As a matter of fact, COVID-19/SARS-CoV-2 *does* cause physical loss or damage to property

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In the landmark decisions *Bell Atlantic Corp. v. Twombly* (550 U.S. 544 (2007)), and *Ashcroft v. Iqbal* (556 U.S. 662 (2009)), the Supreme Court announced a new standard for determining whether a claim is sufficiently pleaded to survive a Rule 12(b)(6) motion to dismiss under the Federal Rules of Civil Procedure. In doing so, the Supreme Court departed from the "notice pleading" standard, where a complaint was not dismissed for failure to state a claim unless it appeared beyond doubt that the plaintiff could prove no set of facts in support of her claim that would entitle her to relief. *Conley v. Gibson* (355 U.S. 41, 46 (1957)).

Early appellate rulings have concluded that policyholders' allegations are implausible *because a virus can never cause physical loss or damage to property.*

The *Twombly* "plausibility" threshold would instead require that a complaint contain "factual allegations suggesting (not merely consistent with) an entitlement to relief." (550 U.S. 544, 546 (2007)). The Supreme Court clarified in *Iqbal* that whether a complaint is "plausible" turns not on whether the alleged conduct is unlikely, but on whether the complaint contains sufficient nonconclusory factual allegations to support a reasonable inference that the conduct occurred. (556 U.S. 662, 679 (2009)).

Fast forward to late 2020 and the onslaught of COVID-19 business interruption litigation. These cases generally fall into two categories: (1) claims based on civil authority orders that forced businesses to close or change operations, but which do not allege any presence of virus; and (2) claims based on the presence of the virus and alleged physical loss or damage that results. The second category can be further divided into claims in which the insurance policy at issue contains a virus exclusion and those that do not. Likewise, there are claims that involve other forms of pollution or contamination exclusions and those that do not.

As policyholders have sought insurance coverage for losses caused by COVID-19, early appellate rulings have concluded that policyholders' allegations are *implausible* based on the belief that a virus can never cause physical loss or damage to property. For example, the 5th U.S. Circuit Court of Appeals held in *Ferrer & Poirot, GP v. Cincinnati Ins. Co.* that "[w]hile COVID-19 has wrought great physical harm to people, it does not physically damage property within the plain meaning of 'physical.'" (36 F.4th 656, 658 (5th Cir. 2022)).

Other appellate decisions have reached the same result even though the plaintiffs in those and many other cases pleaded that COVID-19 and SARS-CoV-2 (which is shed by people with COVID-19) were persistently present and caused damage to their property, including detailed allegations of how COVID-19 viral particles interacted with and negatively altered their property. *See, e.g.*, *Uncork and Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926 (4th Cir. 2022); *Consol. Rest. Operations, Inc. v. Westport Ins. Corp.*, 205 A.D.3d 76, 85 (N.Y. App. Div. 1st Dep't 2022), *appeal filed*, No. APL-2022-00160. None of these appellate courts ever considered evidence, nor did any hear what medical, scientific, or environmental experts had to say on the issue.

These rulings are largely the product of an absence of evidence of how a virus affects the insured property. Absent evidence, courts have had little difficulty distinguishing COVID-19 cases from more than 50 years of pre-pandemic precedent, where the presence of dangerous or noxious substances has historically sufficed to trigger coverage even in the absence of tangible alteration to the property. See, e.g., *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (gasoline under the building rendered building unusable); *Gregory Packaging, Inc. v. Travelers Prop. and Cas. Co. of Am.*, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) (ammonia from broken refrigeration system required evacuation); *Port Auth. of N.Y. and N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3rd Cir. 2002) (asbestos fibers would make building uninhabitable); *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799 (N.H. 2015) (odor from cat urine that rendered the property unusable).

To know whether something — anything — has had, or could ever have, a causal effect on something else that is tangible presents a quintessential question of fact that requires evidence. And, when that tangible "anything" is a microscopic virus that allegedly bonds with and alters surfaces of property and indoor air in a deleterious manner, creating a dangerous condition that did not

exist but for the presence of the virus, expert opinion evidence is warranted, too.

Now, more than two years after SARS-CoV-2 first emerged, courts are taking a closer look. In *Huntington Ingalls Industries Inc. v. Ace American Insurance Co.*, the Vermont Supreme Court held on Sept. 23, 2022, that Vermont's long-standing rules of pleading required a trial court to accept as true allegations in the complaint about the damage caused by the presence of COVID-19 and allow the case to proceed to discovery. (2022 VT 45 (Vt. 2022)). There, the Superior Court erred by dismissing the case, requiring the Supreme Court to reverse.

Huntington Ingalls is the first state high court decision to acknowledge the factual issues posed by the presence of virus on property, but the decision is no outlier. Several weeks earlier, on July 13, 2022, the California Court of Appeal for the Second District reached the same result in *Marina Pacific Hotel and Suites, LLC v. Fireman's Fund Ins. Co.* (81 Cal. App. 5th 96 (2022)).

The California Court of Appeal closely reviewed the plaintiff's allegations: that COVID-19 viral particles "not only [live] on surfaces but also [bond] to surfaces ... which transform[s] the physical condition of the property. The virus was present on surfaces throughout the insured properties. ... As a direct result, the insureds were required to close or suspend operations." (*Id.* at 108).

The court concluded "the insureds have unquestionably pleaded direct physical loss or damage to covered property ... a distinct, demonstrable, physical alteration of the property." (*Id.*). Other appellate courts have similarly concluded that the dangers presented from the presence of COVID-19 are sufficient to trigger coverage. (*See Ungarean v. CNA et al.*, Nos. 490 WDA 2021 and 948 WDA 2021, 2022 WL 17334365 (Pa. Super. Ct. Nov. 30, 2022)).

But it was a jury in Texas that finally provided the confirmation needed to put the "plausibility" question to bed, *under any standard*, once and for all. There, after receiving and weighing evidence, and hearing from experts, a jury of 12 ordinary people found that it was not only plausible that the SARS-CoV-2 virus could cause physical loss or damage to property, but that, *as a matter of fact*, it happened.

In *Baylor College of Medicine v. XL Insurance America Inc.*, a jury concluded that the presence of SARS-CoV-2 on site at Baylor's insured properties caused a tangible alteration of Baylor's property sufficient to meet the plain and ordinary meaning of the undefined phrase "direct physical loss of or damage to property." (No. 2020-53316 (Tex. Dist. Ct. Aug. 31, 2022)).

Baylor brought suit in the District Court of Harris County, Texas, against its insurers seeking coverage for its losses caused by the presence of COVID-19 viral particles on its property. The insurers moved for summary judgment, arguing that COVID-19 cannot cause physical loss or damage to property and that certain exclusions in the policies applied.

The court granted summary judgment for certain insurers based on exclusions contained in their policies. But for the insurers that did not have these exclusions, the court held that "a question of fact exists as to whether COVID-19, if present, caused direct physical loss or damage to [Baylor]'s insured property." (No. 2020-53316, at *1 (Tex. Dist. Ct. Dec. 6, 2021)).

The case proceeded to trial in August, and the jury reached its verdict for Baylor on Aug. 31, 2022. The jury found that the evidence, including testimony from medical and science experts, proved that COVID-19 and its causative virus in fact caused physical loss of or damage to Baylor's property under the plain and ordinary meaning of that phrase.

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By concluding as a matter of fact that the presence of the SARS-CoV-2 virus caused physical loss of or damage to property, the verdict cast serious doubt, if not altogether undermined, any continued debate regarding "plausibility." Whether a virus may damage property has been confirmed. The question that remains is whether federal courts will acknowledge the jury's factual conclusion in *Baylor* and afford it due regard in the threshold consideration of "plausibility."

The federal bench has repeatedly reminded litigants in COVID-19 business interruption matters that the court must apply its "common sense" in determining whether allegations plausibly present a cognizable claim. *See, e.g.*, *Stacy Enters. Inc. v. Cincinnati Ins. Co.*, 563 F. Supp. 3d 738, 747 (S.D. Ohio 2021); *Landsdale 329 Prop, LLC v. Hartford Underwriters Ins. Co.*, 537 F.Supp.3d 780, 786 (E.D. Pa. 2021). But just as "common sense" requires consideration of the court's general knowledge, so too must it include, and not summarily exclude, consideration of what a jury of 12 average citizens determined after weighing the evidence and expert opinions.

"Plausibility," should no longer be an impediment in any court as concerns the virus' ability to cause loss or damage. The only issue left to be weighed against the applicable pleading standard should be whether SARS-CoV-2 was allegedly (plausibly) present, after which a jury should decide whether it in fact caused damage to the insured property.

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