THE STATE OF NEW HAMPSHIRE SUPREME COURT

No. 2022-0155

SCHLEICHER AND STEBBINS HOTELS, LLC, et al.,
Plaintiffs-Appellees,

v.

STARR SURPLUS LINES INSURANCE COMPANY et al.,
Defendants-Appellants.

Appeal from the Merrimack County Superior Court
No. 217-2020-CV-00309

AMICUS CURIAE BRIEF OF THE NEW HAMPSHIRE LODGING & RESTAURANT ASSOCIATION IN SUPPORT OF APPELLEES AND AFFIRMANCE

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INTEREST OF AMICUS CURIAE

The New Hampshire Lodging & Restaurant Association ("NHLRA") has represented the interests of New Hampshire's hospitality industry for over one hundred years. Over 1,300 hotels and restaurants in the state are members of the NHLRA. The hospitality industry is a vital part of New Hampshire's economy, with over $3.3 billion in gross sales in 2021. The industry is a significant driver of tax revenue for the state, and generates about $300 million a year in tax revenue via rooms and meals tax. This is the third largest source of tax revenue for the state. The industry also employs over 60,000 New Hampshire residents, representing nearly 10% of the jobs in the state. Although the hospitality industry is recovering from the effects of the pandemic, these numbers are still below 2019 levels and the NHLRA expects them to continue to grow in the coming months.

The NHLRA assisted its members in creating protocols to mitigate the impact of Covid-19 and ensure that they can operate safely, despite the persistent reintroduction of the SARS-CoV-2 virus and its continued presence in member businesses. The NHLRA's President & CEO, Mike Somers, served on the Governor's reopening task force and wrote the first draft of the state's reopening rules and protocols with input from the NHLRA's Board of Directors. Throughout the pandemic, the NHLRA helped make sure that its members were up to date with

changes to the protocols and worked closely with state agencies to ensure that businesses could reopen safely.

The NHLRA seeks to fulfill the classic role as amicus, assisting the Court by highlighting the broad implications of various possible rulings and making "useful suggestions to the court" on material that might otherwise escape the notice of the Court. Blanchard v. Bos. & M.R.R., 86 N.H. 263, 266 (1933). In this respect, they will provide vital context for the decisions, context that may not be adequately presented by the parties to the case. The NHLRA has appeared as amicus curiae before this Court previously on issues of statewide importance. Appeal of Niadni, Inc., 166 N.H. 256 (2014).

SUMMARY OF ARGUMENT

Lodging and dining are critical components of the New Hampshire economy. Hospitality businesses are uniquely susceptible to losses from dangerous and noxious substances that are invisible and do not cause structural alteration to property, such as fumes, odors, carbon monoxide, bacteria, and viruses. These businesses purchase insurance coverage to protect (among other things) the use of their property when that use is lost or diminished because of the hazards posed by the presence of such physical agents. And, for decades insurance companies have specifically provided coverage to hospitality businesses for losses caused by these physical agents. The ability to use one's property

is an essential property right, one that has long been protected by insurance in New Hampshire. In fact, this Court reiterated that long-standing protection just seven years ago in Mellin v. Northern Security Insurance Co., 167 N.H. 544 (2015). The industry has relied on such protection for years and this Court should not erode this important property-rights protection but should indeed staunchly defend it. If insurance companies want to exclude from coverage the physical loss and damage that unseen physical agents cause, they are free to try their hand at the negotiating table. They should not be allowed to have this Court do this work for them retrospectively.

In light of this precedent and public policy, recent decisions, including the April decision by the Massachusetts Supreme Judicial Court, are not persuasive. As a matter of scientific fact, something the Massachusetts Supreme Judicial Court and most other courts never considered on the undeveloped records in those cases, COVID-19 is not "evanescent" or easily "wiped" away from surfaces or in the air, especially not at dining and hospitality establishments. As New Hampshire and other jurisdictions, including Louisiana most recently this month (on a fully developed record), have noted, the viral particles that intrude upon physical property cause substantial loss on account of rendering the property unusable.

Finally, there is no danger of insurer bankruptcy. The representations by the Insurer's amicus are unfounded and misleading.

ARGUMENT

I. Mellin Affords Critical Protection to New Hampshire's Hospitality Businesses.

Mellin v. Northern Security Insurance Co., 167 N.H. 544 (2015), is the leading case interpreting the phrase "physical loss" in a property insurance policy in New Hampshire in the context of lodging. In Mellin, the policyholders owned a condominium that smelled of cat urine, an odor that could not be removed and that forced the policyholder's tenants to leave. Mellin, 167 N.H. at 545–46. Without this income, the policyholders were forced to sell the condominium for less than it would have been worth without the odor. Id. They then sought coverage under a policy that covered "physical loss to property." Id. After the insurer denied coverage, the policyholders filed suit. This Court reversed the decision of the Superior Court, which had upheld the coverage denial.

The Court first noted that the phrase "physical loss" was undefined, and it, therefore, gave the words "their ordinary meaning." Id. at 548. The insurer argued that "physical loss" required a "tangible alteration," but the Court rejected this "restricted reading." Id. Instead, the Court stated "'physical loss'

need not be read to include only tangible changes to the property that can be seen or touched, but can also encompass changes that are perceived by the sense of smell." Id. The Court explained:

> physical loss may include not only tangible changes to the insured property, but also changes that are perceived by the sense of smell and that exist in the absence of structural damage. These changes, however, must be distinct and demonstrable. Evidence that a change rendered the insured property temporarily or permanently unusable or uninhabitable may support a finding that the loss was a physical loss to the insured property.

Id. at 550.

The Court rejected cases from other jurisdictions that "adopted a more limited interpretation of 'physical loss.'" Id. at 548 (disagreeing with cases that found mold and asbestos do not cause physical loss). The Court instead agreed with a "substantial body of case law" that held that "a variety of contaminating conditions, including odors, have been held to constitute a physical loss to property." Id. The Court approvingly cited a decades-long line of cases, including Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America, No. 2:12-CV-04418 (WHW), 2014 WL 6675934 (D.N.J. Nov. 25, 2014) (holding that presence of ammonia that "physically transformed the air" in a facility constituted physical loss); Western Fire Insurance Co. v. First Presbyterian Church, 437 P.2d 52 (Colo. 1968)

(holding that gasoline vapors that infiltrated a church making it uninhabitable constituted "direct physical loss" to property); TRAVCO Ins. Co. v. Ward, 715 F. Supp. 2d 669 (E.D. Va. 2010) (toxic gases constituted direct physical loss); and others. Mellin, 167 N.H. at 549. Simply put, physical loss includes "not only tangible changes to [an] insured property, but also changes . . . that exist in the absence of structural damage," provided that such changes be both "distinct and demonstrable." 167 N.H. at 550.

Applying this standard, the Court found that the odor of cat urine caused physical loss to the insured property. The Court explained that the odor caused a "distinct and demonstrable alteration" to property and that the trial court had erred by requiring the plaintiffs to show a "tangible physical alteration." Id. at 551.

Similarly, surfaces laced with a potentially lethal virus have undergone a "distinct and demonstrable" change that poses a substantial risk to human health. Businesses that provide hospitality such as lodging and dining are uniquely vulnerable to losses caused by physical agents that render property unusable but cannot be seen, such as the odor at issue in Mellin. Physical agents such as odors and fumes, carbon monoxide, and bacteria and viruses can render a lodging or restaurant's premises unusable even though each of these is invisible. The great

number of customers and guests that visit hospitality businesses heightens the danger from bacteria and viruses. Restaurants, with their reliance on gas cooking equipment, are vulnerable to losses from carbon monoxide and smoke. Odors and fumes can easily render a hotel or restaurant effectively unusable. Many hospitality businesses purchased insurance coverage reasonably expecting coverage for the physical loss and damage that these agents cause.

The insurance industry itself understood these needs. Take, for example, Greater New York Insurance Company, which marketed its products specifically to the hospitality industry, restaurants in particular. After the first SARS pandemic in 2006, the Insurance Services Office, the insurance-industry arm that develops standard insurance-policy language, crafted a virus exclusion. The company told regulators that the new virus exclusion, by excluding coverage of losses from pandemic exposure, would increase the losses that policyholders would bear in business-interruption claims:

> The ISO initial filing of this endorsement indicated that the exclusion was appropriate due to "pandemic" exposure to loss which was not anticipated in the standard coverage forms or in development of the loss costs for Commercial Property. Therefore, we assume that this Exclusion is deleting coverage across the entire NY Commercial Fire and Allied book written by the ISO member companies that utilize the ISO

> product, unless modified by such a Company exception.
>
> Because the application of this Exclusion is to Commercial Property, we anticipate losses to fall largely in Business Personal Property ("stock") and Business Interruption/Time Element coverage segments.

Exhibit A (emphasis added.) The insurer decided not to use the exclusion on a regular basis for three reasons: (1) it felt its hospitality clientele would expect the coverage to be in place for physical loss and damage from a virus, (2) it felt the risk was largely limited to food-borne illnesses and that it could impose the exclusions on specific accounts with a demonstrated risk, and (3) it decided that an airborne pandemic was "highly unlikely":

> The GNY Insurance Companies wishes to make this endorsement CP 01 78 Optional on individual risks rather than Mandatory on a panacea basis. Because the GNY Insurance Companies is largely a niche market of habitational business, we feel that our exposure to this type of loss ("pandemic") is minimal, since such contagious disease is largely . . . transmitted to third parties via ingestion or some other direct contact to an insured's products. While it is possible that some type of disease (airborne Legionnaires Disease, for example) could spread through a HVAC system in any selected Apartment or Condo Building, it is highly unlikely that it would spread throughout a vast proportion of the apartments and condominiums across NYC that we insure.

Id.

COVID-19 falls into the class of losses that are covered under Mellin. COVID-19 spreads via aerosols—microscopic respiratory droplets that are suspended in the air. COVID-19 thus causes a "distinct and demonstrable" alteration to the air, turning it into a dangerous mechanism for the transmission of a deadly disease, making the property uninhabitable, much like the cat-urine odor in Mellin. Only extraordinary efforts such as closing the property or installing specialized filters can repair the damage that COVID-19 causes to indoor air. But, even then, continued use of the property, as is necessary to mitigate the greater loss that would result from total closure, reintroduces the deadly viral particulate back into the premises. This cycle of persistent "distinct and demonstrable" alteration necessitates costly remedial measures and reduced levels of business operation, both of which are covered loss. It is, as the Court held in Mellin, irrelevant that COVID-19 cannot be seen by the naked eye.

Insurers are free to seek to exclude the physical loss and damage that invisible physical agents cause to insured property. Many insurers do, through the use of virus exclusions. Others, especially in the hospitality sector, did not do so before the pandemic exactly because they knew that lodging and restaurant businesses expected such coverage. (Many have reassessed their

risk after the pandemic and inserted virus exclusions going forward.) Such express exclusions, if written clearly, can provide certainty. What the insurers ask this Court to do would not provide certainty.

By asking this Court to roll back precedent, the insurers are courting the significant disruption to the hospitality sector that will result by throwing into doubt what is covered by language whose meaning this Court settled in Mellin. Maintaining Mellin is crucial to the viability of business interruption insurance in this state, and the Court should consider the effect that a ruling would have on future losses. For instance, under Mellin, an ammonia leak causes covered physical loss or damage, just as it does in other jurisdictions. See e.g., Gregory Packaging, 2014 WL 6675934. If the Court overturns or abrogates Mellin, this protection will vanish, seriously limiting the protection that New Hampshire businesses have come to rely on as a means of protecting their enterprises. In that way, absent Mellin, a fishery in New Hampton or Berlin that experiences an ammonia leak in a refrigeration system, that forces the fishery to close for period of time, however short, would be denied the insurance benefit that it has long-counted on for protection. Similarly, a carbon monoxide leak that forces the closure of the hotel — now covered under Mellin — would no

longer be covered if Mellin is limited. This Court should leave Mellin untouched and hold that COVID-19 falls within its scope.

II. Remediation of COVID-19 Requires Extensive Repairs and Mitigation Efforts, Not Mere Cleaning.

The Insurers and their amicus repeat the simplistic trope that COVID-19 is "evanescent" and can simply be "wiped off" surfaces. This is simply untrue, at least as concerns hospitality businesses, and New Hampshire law should not be changed to follow such an illusory concept.

Cleaning is ineffective for a highly trafficked business such as a hotel or restaurant. Short of closing the institution—which would be devastating to these businesses and the local economy and is contrary to the requirement in many policies for policyholders to try to mitigate their losses by, for example, remaining open—COVID-19 cannot be removed. It is constantly reintroduced. Cleaning is no more effective than a sponge would be to hold back a tidal surge. Remediation efforts are ineffective in completely removing the virus from the property, just like remediation failed in Mellin.

Cleaning is inapplicable to the air. The virus cannot be "wiped" away from the air. Specialized filters can help but will never be completely effective. The virus will circulate and spread

throughout an establishment notwithstanding measures to mitigate its circulation through the air.

A great portion of the Insurers' and their amicus's briefs is devoted to urging this Court to surrender its independence and go with the flow, making only weak attempts to justify their argument under Mellin. Indeed, the Insurers' amicus's avowed purpose is to persuade this Court to mold itself to other states. Mot. of APCIA Lv. to File Amicus Br. Suppt. Appellants at 2, ¶ 1. This Court should resist these pleas.

In this vein, the Insurers place particular reliance on Verveine Corp. v. Strathmore Insurance Co., 184 N.E.3d 1266 (Mass. 2022), which held that COVID-19 cannot cause physical loss or damage and is "evanescent," meaning that it will "dissipate on its own." (Insurers Br. at 20.) Massachusetts has neither the precedent (Mellin) nor the strong public policy (defending property rights) that exists in New Hampshire. Verveine also misses the mark in many respects. Whether or not, as a matter of scientific fact, COVID-19 can accurately be described as "evanescent" in the abstract, it is hardly evanescent when introduced to property on the scale that it was introduced to S&S Hotels' property. It is impossible to both (1) completely remove COVID-19 from hospitality property, and (2) keep that property open.

A more apt citation is the case that a Louisiana state appellate court recently decided, upholding coverage in favor of a restaurant that lost the full use of its property because of the continuous infiltration of COVID-19 to the premises. Cajun Conti LLC v. Certain Underwriters at Lloyd's, London, No. 2021-CA-0343, 2022 WL 2154863 (La. Ct. App. June 15, 2022). There, the court correctly determined that the phrase "direct physical loss of or damage to" insured property is ambiguous and could reasonably refer to loss of a property's full use, which is exactly the result that on-site COVID-19 had for the restaurant policyholder. Citing the same line of authority that this Court relied on in Mellin, the Louisiana court rejected the insurers' "follow the herd" argument and found persuasive those cases that "extended coverage to losses arising from disease-causing agents with a tangible physical form but which are, nevertheless, not discernible with the naked human eye."

The "evanescence" concept is illusory, but the hospitality industry's reliance upon a long-standing rule of law, as well as industry practice, is very real. Contracts have been made, premiums have been paid, and businesses have been launched with the expectation that when unseen yet nevertheless damaging physical forces render property unusable, then businesses should at least expect their insurance to cover such

losses. The Court should not change the Mellin rule and pull the rug out from under businesses that have relied on it for years.

III. There Is No Danger of Insurer Insolvency.

The arguments by the Insurers' amicus are wrong. Their amicus cites statistics pertaining to potential business interruption losses from COVID-19. The potential liability on insurers is far less. The insurance industry itself reports that more than 80% of policies contain a virus exclusion. E.S. Knutsen & J.W. Stempel, Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic, 27 Conn. Ins. L.J. 185, 270 (2020); NAIC COVID-19 Report for 2020, at 34 (2020).[1] These exclusions provide: "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." Knutsen & Stempel, supra. Insurers' amicus argues that the industry would

[1] NAIC COVID-19 Report for 2020, National Association of Insurance Commissioners, https://content.naic.org/sites/default/files/naic-covid-19-report-update3-eoy-2020.pdf ("Of nearly 8 million commercial insurance policies include business interruption coverage and 83% of all policies included an exclusion for viral contamination, virus, disease, or pandemic . . . .").

go bankrupt, but hides the fact that the insurance industry recorded record profits in 2020 and 2021.[2]

Amongst the 20% of policyholders whose policies do not include virus exclusions, not every policyholder suffered a covered loss above the deductible and filed a claim. Only a subset of businesses have met all the requirements for coverage. Indeed, this is the only case filed in New Hampshire state court seeking coverage for losses related to COVID-19 (two more were filed in federal court in New Hampshire).[3] There is thus no risk that a decision in favor of S&S Hotels will result in a flood of litigation.

A decision in favor of S&S Hotels poses no danger to the insurance industry. The Court should not roll back Mellin and deal real damage to New Hampshire businesses to avoid hypothetical highly unlikely damage to the insurance industry.

CONCLUSION

Mellin is an important precedent that protects the hospitality industry and other businesses throughout the state.

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[2] U.S. Property & Casualty and Title Insurance Industries – 2021 First Half Results, National Association of Insurance Commissioners, https://content.naic.org/sites/default/files/inline-files/Property-Casualty-and-Title-Insurance-Industries-2021-Mid-Year-Report.pdf.

[3] CCLT Case List, Covid Coverage Litigation Tracker, University of Pennsylvania Carey Law School, https://cclt.law.upenn.edu/cclt-case-list/.

Under the rule that this Court established in that case, COVID-19 is covered under commercial property insurance policies because it causes a distinct alteration to property. Overturning or limiting Mellin would place the hospitality industry at risk of losses that it is currently protected against. The Court should follow its own precedent and affirm the trial court's grant of summary judgment in favor of S&S Hotels.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Amicus respectfully request to participate in oral argument before the full Court with 15 minutes for amicus, and designate Michael S. Levine to argue.

CERTIFICATION OF WORD COUNT

Pursuant to Supreme Court Rule 26 this Brief contains 3,285 words, exclusive of the cover page, signatures, pages containing the table of contents, tables of citations, and the addendum. The word count was made using the word count feature of Microsoft Office 365 Pro Plus, Microsoft Word Version 1808.

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CERTIFICATION OF SERVICE

I, Christopher T. Vrountas, hereby certify that on June 24, 2022, I served the foregoing document on all counsel of record via the New Hampshire Supreme Court E-Filing portal.

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EXHIBIT A

EXPLANATORY MEMORANDUM – RESPONSE TO OBJECTION 1 DATED 4-30-2010

The chief object of this filing is to submit a Company Exception to ISO State Exception Rule A.6.

Currently, this ISO rule imposes a Mandatory application of a Virus and Bacteria Exclusion CP 01 78 to the coverage afforded by the ISO Commercial Property Coverage Form. The ISO initial filing of this endorsement indicated that the exclusion was appropriate due to "pandemic" exposure to loss which was not anticipated in the standard coverage forms or in development of the loss costs for Commercial Property. Therefore, we assume that this Exclusion is deleting coverage across the entire NY Commercial Fire and Allied book written by the ISO member companies that utilize the ISO product, unless modified by such a Company exception.

Because the application of this Exclusion is to Commercial Property, we anticipate losses to fall largely in Business Personal Property (“stock”) and Business Interruption/Time Element coverage segments. We also anticipate that it will not affect large segments of GNY’s current book, but rather solely to some isolated risks.

The GNY Insurance Companies wishes to make this endorsement CP 01 78 Optional on individual risks rather than Mandatory on a panacea basis. Because the GNY Insurance Companies is largely a niche market of habitational business, we feel that our exposure to this type of loss ("pandemic") is minimal, since such contagious disease is largely is transmitted to third parties via ingestion or some other direct contact to an insured’s products. While it is possible that some type of disease (airborne Legionnaires Disease, for example) could spread through a HVAC system in any selected Apartment or Condo Building, it is highly unlikely that it would spread throughout a vast proportion of the apartments and condominiums across NYC that we insure.

While GNY does write some business in the restaurant classifications and we acknowledge that some exposure is inherent in such classifications due to the "Typhoid Mary" or contagious disease hazard (as some saw in the Hepatitis B exposure via a green onion vector some years ago), we feel such exposure is minimal since we do not write large concentrations of these risks in the same locales who could potentially use the same vendors of supplies. We do not write “chain” restaurants utilizing the same suppliers.

For all of the above reasons, we believe application of this Exclusion is appropriate on occasion, only to certain individual risks which sell or distribute products to the public. Additionally, GNY’s underwriting management feels that such an endorsement would be considered imposed on a restaurant account only if the risk presented with claim history indicative of recent incident and loss control with little remediation.

Therefore, to answer your specific questions, we do not anticipate that any of our insured’s will voluntarily request this exclusion; some (habitational risks) because it would never enter their minds as a problem for which they would voluntarily reduce coverage; others (restaurants) because they feel that such an event is well within the realm of possible fortuitous occurrences and should be covered should such an event arise.

We anticipate that the Company will impose this exclusion on such individual risks that present with recent loss history of this type of claim and loss control that would give us concerns of an on-going nature (cavalier attitude of management regarding implementation of hand washing procedures by food handling staff); i.e., we would impose attachment of this Exclusion in accordance with prudent supportable underwriting analysis of risk (since the variables involved could be of substantial scope). We do not anticipate imposing this exclusion on any specific classification (though restaurants are probably the most likely to experience such events) or across large segments of our book of business, since we do not feel the exposure to loss is very high in any segment of our existing Commercial Property book (though we acknowledge the possibility for Apartments, Condominiums and Office/Retail Buildings to experience such an event).

Because of the broad scope of the potential events which may occur, we feel that it is largely impossible to create a rule which takes in every aspect of exposure to communicable disease. Is it possible to simply indicate something in your proposed revision of our rule to state “This Exclusion will be applied on a case-by-case basis to risks which present with recent loss history which in the underwriters judgment indicates a potential higher than average exposure to loss”?

As indicated, our main object of this filing is to remove the carte blanch application of this Exclusion and not deny coverage to the majority portion of our book.