge that this condition does not remove all coverage. Nor does the condition fail to restore any Limited Coverage to the insured in the event of excluded causes. It restores coverage – from the virus exclusion – for loss or damage from fungus or rot and even viruses, in very rare circumstances. The First District misapplied California law by using the illusory coverage doctrine to eviscerate the conditions for an exception to an exclusion (here a Limited Coverage provision giving back coverage under specified conditions). Not only was the First District's application of the illusory coverage doctrine erroneous, but the consequences of its ruling are highly problematic.

II. APPLYING THE ILLUSORY COVERAGE DOCTRINE BASED ON THE LIKELIHOOD OF RISKS FACING EACH INDIVIDUAL POLICYHOLDER WOULD UNDERMINE THE USE OF STANDARD POLICY FORMS, CHANGE THE WAY INSURANCE IS WRITTEN IN CALIFORNIA, AND DISRUPT THE AFFORDABILITY AND AVAILABILITY OF INSURANCE.

Most commercial property insurance policies are not separately negotiated between an insurance company and a particular policyholder. They are written on standardized policy forms that allow the insurer to cover and price risks efficiently, which enhances the affordability and availability of insurance coverage within a particular market. This is how the commercial property insurance market works in California, as elsewhere.[7] Businesses like John's Grill typically purchase the insurance they need by choosing among the

[7] The California Department of Insurance sets forth a "Commercial Insurance Guide" for small businesses, which, among other things, describes various coverage forms used in commercial property insurance. *See* https://www.insurance.ca.gov/01-consumers/105-type/95-guides/09-comm/commercialguide.cfm (last visited Dec. 20, 2023).

available coverages contained in an insurer's standardized policy forms. The policyholder chooses whether to purchase a particular type of coverage, including add-on coverages that might pertain specifically to their business, but typically does not separately negotiate the terms of a policy form or add-on coverage in an endorsement.[8] The use of standardized forms benefits consumers, because it allows an insurer to price and take on a particular type of risk, making that insurance broadly available at a premium that reflects the insurers' ability to spread the risk.

The policy in this case is a widely-used commercial property insurance form, not a customized policy drafted specifically for John's Grill. Yet because John's Grill—a particular restaurant in San Francisco—was unlikely to benefit from the "virus" part of the Limited Coverage provision, the court below said the Limited Coverage was "virtually" illusory. It then refused to enforce the stated conditions for that Limited Coverage grant, even though this policy, and each of its provisions, is not bespoke coverage tailored to John's Grill. It is one thing to apply the illusory coverage doctrine to protect against circumstances where a policy essentially provides no benefit: where it will never cover the insured. It is quite another to rule, as the First District did, that every provision of a policy must be tested against an individual insured's circumstances before it will be given effect.

This aspect of the First District's ruling would upend how commercial insurance coverage is written in California. It would require every policy to be tailored to the specific

[8] That the multi-peril policy at issue is long stems from the multiple insurance coverages provided. If its structure were inherently ambiguous as John's Grill implies, the California Department of Insurance would presumably not permit its use throughout California. See Answering Brief on the Merits at 16; Reply Brief on the Merits at 21.

insured, undermining if not eliminating the value of standard form provisions. While Fortune 100 companies may negotiate the provisions of their commercial policies with their insurers and thereby tailor their insurance coverage more precisely to their needs, such insurance is expensive. It is unrealistic and unaffordable for most small to mid-size businesses to customize each provision of their commercial property insurance, and John's Grill did not do so here.

The Sentinel policy at issue in this case is a general policy form approved by the Insurance Commissioner. By relying on general policy forms, Sentinel is able to offer coverage to companies like John's Grill at affordable prices. Policyholders may bargain for different provisions and protections they would like to incorporate into their policies and pay premiums correlated to the coverage they choose. But no insurer would be able to reasonably provide affordable coverage if every insurance policy it wrote were unique to a particular policyholder's circumstances. Because the market relies on widely-used forms, a commercial property insurance policy form that is purchased by a restaurant, might well purchased by a retail establishment, a dog walking business, or a farm. The efficiencies of scale afforded by the use of standardized forms makes the insurance more affordable for consumers, and allows insurers to offer coverages to a wide array of businesses.

The First District's distortion of the illusory coverage doctrine would harm consumers. It would raise the costs and limit the availability of coverage by requiring insurers in California to ensure that *every aspect of each* policy provision is foreseeably beneficial to each individual policyholder -- or else cease providing limited and conditional coverages that may restore coverage for that insured in some, but not all, circumstances

they encompass. If the ruling below is not reversed, the efficiencies and lower premiums offered by standard form policies would be severely undermined. *See, e.g.*, *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 711 (Cal. 1989) (approving ruling below that improperly expanded property insurance coverage would be requiring "ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers' potential liabilities"). In essence, the entire California marketplace would act like a specialized market, with significant implications for insurance affordability and availability. Insurers would either need to incur additional underwriting costs associated with these requirements, or withdraw from the California property insurance market altogether. This is a real concern, as the state of California has experienced in other contexts.[9]

Nor is it a benefit to consumers, who not only would likely face higher premiums, but might also need to hire a broker to tailor their policies to their precise business risks. Brokers, in turn, would be exposed to additional liability and would pass those costs on to the consumer as well. In short, while there is no doubt that businesses like John's Grill suffered as a result of the pandemic, the answer is not to distort the illusory coverage doctrine to find coverage. Doing so might afford John's Grill coverage in the short run, but it would hinder the availability of affordable coverage for small businesses in the long

[9] *See, e.g.*, Cal. Dep't of Ins., "The Availability of and Affordability of Coverage for Wildfire Loss in Residential Property Insurance in the Wildland-Urban Interface and Other High-Risk Areas of California: California Department of Insurance Summary and Proposed Solutions," https://www.insurance.ca.gov/0400-news/0100-press-releases/2018/upload/nr002-2018AvailabilityandAffordabilityofWildfireCoverage.pdf (last visited Dec. 20, 2023).

run.[10] Consumer needs are best served by recognizing the importance of widely-used commercial property insurance policy forms to a stable and competitive insurance market, thereby ensuring that commercial property insurance remains available to small and medium-sized businesses on an affordable basis.

CONCLUSION

For the above reasons, APCIA urges the Court to reverse the Court of Appeals with respect to Sentinel's demurrer, enforce the unambiguous preconditions to coverage found in the exception to the endorsement, and hold that the doctrine of illusory coverage does not require a showing that every aspect of each policy provision is foreseeably beneficial to each individual policyholder on a policyholder-by-policyholder basis.

DATED: December 21, 2023

Respectfully submitted,

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[10] Nor is the answer to strain to create coverage for losses that are not covered by property policies affording coverage for physical loss and physical damage. John's Grill's property policy is no different from any other property policy requiring "physical loss or damage" before coverage will apply, a condition which the overwhelming weight of authority nationwide has found is not satisfied by a property's potential or actual exposure to the COVID-19 virus. In addition to misapplying the illusory coverage doctrine, the First District's ruling guts the "physical loss or damage requirement" of the policy and conflicts with the history and purpose of commercial property insurance. "The imperative of a 'direct physical loss' or 'direct physical damage' . . . is the North Star of [a] property insurance policy from start to finish." *Santo's*, 15 F.4th at 402. *See also* John Henry Magee & Oscar N. Serbein, *Property & Liability Insurance* 61-62 (1967).

CERTIFICATE OF COMPLIANCE

Pursuant to the California Rules of Court, I hereby certify that this application contains 3,890 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By 

Counsel for American Property Casualty Insurance Association and National Association of Mutual Insurance Companies

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2023, I caused the foregoing to be electronically filed with the Clerk of the Court using EFS/True Filing, which will send notification of such filing to all registered participants.

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