

Companion Case Briefs: *Cato Corp. v. Zurich American Insurance & North State Deli, LLC v. Cincinnati Insurance**

INTRODUCTION

When the COVID-19 pandemic swept across the nation, governments responded by shuttering restaurants, coffeehouses, and retail shops to “stop the spread.”¹ These closures, initially temporary, extended into months of dark storefronts, and “for lease” signs began to replace the names of once-favorite local spots.² But in the years since, COVID has gradually slipped from our public memory,³ and businesses face more topical challenges like supply-chain disruptions and inflation.⁴ Not so for the owners of seventeen North Carolina businesses. Their experience with the pandemic remained largely uncertain until the state’s highest court handed down two companion decisions in late 2024.

In *Cato Corp. v. Zurich American Insurance*⁵ and *North State Deli, LLC v. Cincinnati Insurance*,⁶ business-plaintiffs sought coverage for COVID-related revenue losses.⁷ In *Cato*, the court dismissed the insured’s complaint for failure to state a claim,⁸ but in *North State*, the court granted the restaurateurs’ claim

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1. 2020 *Results of the Business Response Survey*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/brs/2020-results.htm#highlighted-results> [<https://perma.cc/2388-AM7F> (staff-uploaded archive)] (“During the pandemic, 56 percent of establishments (4.7 million) experienced a decrease in demand for their products or services and 19 percent of establishments (1.6 million) experienced a government-mandated closure.”).

2. Leland D. Crane, Ryan A. Decker, Aaron Flaaen, Adrian Hamins-Puertolas & Christopher Kurz, *Business Exit During the COVID-19 Pandemic: Non-Traditional Measures in Historical Context* 16 & fig.5, (Bd. of Governors of the Fed. Rsrv. Sys. Working Paper 2020-89, 2020), <https://www.federalreserve.gov/econres/feds/files/2020089pap.pdf> [<https://perma.cc/BM3R-MXQ4>] (“[T]he cumulative 2020 exit rate of restaurants . . . [was] around 12 percent, already well above the annual rates seen in official data in recent years (around 8 percent).”).

3. Kate Cohen, *The Five Years We Can’t Remember*, WASH. POST (Mar. 6, 2025), <https://www.washingtonpost.com/opinions/interactive/2025/pandemic-memory-covid-lockdown-forgetting/> [<https://perma.cc/7YAE-WRR9> (staff-uploaded, dark archive)].

4. Emily Heaslip, *5 Biggest Challenges Facing Small Businesses Right Now*, U.S. CHAMBER COM. (Dec. 3, 2023), <https://www.uschamber.com/co/start/strategy/biggest-small-business-challenges> [<https://perma.cc/JCV9-ADZT>]; *Global Supply Chain Fragility: Five Trends and Their Impact on the Global Economy*, KPMG (July 2024), <https://kpmg.com/us/en/articles/2024/2024-supply-chain-update.html> [<https://perma.cc/SGT2-SZZE>].

5. 386 N.C. 667, 909 S.E.2d 144 (2024).

6. 386 N.C. 733, 908 S.E.2d 802 (2024).

7. *Cato*, 386 N.C. at 668, 909 S.E.2d at 146; *N. State Deli*, 386 N.C. at 734, 908 S.E.2d at 805.

8. *Cato*, 386 N.C. at 668, 909 S.E.2d at 146.

for declaratory judgment.⁹ The difference? Zurich's policy contained a viral contamination exclusion.¹⁰ Cincinnati's did not.¹¹ Viewed in isolation, these decisions offer routine applications of established insurance doctrine. Against the backdrop of cases holding for the insurer,¹² however, *Cato* and *North State* reveal something significant: North Carolina courts' willingness to apply interpretative principles faithfully—regardless of the potential consequences of doing so. That fidelity allowed the *North State* plaintiffs to recover what they deserved.

I. FACTUAL & PROCEDURAL BACKGROUND

A. *The Government Orders*

On March 3, 2020, the North Carolina Department of Health and Human Services “announced the first case of COVID-19 in North Carolina.”¹³ Seven days later, Governor Roy Cooper issued an executive order declaring a state of emergency.¹⁴ And just seven days after that, Governor Cooper issued an executive order that limited restaurants “to carry-out, drive-through and

9. *N. State Deli*, 386 N.C. at 735, 908 S.E.2d at 805.

10. *Cato*, 386 N.C. at 668, 909 S.E.2d at 146. In brief, a viral contamination exclusion excludes insurance coverage for losses related to viruses.

11. *N. State Deli*, 386 N.C. at 746, 908 S.E.2d at 812.

12. *Appeals in Business Interruption Cases*, COVID COVERAGE LITIG. TRACKER, <https://clt.law.upenn.edu/appeals/> [<https://perma.cc/HWS9-FLEP> (staff-uploaded archive)] [hereinafter *Appeals in Business Interruption Cases*]. The first appellate federal court to consider the issue held that pandemic-related closures did not constitute “direct physical loss.” *Oral Surgeons, P.C. v. Cincinnati Ins.*, 2 F.4th 1141, 1144 (8th Cir. 2021) (“[T]here must be some physicality to the loss or damage of property—e.g., a physical alteration, physical contamination, or physical destruction.”). Nearly every federal appellate court followed suit. *See, e.g.,* *Julio & Sons Co. v. Cont'l Cas.*, 692 S.W.3d 877, 883 (Tex. Ct. App. 2024) (holding that “as a matter of law, business income losses resulting from the COVID-19 pandemic are not covered under property insurance policies requiring a direct physical loss of or damage to property.”); *10012 Holdings, Inc. v. Sentinel Ins.*, 21 F.4th 216, 220–21 (2d Cir. 2021) (same); *Uncork & Create LLC v. Cincinnati Ins.*, 27 F.4th 926, 934 (4th Cir. 2022) (same); *Estes v. Cincinnati Ins.*, 23 F.4th 695, 696 (6th Cir. 2022) (same); *Mudpie, Inc. v. Travelers Cas. Ins. of Am.*, 15 F.4th 885, 892 (9th Cir. 2021) (same); *Goodwill Indus. of Cent. Okla. v. Phila. Indem. Ins.*, 21 F.4th 704, 711 (10th Cir. 2021) (same). Insureds fared little better in state courts. *See, e.g.,* *Musso & Frank Grill Co. v. Mitsui Sumitomo Ins. USA*, 77 Cal. App. 5th 753, 761 (2022) (ruling in favor of insurer in state court).

13. *See generally A Timeline: North Carolina's Pandemic Recovery Progress*, N.C. PANDEMIC RECOVERY OFF., <https://ncpro.nc.gov/news-stories/timeline> [<https://perma.cc/MP2T-SG7X>] (last updated Nov. 4, 2024) (charting the pandemic's progress and North Carolina's response).

14. Exec. Order No. 116, 34 N.C. Reg. 1744, 1744–49 (Mar. 10, 2020); *North Carolina – Coronavirus State Actions*, NAT'L GOVERNORS ASS'N (Mar. 9, 2020), <https://www.nga.org/coronavirus-state-actions/north-carolina/> [<https://perma.cc/WQQ8-ZY8X>].

delivery services only.”¹⁵ “Bars with no food service were closed outright.”¹⁶ Executive Order 121 issued a statewide stay-at-home order beginning March 30 which closed all nonessential retail businesses.¹⁷ North Carolina localities and municipalities supplemented the state orders, and by December 2020, at least thirty-four restaurants in Charlotte¹⁸ and over forty in the Triangle had gone out of business.¹⁹

B. *The Insurance Policies*

The plaintiffs in *North State* were sixteen North Carolina restaurants and bars (the “restaurants”).²⁰ Each carried commercial all-risk property insurance²¹ with Cincinnati Insurance Company and Cincinnati Casualty Company (collectively “Cincinnati”).²² Within the policies were identical provisions promising to pay for “actual loss of ‘Business Income’ . . . sustain[ed] due to the necessary ‘suspension’ of . . . ‘operations,’” so long as the suspension was “caused by direct ‘loss’ to property at a ‘premises’ . . . caused by or result[ing] from a[n] Covered Cause of Loss.”²³ Under the policies’ terms, “loss” meant

15. Exec. Order No. 118, 34 N.C. Reg. 1834, 1836 (Mar. 17, 2020); Press Release, Governor Roy Cooper, Governor Cooper Issues Executive Order to Close Sit-Down Service at Restaurant and Bars and Make State Unemployment Benefits More Widely Available (Mar. 17, 2020), <https://www.ncdhhs.gov/> [<https://perma.cc/8NJE-YV89>].

16. *N. State Deli*, 386 N.C. at 736, 908 S.E.2d at 806 (2024) (citing Exec. Order No. 118, 34 N.C. Reg. 1834, 1836 (Mar. 17, 2020)).

17. Exec. Order No. 121, 34 N.C. Reg. 1903, 1906 (Mar. 27, 2020).

18. 30+ *Charlotte Restaurants that Permanently Closed in 2020*, CHARLOTTE OBSERVER (Dec. 23, 2020, at 13:07 ET), <https://www.charlotteobserver.com/charlottefive/c5-around-town/c5-development/article248009365.html> [<https://perma.cc/6MQB-SZN8> (staff-uploaded archive)].

19. Drew Jackson, *Triangle Restaurants Faced a Brutal 2020. Here Are the Ones that Closed this Year*, NEWS & OBSERVER (Dec 29, 2020, at 8:30 ET), <https://www.newsobserver.com/living/food-drink/article248071165.html> [<https://perma.cc/54PM-JXLV> (staff-uploaded, dark archive)]. Nationwide, “more than 44 million people in the U.S. had applied for unemployment benefits” as of June 2020, and small businesses “were estimated to be losing \$255 to \$431 billion per month due to the government-ordered shutdowns.” Christopher C. French, *COVID-19 Business Interruption Insurance Losses*, 27 CONN. INS. L.J. 1, 3–4 (2020); see also John Grossmann, *A Business Ponders Whether Its Location Is Perfect, or a Disaster*, N.Y. TIMES (Dec. 7, 2011), <https://www.nytimes.com/2011/12/08/business/smallbusiness/a-business-tries-to-decide-whether-its-location-is-perfect-or-a-disaster.html> [<https://perma.cc/HTQ8-WCUW> (staff-uploaded, dark archive)] (noting that forty percent of businesses subject to a disaster never reopen their doors and, of the sixty percent that do, a quarter fail within two years).

20. The restaurants and bars were “Lucky’s Delicatessen, Mothers & Sons Trattoria, Mateo Bar de Tapas, Saint James Seafood, Parizade, Bin 54, City Kitchen, Village Burger, Nasher Cafe, Local 22, Kipos Greek Taverna, Golden Fleece, Vin Rouge, Rosewater, Farm Table, and Gatehouse Tavern.” *N. State Deli*, 386 N.C. at 734 n.1, 908 S.E.2d at 805 n.1. The plaintiffs in *North State* were the parent companies of these businesses. *Id.*

21. All-risk insurance is “a type of property insurance that protects property loss or damage from any peril, unless the peril is expressly excluded.” *Id.* at 736, 908 S.E.2d at 806 (citing *Open-Perils Insurance*, BLACK’S LAW DICTIONARY (12 ed. 2024)).

22. *Id.*

23. *Id.* at 738, 908 S.E.2d at 807 (emphasis added).

“accidental physical loss or accidental physical damage,” and “Covered Cause of Loss” meant “direct ‘loss’ unless the ‘loss’ is excluded.”²⁴ Importantly, the *North State* policies did not exclude viruses or viral contamination.²⁵

In contrast to the local businesses in *North State*, the plaintiff in *Cato* was a clothing retailer with over 1,300 stores across thirty-seven states (“Cato”).²⁶ Cato’s all-risk policy with Zurich American Insurance Company (“Zurich”) was functionally identical to the *North State* policies.²⁷ Zurich insured Cato for lost business income on the same grounds.²⁸ In stark contrast to the Cincinnati policies in *North State*, however, Cato’s policy expressly excluded “[c]ontamination, and any cost due to Contamination,” defining contamination as “any condition of property due to the actual presence of any . . . virus.”²⁹

Anticipating that Cincinnati would deny coverage, the restaurants filed suit for a declaratory judgment on August 7, 2020.³⁰ The *North State* plaintiffs contended that, by losing access to and use of their restaurants, they suffered “a non-excluded ‘direct physical loss.’”³¹ No definition of direct physical loss appeared in the policies, so the trial court granted the plaintiffs’ motion for summary judgment.³² Cincinnati appealed, and the intermediate court reversed.³³

Less than a year after the *North State* plaintiffs filed suit, Cato sought (1) a declaratory judgment that its losses were covered under its policy with Zurich, (2) damages for breach of contract, and (3) treble damages and attorneys’ fees

24. *Id.* at 737–38, 908 S.E.2d at 807.

25. *Id.* at 739, 908 S.E.2d at 807. In regular English, “the restaurants are entitled to recover insurance payments for the slowdown or cessation of business activities if their losses stemming from the government-ordered shutdowns are a ‘direct’ ‘physical loss or . . . physical damage’ to property . . .” *Id.*

26. *Cato Corp. v. Zurich Am. Ins.*, 386 N.C. 667, 668, 909 S.E.2d 144, 146. At the close of fiscal year 2024, Cato had downsized, operating only 1,117 stores in thirty-one states. *Cato Corp.*, 2024 Annual Report (Form 10-K) 4 (Mar. 31, 2025).

27. *See Cato*, 386 N.C. at 668–69, 909 S.E.2d at 146 (noting that the policy covered “direct physical loss of or damage to property . . . from any cause unless excluded”).

28. *Id.* at 669, 909 S.E.2d at 147.

29. *Id.* at 669, 909 S.E.2d at 146–47.

30. *N. State Deli*, 386 N.C. at 739, 908 S.E.2d at 807.

31. *N. State Deli, LLC v. Cincinnati Ins.*, No. 20-CVS-02569, 2020 N.C. Super. LEXIS 38, at *4 (2020).

32. *Id.* at *5, *10.

33. *N. State Deli, LLC v. Cincinnati Ins.*, 284 N.C. App. 330, 331, 875 S.E.2d 590, 591 (2022). In the appellate court’s words, the “[p]laintiffs did not allege that their loss resulted from physical harm to their property, but that the Governmental Orders resulted in loss of business.” *Id.* at 333–34, 875 S.E.2d at 593 (citing *Fs Food Grp. LLC v. Cincinnati Ins.*, 584 F. Supp. 3d 104, 111 (W.D.N.C. 2022); *Summit Hosp. Grp., Ltd. v. Cincinnati Ins.*, No. 5:20-CV-254-BO, 2021 WL 831013, at *3–4 (E.D.N.C. Mar. 4, 2021)).

for violations of North Carolina’s Unfair and Deceptive Trade Practice Act.³⁴ Cato’s suit for declaratory judgment operated on a theory nearly identical to that in *North State*. According to Cato, the policy covered its losses because the virus “physically inundated” its stores, transforming surfaces into “dangerous transmission sources” and rendering properties “uninhabitable, unfit, unsafe and unusable.”³⁵ The trial court relied on the intermediate appellate decision in *North State* to dismiss Cato’s claims,³⁶ and the court of appeals affirmed.³⁷

II. SAME DOCTRINE, DIFFERENT OUTCOME

The Supreme Court of North Carolina granted the *North State* and *Cato* plaintiffs’ petitions for discretionary review.³⁸ In both *North State* and *Cato*, the court considered two issues seriatim: first, whether the plaintiffs had sufficiently alleged direct physical loss of or damage to property; and second, whether the policies contained exclusions that precluded coverage.

At root, the two pairs of questions involved well-settled principles of contract law and insurance policy interpretation. With respect to contracts generally, North Carolina courts interpret undefined terms according to their “ordinary meaning,” a task that requires looking at context;³⁹ “consult[ing] standard, nonlegal dictionaries”;⁴⁰ and ensuring the term’s “harmony with other portions of the policy.”⁴¹ Additionally, insurance policies have their own “special interpretive principles,”⁴² the most cited of which is likely *contra*

34. An Act Relating to Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance (“Unfair and Deceptive Trade Practices Act”), ch. 1112, 1949 N.C. Sess. Laws 1299; *Cato*, 386 N.C. at 670, 909 S.E.2d at 147.

35. *Cato*, 386 N.C. at 670, 673, 909 S.E.2d at 147, 149.

36. *Id.* at 668, 909 S.E.2d at 146 (citing *N. State Deli*, 284 N.C. App. at 332–33, 875 S.E.2d at 592–93, *rev’d and remanded by N. State Deli*, 386 N.C. at 748, 908 S.E.2d at 813).

37. *Cato Corp. v. Zurich Am. Ins.*, No. COA23-305, 2023 WL 8066674, at *4 (N.C. Ct. App. Nov. 21, 2023) (holding that “tangible alteration to the property is necessary to” recover for a “direct physical loss of or damage” to property).

38. *Cato*, 386 N.C. at 671, 909 S.E.2d at 148; *N. State Deli*, 386 N.C. at 739, 908 S.E.2d at 808.

39. *N. State Deli*, 386 N.C. at 740, 908 S.E.2d at 808–09 (citing *Accardi v. Hartford Underwriters Ins.*, 373 N.C. 292, 295 838 S.E.2d 454, 457 (2020)).

40. *Id.* at 740–41, 908 S.E.2d at 809 (citing *N.C. Farm Bureau Mut. Ins. v. Martin*, 376 N.C. 280, 287, 851 S.E.2d 891, 896 (2020)).

41. *Id.* at 741, 908 S.E.2d at 809 (citing *Wachovia Bank & Tr. Co. v. Westchester Fire Ins.*, 276 N.C. 348, 355, 172 S.E.2d 518, 522 (1970)).

42. *Id.* (citing *Jones v. Pa. Cas.*, 140 N.C. 262, 263–65, 52 S.E. 578, 578–79 (1905)).

proferentem.⁴³ “Where a policy term is ambiguous . . . it should be construed against the insurance company and in favor of the policyholder.”⁴⁴

On appeal, the *North State* plaintiffs argued that the government orders resulted in a physical loss of property because the orders prevented them from opening their restaurants and, later from operating them as they pleased.⁴⁵ Cincinnati saw it differently. It argued that, while the restaurateurs lost access, “loss of physical use” does not amount to direct physical loss. Put simply, the virus and accompanying government orders impacted people, not property, so “the restaurants experienced no physical change to the business property itself.”⁴⁶

The *North State* court began its analysis by noting that one definition of “loss” is “a deprivation, failure to keep possession, or the state or fact of being destroyed.”⁴⁷ As applied to the policy’s language, a *loss* of property could include losing “the ‘use’ for which a property is insured.”⁴⁸ The syntax surrounding the phrase “direct physical loss” also lent itself to the restaurants’ preferred definition.⁴⁹ As the court noted, the policy referenced “direct physical loss . . . in conjunction with ‘direct physical damage,’ so ‘loss’ must have some meaning distinct from ‘damage’ to effectuate both provisions.”⁵⁰

As to what this “distinct” definition of loss might be, the restaurants and Cincinnati both offered reasonable interpretations.⁵¹ In line with Cincinnati’s reading, “loss” could mean “complete destruction or total dispossession,” while “damage” could mean “less-than-complete impairment or alteration.”⁵² But to the restaurants’ point, the “or” separating “direct physical loss *or* [direct physical] damage” could function disjunctively, meaning that “loss” was purposefully broader than “damage” and could reasonably include “deprivation . . . of use or function, complete or partial.”⁵³

43. See Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531, 531 (1996) (“The first principle of insurance law is captured by the maxim *contra proferentem* . . .”); *id.* at 532 n.4 (finding that, between 1980 and 1995, 4,416 state-court opinions invoked *contra proferentem*).

44. *N. State Deli*, 386 N.C. at 741, 908 S.E.2d at 809 (citing *Accardi*, 373 N.C. at 295, 838 S.E.2d at 456). See generally Jeffrey E. Thomas, *Contra Proferentem and Ambiguity*, in 1 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 5.02 (Jeffrey E. Thomas & Francis J. Mootz, III, eds., 2025) (overviewing *contra proferentem*, its evolution, and modern variations).

45. *N. State Deli*, 386 N.C. at 735, 908 S.E.2d at 805.

46. *Id.* at 743, 908 S.E.2d at 810.

47. *Id.* at 742, 908 S.E.2d at 810 (citing *Loss*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002)).

48. *Id.* at 743, 908 S.E.2d at 810.

49. *Id.*

50. *Id.* at 743–44, 908 S.E.2d at 810–11.

51. *Id.* at 744, 908 S.E.2d at 811.

52. *Id.*

53. *Id.* (emphasis added).

Cincinnati next argued that its “period of restoration” provision, which set the duration of coverage, counseled against the restaurants’ interpretation.⁵⁴ The period of restoration provision allowed coverage to extend until the earlier of the (1) the date on which the insured rebuilds or (2) twelve months after the loss occurs.⁵⁵ Cincinnati argued that the provision’s reference to rebuilding and relocating necessarily implied alteration.⁵⁶ Once again, the restaurants’ reading was no less reasonable:⁵⁷ because the restaurants did not have to rebuild or relocate, they could reasonably understand their coverage to extend for twelve months.⁵⁸

Outside of the policy language itself, two facts helped persuade the *North State* court: First, more than eighty percent of business interruption policies included an exclusion for viruses or contamination—Cincinnati’s did not.⁵⁹ Because all-risk policies insure against all perils unless an exclusion expressly disclaims coverage,⁶⁰ a reasonable policyholder must consider the “universe of perils beyond the four corners of the document to know what coverage they have paid for.”⁶¹ Against this backdrop, one would expect policies without a viral exclusions provision to cover viruses. Second, the court noted that the restaurants alleged that the insurance broker thought the policy would cover lost profits from government shut-down orders during a pandemic—a fact which Cincinnati did not contest.⁶²

Because Cato’s policy was “functionally the same as . . . North State Deli’s policy,”⁶³ the court cited *North State* to accept Cato’s argument that the orders resulted in “direct physical loss” in the form of lost access and use of the property.⁶⁴ In addition to the loss-of-use argument, Cato alleged that the physical virus caused “tangible physical transformation of the air and surfaces,” rendering its properties “unsafe, unfit, non-functional and uninhabitable for their intended uses.”⁶⁵ In the court’s words, “That physical destruction, ‘along with the government orders that recognized these physical effects, . . . caused physical loss of Cato’s use of the [properties].’”⁶⁶ Note how the *Cato* court

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 745, 908 S.E.2d at 811.

58. *Id.*

59. *Id.* at 745, 908 S.E.2d at 812.

60. *Id.* at 746, 908 S.E.2d at 812.

61. *Id.* at 745, 908 S.E.2d at 812.

62. *Id.* at 746–47, 908 S.E.2d at 812.

63. *Cato Corp. v. Zurich Am. Ins.*, 386 N.C. 667, 672, 909 S.E.2d 144, 149 (2024).

64. *See id.* at 672–73, 909 S.E.2d at 148–49 (citing *N. State Deli*, 386 N.C. at 743–47, 908 S.E.2d at 802, 810–12).

65. *Id.* at 673, 909 S.E.2d at 149.

66. *Id.* (emphasis added).

declined to differentiate between the legal sufficiency of “government orders” and “physical destruction” insofar as they established “physical loss of . . . use.” As argued in Part III, the court likely accepted Cato’s alternate theory of “loss” to denounce other appellate decisions that ruled against this very theory and underscore the court’s role in keeping insurance companies accountable.⁶⁷

Each of the *North State* and *Cato* plaintiffs successfully established a prima facie case for coverage, thereby shifting the burden to the insurer to demonstrate that an exclusion applies.⁶⁸ In *North State*, Cincinnati did not “argue that any exclusions apply that preclude coverage,”⁶⁹ so the doctrine of *contra proferentem* won the *North State* plaintiffs partial summary judgment.

Not so in *Cato*. Zurich pointed to its policy’s contamination exclusion, which explicitly excluded coverage for losses resulting from “contamination” and “any cost” associated with it, “including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy.”⁷⁰ Importantly, the policy defined “contamination” as “[a]ny condition of property due to the actual presence of any . . . virus.”⁷¹ The viral contamination was “essentially what Cato allege[d],” and a “reasonable person in the position of the insured would understand such allegations to qualify as ‘condition[s] of property due to the actual presence of any . . . virus.’”⁷²

Cato offered several unavailing arguments that the contamination exclusion did not apply. The court rejected Cato’s argument that a Louisiana amendatory endorsement in the policy changed the contamination definition to exclude viruses.⁷³ In its complaint, Cato failed to allege, “as a factual matter, that it bargained for the Louisiana endorsement to apply to its policy covering properties not in Louisiana.”⁷⁴ Moreover, North Carolina precedent prefers to interpret insurance policy provisions in a manner that avoids contradictions and achieves harmony.⁷⁵ The court accomplished as much by reading state-specific amendatory endorsements, many of which are mutually exclusive, to apply only to risks in their respective states.⁷⁶

67. See *N. State Deli*, 386 N.C. at 747–48, 908 S.E.2d at 813 (arguing that allowing insurers to hide “behind a narrower definition imposed by judicial fiat . . . contradicts [the] [c]ourt’s holdings that the lodestar for insurance contract interpretation is the reasonable expectation of the policyholder”).

68. *Cato*, 386 N.C. at 673, 909 S.E.2d at 149; *N. State Deli*, 386 N.C. at 747, 908 S.E.2d at 812.

69. *N. State Deli*, 386 N.C. at 740, 908 S.E.2d at 808.

70. *Cato*, 386 N.C. at 673, 909 S.E.2d at 149.

71. *Id.* at 673–74, 909 S.E.2d at 149.

72. *Id.* at 674, 909 S.E.2d at 149–50.

73. *Id.* at 674, 909 S.E.2d at 150.

74. *Id.*

75. *Id.* at 675, 909 S.E.2d at 150.

76. *Id.* at 675–76, 909 S.E.2d at 150–51.

Cato's other arguments fared no better. Consequently, the court concluded that "a 'reasonable person in the position of the insured' would understand the viral contamination to exclude Cato's alleged losses."⁷⁷

III. SIGNIFICANCE

When the court decided *North State* and *Cato*, North Carolina joined Vermont as the only two states to rule that viruses can lead to physical loss or damage under an insurance policy.⁷⁸ Of the states that had considered the issue at the time, twelve had reached the opposite conclusion, and seven had remanded without taking a stance.⁷⁹ Thirty states have yet to consider the issue, a fact which led certain commentators to believe that the companion cases may embolden other states to apply their insurance interpretation doctrine objectively rather than "follow the herd of decisions that saw no difference between having a virus exclusion and not having one."⁸⁰

Maybe, but with the passage of years since COVID, the practical significance of these cases appears limited. COVID-related complaints remain,⁸¹ and while another pandemic remains possible, insurers learn from their mistakes. After paying millions for SARS-CoV-1 business interruption claims in 2003, the industry quickly developed "broad virus exclusion[s]" to establish a contractual basis for excluding such losses in the future.⁸² By March 2020, nearly eighty-three percent of policies had a pandemic exclusion;⁸³ today,

77. *Id.* at 676, 909 S.E.2d at 151.

78. *See id.* at 671, 909 S.E.2d at 148; *N. State Deli*, 386 N.C. at 746–47, 908 S.E.2d at 812; *Appeals in Business Interruption Cases*, *supra* note 12.

79. *Appeals in Business Interruption Cases*, *supra* note 12.

80. Marshall Gilinsky & Rhonda D. Orin, *Perspectives: North Carolina Supreme Court Gets It Right on COVID Business Interruption Coverage*, BUS. INS. (Feb. 24, 2025), <https://www.businessinsurance.com/perspectives-north-carolina-supreme-court-gets-it-right-on-covid-business-interruption-coverage/> [<https://perma.cc/828M-PMMC>].

81. *See CCLT Case List*, COVID COVERAGE LITIG. TRACKER, <https://cclt.law.upenn.edu/cclt-case-list/> [<https://perma.cc/T9G3-6CEY>] (listing all Covid-19 business interruption cases); Memorandum Opinion and Order at 4–5, *Durham Wood Fired Pizza Co. v. Cincinnati Ins.*, 2025 WL 3485571, No. 1:25-CV-492 (M.D.N.C. Dec. 4, 2025) (dismissing the insureds' claims as conclusory with opportunity to amend because "[o]ne can imagine facts that might support a claim based on [the insurer's] actions and inactions" after the Supreme Court of North Carolina decided *North State Deli*); Order and Opinion on Defendants' Joint Motion to Dismiss, *Tanger Props. Ltd. P'ship v. ACE Am. Ins.*, No. 25CV005614-400, 2025 WL 3008088, at *3 (N.C. Super. Ct. Oct. 27, 2025) ("Following the Supreme Court's issuance of its opinion in *North State Deli*, Tanger initiated this action by filing a Complaint in Guilford County Superior Court on 12 March 2025 in which it challenged Defendants' denial of coverage . . .").

82. Gilinsky & Orin, *supra* note 80.

83. *N. State Deli*, 386 N.C. at 745 n.5, 908 S.E.2d at 812 n.5 (citing NAT'L ASS'N OF INS. COMM'RS, COVID-19 PROPERTY & CASUALTY INSURANCE BUSINESS INTERRUPTION DATA CALL 3 (June 2020), https://content.naic.org/sites/default/files/inline-files/COVID-19%20BI%20Nat%27%20Aggregates_2.pdf [<https://perma.cc/NTL2-VNLJ>] (staff-uploaded archive)]).

such exclusions are likely ubiquitous. Certain insurers had already redrafted their policies within months of North Carolina's emergency declaration.⁸⁴

Cato and *North State* matter not for their narrow holdings but for their symbolic value. Together, they establish that North Carolina courts will not entertain post hoc arguments about ambiguous terms like "direct physical loss," even when insurance companies warn that coverage will "result in crippling payouts and deplete their capital."⁸⁵ By refusing to succumb to these warnings, *Cato* and *North State* "reaffirm[] North Carolina's commitment to protecting policyholders through fair and reasonable interpretation of insurance policies . . . [and] will undoubtedly be . . . touchstone[s] for future disputes and a [source of] hope for policyholders."⁸⁶

The simple reasoning underpinning these decisions makes one wonder why the overwhelming majority of jurisdictions held for the insured and, relatedly, why North Carolina stands out among them. Legal realism—the theory that law bends to "outside influences"⁸⁷—provides a tempting but ultimately inadequate explanation for North Carolina's comparative bravery. This theory would suggest that, during the pandemic's peak, judges interpreted *contra proferentem* and other doctrines narrowly to temper market uncertainty⁸⁸ and protect insurers from widespread bankruptcy. By the time the court decided

84. See Alwyn Scott, *Some Insurers Strengthening Virus Exclusion Language in Policies After COVID Cases*, INS. J. (Mar. 5, 2021), <https://www.insurancejournal.com/news/national/2021/03/05/603965.htm> [<https://perma.cc/2U6Q-FT3E>] ("New policies and renewals now define terms like 'communicable disease' or 'microorganism' The new language aims to snuff out ambiguity."). For an interesting discussion of why insurers may choose not to define terms like "communicable disease," see generally Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105 (2006) (arguing that the cost of litigation and the value of certainty leads insurers to retain ambiguous language in definitions if a sufficient threshold of courts interpreted the language in favor of the insurer).

85. Scott, *supra* note 84 ("[C]over[ing] losses from business customers affected by the pandemic . . . would cost [insurers] as much as \$431 billion . . ."); Jonathan Stempel, *Business Owners Can Sue Insurer over Coronavirus Losses, Missouri Judge Rules*, REUTERS (Aug. 12, 2020), <https://www.reuters.com/article/us-health-coronavirus-insurance-decision/business-owners-can-sue-insurer-over-coronavirus-losses-missouri-judge-rules-idUSKCN2582AK/> [<https://perma.cc/T7QJ-RGKY> (staff-uploaded archive)].

86. Chip Merlin, *Policyholders Win a Covid Case! North Carolina Supreme Court Rules Government Closure Order Can Result in "Direct Physical Damage,"* MERLIN L. GRP. (Dec. 15, 2024), <https://www.propertyinsurancecoveragelaw.com/blog/policyholders-win-a-covid-case-north-carolina-supreme-court-rules-government-closure-order-can-result-in-direct-physical-damage/> [<https://perma.cc/S6ZX-2B2M>].

87. Julius Paul, *Foundations of American Realism*, 60 W. VA. L. REV. 37, 38 (1957).

88. See Brian H. Bix, *COVID Concerns: Some Realism About Equitable Relief*, 85 LAW & CONTEMP. PROBS. 37, 49 (2022).

North State and *Cato* nearly four years later, COVID-related losses no longer threatened insurance giants.⁸⁹

Legal realism's descriptive account collapses under scrutiny. First, it is not clear that the insurance industry accurately framed COVID's threat. The American Property Casualty Insurance Association, for example, estimated that it would cost \$255 billion to \$431 billion per month to cover lost business income.⁹⁰ Those numbers are eye-popping but so was the methodology.⁹¹ After accounting for the fact that forty percent of businesses had business interruption insurance and that eighty-three percent of insurance policies contained a viral exclusion when the pandemic struck, the actual cost "would be in the millions per month."⁹² Insurers—companies that profit from predicting risk—likely inflated these numbers to influence legislators⁹³ and, as the weight of precedent would indicate, courts.⁹⁴ Overemphasizing the importance of the pandemic's recession means stipulating to the alarmism that permeated the industry's narrative.

Even accepting the realism counterargument with respect to *North State*, one is left wondering why the highest court would expend resources deciding *Cato* when (1) *North State* accepted an argument for coverage identical to one of *Cato*'s and (2) the viral exclusion provided a straightforward way to decide the case.⁹⁵ Yet the court went out of its way to accept *Cato*'s theory of loss regarding the virus's physical inundation of the property.⁹⁶ One possible explanation is that state, federal, trial, and appellate courts almost invariably rejected this particular theory, while the *North State* plaintiffs' argument from syntax went comparatively untested.⁹⁷ Far from being a reiteration of *North State*'s

89. The timing of the case does not actually matter; rather, the number of jurisdictions to rule for the insurer is what freed the court to hold in favor of the policyholder.

90. Alwyn Scott and Suzanne Barlyn, *U.S. Insurers Use Lofty Estimates to Beat Back Coronavirus Claims*, REUTERS (June 12, 2020, at 4:25 ET), <https://www.reuters.com/article/business/u-s-insurers-use-lofty-estimates-to-beat-back-coronavirus-claims-idUSKBN23J0T5/> [<https://perma.cc/BD2S-D9HB>].

91. *Id.* ("The APCIA estimate is an industry worst-case scenario based on all small firms with business interruption coverage being able to claim. It also assumes that between 60% and 90% of businesses with fewer than 100 employees will be impacted by COVID-19.").

92. *Id.*

93. *See id.* ("The estimate . . . was recently used by the industry to successfully lobby against state and city lawmakers' efforts to legislate to make the sector pay.").

94. To the extent that insolvency actually loomed, *North State* places the blame on the insurer's own "selection of the words by which it chose to be bound." *N. State Deli LLC v. Cincinnati Ins.*, 386 N.C. 733, 742, 908 S.E.2d 802, 809 (2024) (citing *Jamestown Mut. Ins. v. Nationwide Mut. Ins.*, 266 N.C. 430, 438, 146 S.E.2d 410, 410 (1966)).

95. *See Cato Corp. v. Zurich Am. Ins.*, 386 N.C. 667, 668, 909 S.E.2d 144, 146 (2024).

96. *See supra* notes 64–66 and accompanying text.

97. *See N. State Deli*, 386 N.C. at 747, 908 S.E.2d at 812–13 ("[W]e decline to do what other courts have done and affirmatively define [direct physical loss,] the 'slippery term' Cincinnati chose to

aspirations, then, the *Cato* decision is what demarcates the gulf between North Carolina and the jurisdictions that deferred to the industry's warnings.

The court may have deliberately accepted *Cato*'s elsewhere-rejected theory to prevent emergency-driven deviations from creating bad precedent. In *North State*, the court remarked that holding for Cincinnati would "license[]" insurers "to pitch consumers on an expansive 'all-risk' policy[] while hiding behind a narrower definition imposed by judicial fiat when it comes time to pay out."⁹⁸ The court decided the companion cases at a time when the predictable consequences of heeding the industry's warnings had already begun to materialize in other states. Writing just one month before the decisions, Richard Lewis and Nicholas Insua noted that the "insurance industry is using results in COVID-19 cases to affect a major restriction in the coverage they provide"—a development that will "dramatically restrict coverage for thousands of policyholders" who often opt to negotiate, not litigate, their claims "on the basis of the law set forth by courts."⁹⁹

An unfortunate feature of precedent is that exigencies justify one deviation from the rule of law, which in turn justifies the next. *Cato* and *North State* averted this feedback loop, but what these cases portend for North Carolina beyond that remains uncertain. For now, these cases matter because two insurance-company defendants and seventeen business plaintiffs received fair interpretations of their contracts.

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use in this manifestly ambiguous situation."); *id.* (collecting cases that accepted insurance companies' post hoc definition for "direct physical loss"); see also *Appeals in Business Interruption Cases*, *supra* note 12 (providing abstracts for appellate-level decisions that ruled on the meaning of "direct physical loss").

98. *N. State Deli*, 386 N.C. at 747–48, 908 S.E.2d at 813.

99. Richard Lewis and Nicholas Insua, *How Property Insurance Coverage Shrank after the Pandemic*, LAW360: INS. AUTH. (Nov. 7, 2024, at 10:31 ET), https://www.americancollegecoverage.org/assets/CommitteeNewsArticles/ACCC_Articles_HowPropInsCovShrankAfterPandemic_Law360_20241108.pdf [<https://perma.cc/M32G-HCB4>]. The authors note that "as coverage is seemingly shrinking, rates are rising." *Id.*

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