

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

CASE NO. 2022-0155

SCHLEICHER AND STEBBINS HOTELS, LLC, et al.

v.

STARR SURPLUS LINES INSURANCE COMPANY, et al.

**Interlocutory Transfer from The New Hampshire Superior Court,
Merrimack County, Case No. 217-2020-CV-00309**

**REPLY BRIEF OF PLAINTIFFS-CROSS-APPELLANTS
SCHLEICHER AND STEBBINS HOTELS, LLC, ET AL.
REGARDING POLLUTION EXCLUSION IN AXIS POLICY**

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SUMMARY OF THE ARGUMENT

This Court has twice held that the use of the undefined phrase “release, discharge, escape or dispersal of pollutants or contaminants” in a pollution exclusion is ambiguous, and held that it refers to escapes of hazardous materials of the type that occur with industrial pollution.

Axis had decades to revise or define the phrase “release, discharge, escape or dispersal” if it wanted to cure the ambiguity first identified by this Court in 1996 and let its customers know that the pollution exclusion applied beyond “escapes” or “releases” similar to environmental accidents. It did not.

The exclusion at issue is a pollution exclusion, not a virus or pandemic exclusion. Adding the word virus to the definition of “pollutant or contaminant” does not resolve the ambiguity recognized by this court regarding the phrase “release, discharge, escape or dispersal.” This is not a case where containers transporting anthrax, another virus or some kind of medical waste ruptured and was released into the environment. There was no “release, discharge, escape or dispersal” of COVID-19 here, as this Court consistently has interpreted that undefined phrase.

If Axis wanted to unambiguously exclude coverage for business interruption losses from a pandemic or virus, it could have added a virus exclusion to the Policy sold to S&S. Indeed 83% of commercial property insurance policies sold prior to the pandemic included a virus exclusion, but not the Policies Defendants sold to S&S. Tellingly, it was only *after* the pandemic struck that Axis sought to add a virus exclusion to S&S’s policy.

S&S’s interpretation of the Axis Pollution Exclusion – that it applies

to the accidental rupture of containers of hazardous pollutants or contaminants – is reasonable. At best, the Axis Pollution Exclusion is ambiguous, and it was error to dismiss S&S’s suit against Axis at this early stage without any discovery.

ARGUMENT

Under black letter law, Axis bears the burden of proving that its Pollution Exclusion unambiguously bars coverage. *Cogswell Farm Condo. Assn. v. Tower Group, Inc.*, 167 N.H. 245, 249 (2015). Meeting that burden requires Axis to prove that its interpretation of “release, discharge, escape or dispersal” is the only reasonable interpretation of the Pollution Exclusion. *Great Am. Dining v. Philadelphia Indem. Ins. Co.*, 164 N.H. 612, 616 (2013).

No “amazing feats of linguistic gymnastics” are needed to see the ambiguity in Axis’s application of that phrase. Axis Br. at p. 16 (*citing Bates v. Phoenix Mut. Fire Ins. Co.*, 156 N.H. 719, 722 (2008)). This Court has *twice* held that phrase to be ambiguous when applied to losses outside the environmental pollution context. *Weaver v. Royal Ins. Co. of America*, 140 N.H. 780, 783 (1996); *Mellin v. Northern Security Ins. Co., Inc.*, 167 N.H. 544, 551 (2015). Axis cannot meet its burden of proving that its interpretation is the *only* reasonable interpretation of that key phrase.

I. THE CASES CITED BY AXIS ARE NOT CONTROLLING OR ON POINT

A. Axis Relies on Non-New Hampshire Cases and Misstates the Analysis in *Weaver* and *Mellin*

Axis relies extensively on cases that did not apply New Hampshire

law and were not bound by *Weaver* and *Mellin*. Axis Br. at pp. 20-25. Those cases are not controlling (or on point, as discussed below).

Axis's discussion of *Weaver* and *Mellin* misstate this Court's rulings. Axis incorrectly states that this Court's analysis in *Mellin* "was limited to whether the odor of cat urine fell within the pollution exclusion's definition of 'irritant or contaminant'" and "did not even analyze whether there was a 'discharge, dispersal, release or escape' of a pollutant." Axis Br. at pp. 17-18. To the contrary, the Court emphasized that those key words in the exclusion are environmental legal terms of art, relate to "improper disposal or containment of hazardous waste," and are ambiguous when insurance companies seek to apply the scope of the exclusion beyond that context. *Mellin*, 167 N.H. at 553-54; *Weaver*, 140 N.H. at 783.

Axis argues that *Weaver* should be limited to its facts and is not controlling here. Axis Br. at p. 17. But the facts and analysis in *Weaver* are equally applicable here. The lead paint and dust particles in *Weaver* were "spread widely" by Mr. Weaver's presence at the insured property in the same way that aerosolized particles are "spread widely" by people infected with the virus. *See Weaver*, 140 N.H. at 781.

The Superior Court's conclusion that the coronavirus is "dispersed" when someone "coughs, sneezes, talks[,] [] sings" (Add. at 19) is contrary to this Court's decisions in *Weaver* and *Mellin* that the phrase "release, discharge, escape or dispersal" is an environmental term of art and ambiguous in contexts outside of traditional environmental contamination. At best, the Axis Pollution Exclusion is ambiguous and should be interpreted in favor of coverage, or at least be a subject for discovery prior to motions for summary judgment.

B. The Exclusions in Most of Axis’s Cases Were Critically Different from the Axis Pollution Exclusion

Axis is wrong to argue that “there is no basis to distinguish the legion of decisions that have enforced virus exclusions to preclude coverage for COVID-19 claims.” Axis Br. at p. 21. The policies in most of those cases included an actual virus exclusion; Axis’s policy here does not.

Axis’s assertion that “Courts Outside New Hampshire Have Overwhelmingly Enforced *The Same Virus Exclusion* In the Same Context Of A Coronavirus Claim” is erroneous. Axis Br. at 20 (emphasis added). Each case Axis cites there involved standard virus exclusions that bar coverage for “loss or damage caused by, or resulting from any virus, bacterium or other microorganism...”¹ Axis did not add such a virus exclusion to S&S’s Policy. None of those cases involved the interpretation of the phrase “discharge, dispersal, release or escape” of a pollutant or contaminant – let alone under this Court’s precedent in *Weaver* and *Mellin*.

Axis cites to other cases, claiming that the policies at issue contained the “same wording as the AXIS Exclusion.” Axis Br. at 22-23. At least half of them do not.² Those cases did not address policy language

¹ *Id.* (citing *AFM Mattresses Co., LLC v. Motorists Com. Mut. Ins. Co.*, 37 F.4th 440 (7th Cir. 2022); *Goodwill Indus. Of Cent. Oklahoma, Inc. v. Philadelphia Indem. Ins. Co.*, 21 F.4th 704 (10th Cir. 2021); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885 (9th Cir. 2021); *Lee v. State Farm Fire & Cas. Co.*, 2022 Il App (1st) 210105 (March 21, 2022); *MAC Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co.*, No. A-0714-20, 2022 WL 216396 (N.J. Super. App. Div. June 20, 2022)).

² *Id.* at 22-23 (citing *Dana Inc. v. Zurich Am. Ins. Co.*, No. 41-50, 2022 WL 2452381, at *1 (6th Cir. July 6, 2022); *Cordish Companies, Inc. v. Affiliated FM Ins. Co.*, No. CV ELH-20-2419, 2021 WL 544874 (D. MD. Nov. 22, 2021), *aff’d*, No. 21-2055, 2022 WL 1114373 (4th Cir. Apr. 14, 2022); *Boscov’s Dep’t Store, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 546 F. Supp. 3d 354 (E.D. Pa. 2021); *Monarch Casino & Resort, Inc. v. Affiliated FM Ins. Co.*, No. 20-CV-1470, 2021 WL 4260785 (D. Colo. Sept. 17, 2021)).

excluding loss resulting from the “release, discharge, escape or dispersal of pollutants.” Axis’s representations to the Court are incorrect and its cases are not on point.

The fact that so many of the cases cited by Axis involve *actual* virus exclusions highlights the shortcoming of Defendants’ position on this appeal. Whereas 83% of policies sold in 2019-20 included exclusions for virus or pandemic,³ Defendants did *not* add a virus exclusion to the Policies they sold to S&S. S&S paid nearly \$1,000,000 in annual premiums for those Policies. S&S is entitled to the benefit of the bargain under the broad Policies it purchased, and cannot be stripped of its contractual rights based on narrower terms sold to others.

II. THE COVID-19 PANDEMIC DID NOT INVOLVE THE “RELEASE, DISCHARGE, ESCAPE OR DISPERSAL” OF A POLLUTANT OR CONTAMINANT

Axis spends several pages quoting S&S’s allegations that COVID-19 is “shed,” “spread,” transmitted,” “suspended” and “re-suspended” in the air and then baselessly contends that “Plaintiffs seek coverage for the ‘release, discharge, escape or dispersal’” of a virus. Axis Br. at pp. 12-14. But “shed” “spread” and “transmit” are not the same as or synonymous with “release” “discharge” “escape” or “disperse.”

Critically, Axis did not use “shed” “spread” or “transmit” in its Pollution Exclusion, or any words that connote an exclusion for pandemic.

³ See COVID-19 Property & Casualty Insurance Business Interruption Data Call Part I, June 2020, available at https://content.naic.org/sites/default/files/inline-files/COVID-19%20BI%20Nat%271%20Aggregates_2.pdf; NAIC COVID-19 Report for 2020, at 23, available at <https://content.naic.org/sites/default/files/naic-covid-19-report-update3-eoy-2020.pdf>

Axis cannot conveniently substitute “shed, transmit or suspend” now for the words it actually used in its Pollution Exclusion; which this Court described as “terms of art in environmental law which generally are used with reference to damage or injury caused by improper disposal or containment of hazardous waste.” *Mellin*, 167 N.H. at 553 (citation omitted); *see also Weaver*, 140 N.H. at 782.

There is no dispute that COVID-19 is “transmitted” and “spread” – but there is a very sharp dispute over whether the pandemic involves the “release, discharge, escape or dispersal” of COVID-19 as those undefined terms were used by Axis in its Pollution Exclusion. Axis’s exclusion arguably would apply to a loss where a biohazard container broke and there was a “release, discharge, escape or dispersal” of a virus, but that phrase does not describe the organic spread of COVID-19 at issue here. It certainly does not describe it in unambiguous terms, as required for the exclusion to apply under settled New Hampshire law.

III. GROUNDS FOR DISMISSAL DO NOT EXIST HERE

Axis’s Pollution Exclusion is not a virus exclusion. If it were, then why did Axis try to add an actual virus exclusion after the pandemic struck? There has been zero discovery into important questions like that,⁴ and Axis is wrong to state that “the Court has a complete record” demonstrating that the Axis Pollution Exclusion bars coverage as a matter of law. Axis Br. at p. 25.

Dismissal is not appropriate where there are disputed issues of fact

⁴ Apx. I at 46-47 (Index Nos. 101-02, 107-08, 122-23); Apx. V at 55-79; Supp. Apx. at 89-97.

or where the allegations in the complaint – which must be accepted as true – state a plausible basis for Plaintiffs’ claims. *Belcher v. Paine*, 136 N.H. 137, 142-43 (1992). S&S has alleged and shown that Axis failed to include a virus or pandemic exclusion in the Policy it sold to S&S. Apx. I at 54, 67, ¶¶ 7, 67-69. While Axis disputes this point, such disputes undermine the basis for dismissal. *See* N.H. Rev. Stat. § 491:8-a(III).

S&S also has alleged that its losses are the result of the organic spread of COVID-19 during the pandemic. *See, e.g.*, Apx. I at 69-70, 77, ¶¶ 81-86, 100-117. Axis has never disputed this fact or asserted, for example, that the pandemic was the result of the “escape” of a virus from containers at a lab in China. At best, the question of whether Axis’s Pollution Exclusion applies raises issues of fact that preclude dismissal.

Axis’s only response to the fact that it added a virus exclusion only *after* COVID-19 struck is a footnote citing dicta from *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266 (Mass. 2022), *See* Axis Br. at p. 21-22, n. 6. Axis’s cite to that one case ignores numerous other decisions involving coverage for COVID-related losses that found the absence of a virus exclusion significant. *See Cherokee Nation v. Lexington Ins. Co.*, No. CV-20-150, 2021 WL 506271, at *10 (Okla. Dist. Jan. 28, 2021) (“As with the definition of *direct physical loss*, the Defendant Insurers could have included language that would have clarified any ambiguity regarding pandemic coverage, but they chose not to do so. Indeed, Defendant Insurers’ choice to add the ‘Communicable Disease Exclusion’ underscores the conclusion that the policy at issue does not clearly and distinctly include pandemics . . . Because none of these exclusions contemplate *pandemics*, or *suspected*, *imminent*, *threatened*, or *fear of* viruses—common language

utilized by carriers to exclude such losses clearly and distinctively—these exclusions do not clearly and distinctly apply to the Nation’s loss.”); *Choctaw Nation of Oklahoma v. Lexington Ins. Co.*, No. CV-20-42, 2021 WL 8998468, at *10-11 (Okla. Dist. Feb. 15, 2021) (same); *Ungarean, DMD v. CNA et al.*, No. GD-20-006544, 2021 WL 1164836, at *12 (Pa. Com. Pl. Mar. 25, 2021) (“If Defendants wanted to exclude coverage for any loss caused by viruses in any manner whatsoever, Defendants could have easily included such a provision clearly and unambiguously in the contract. However, Defendants did not include a virus exclusion.”); *Brown’s Gym, Inc. v. The Cincinnati Ins. Co.*, No. 20-CV-3113, 2021 WL 8998468, at *10-11, 25 (Pa. Com. Pl. July 13, 2021) (“As the sole drafter of the policy, Cincinnati had the power to bar business income and extra expense coverage for losses caused by viruses by simply including a virus exclusion among its many exclusions, but it failed to do so . . . the fact that Cincinnati’s business income and extra expense provisions identify 25 exclusions from coverage, but not a virus exclusion, implies that virus-related damages are not intended to be similarly excluded from that same coverage.”); *SWB Yankees, LLC v. CNA Financial Corp.*, No. 20CV2155, 2021 WL 3468995, at *22 (Pa. Com. Pl. Aug. 4, 2021) (“The fact that the business income and extra expense provisions in the policy drafted by CNA, Continental Insurance, and Continental Causality identify 30 exclusions from coverage, but not a virus exclusion, implies that virus-related damages are not intended to be similarly excluded from that same coverage.”).

Ultimately, Axis’s argument is just another attempt to avoid established New Hampshire precedent. This Court’s precedent is clear that

losses like S&S's do constitute "physical loss" even in the absence of structural alteration. *See Mellin*, 167 N.H. at 550. This Court's precedent is equally clear that the pollution exclusion is ambiguous when applied out of the context of improper disposal or containment of hazardous waste. *Id.* at 553; *Weaver*, 140 N.H. at 782-83.

Thus, Axis had absolutely no basis to expect, let alone conclude, that its policy did not cover losses like the one here, or that its Pollution Exclusion unambiguously barred coverage. To the contrary, if Axis wanted to unambiguously bar coverage for losses like the one at issue here, it needed to add a clear virus exclusion, which it only tried to do in 2020, *after* S&S's loss had occurred. *See* Apx. VI at 69. Such facts show that at best, Axis's Pollution Exclusion does not unambiguously exclude coverage for losses from the organic spread of a virus during a pandemic.

IV. AXIS MISLEADS THE COURT ABOUT THE LAW, THE FACTS AND S&S'S ARGUMENTS

Axis's lack of valid arguments is evident from its improper attempt to mislead this Court. The first example is Axis's argument that New Hampshire's standard rules of construction – requiring ambiguous insurance policies to be construed in favor of coverage – do not apply because "Plaintiffs are sophisticated owners/operators of a hotel enterprise who were advised by a specialized insurance broker when procuring the AXIS Policy." Axis Br. at p. 19, n. 5.

As an initial matter, most businesses (and many individuals) use insurance brokers to assist with the purchase of insurance, so the notion that black letter rules of construction are disregarded in such ordinary

circumstances is wrong on its face.

Even worse, Axis knows that New Hampshire law is to the contrary yet fails to cite the controlling law. In briefs presented to Judge Kissinger, Defendants (including Axis) argued for a “sophisticated policyholder” exception to the standard rules of construction, citing this Court’s decision in *Trombly v. Blue Cross/Blue Shield*, 120 N.H. 764, 771 (1980). Supp. Apx. at 23, n. 5. In its responsive brief, S&S pointed out that *Trombly* specifically recognized that “since the object of the [insurance] contract is to provide protection for the insured, the construction that best achieves this purpose should be adopted.” Apx. IV at 307 (*citing Trombly*, 120 N.H. at 771).

Knowing that *Trombly* undermines its argument, Axis’s current Brief pivots to a case from New Jersey and one from the U.S. District Court for the District of New Hampshire, while incorrectly asserting that “this Court has not addressed the issue.” Axis Br. at p. 19, n. 5. Such tactics dovetail with Defendants’ overarching attempt to avoid the application of this Court’s precedent and should be rejected.

Axis also misleads this Court about the facts. Axis states – without any citation to the record – that “Plaintiffs’ broker actually drafted the policy language.” Axis Br. at p. 19, n. 5. But on its face, the Axis Pollution Exclusion bears Axis’s corporate logo and Axis form number “ES 068 0106” – showing that it is a standard form endorsement drafted by Axis. Apx. I at p. 352. The Axis Pollution Exclusion was not part of the Policies the broker obtained from any of the other Appellants. *See, e.g.*, Apx. I at pp. 205-217, 247-260, 296-314. The Axis Pollution Exclusion was drafted by Axis. Axis’s misleading statements to the contrary are the

hallmark of a party whose arguments lack merit.

Finally, Axis misstates S&S's arguments on this appeal. Contrary to the assertion in Axis's Brief (which again lacks any citation to the record), S&S never argues "that the AXIS exclusion is not a virus exclusion simply because the word 'virus' does not appear in the title of the exclusion." Axis Br. at p. 21. S&S's argument has nothing to do with the title of the exclusion. Rather, it is grounded in the core terms of the exclusion, which require a "release, discharge, escape or dispersal" of COVID-19. *See, e.g.*, S&S Br. at pp. 76-78. Axis's straw man argument about the title of the Pollution Exclusion should be ignored.

CONCLUSION

For all the reasons discussed above, Appellees respectfully request that this Court answer the third question presented in the negative.

Respectfully submitted,

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ET AL.

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Dated: August 15, 2022

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief has been served electronically via the court's e-file system to all parties registered to receive such notice in this case.

Dated: August 15, 2022

/s/ Michael K. O'Neil
Michael K. O'Neil, Esquire

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I, Michael K. O’Neil, hereby certify that this brief contains a total of 2,989 words and meets the requirement of 3,000 words or less, exclusive of the cover page, signatures, pages containing the table of contents, and tables of citations.

Dated: August 15, 2022

/s/ Michael K. O’Neil
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