No. _____ FOURTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

NORTH STATE DELI, LLC d/b/a LUCKY'S DELICATESSEN, MOTHERS & SONS, LLC d/b/a MOTHERS & SONS TRATTORIA, MATEO TAPAS, L.L.C. d/b/a MATEO BAR DE TAPAS, SAINT JAMES SHELLFISH LLC d/b/a SAINT JAMES SEAFOOD, CALAMARI ENTERPRISES, INC. d/b/a PARIZADE, BIN 54, LLC d/b/a BIN 54, ARYA, INC. d/b/a CITY KITCHEN and VILLAGE BURGER, GRASSHOPPER LLC d/b/a NASHER CAFE, VERDE CAFE INCORPORATED d/b/a LOCAL 22, FLOGA, INC. d/b/a KIPOS GREEK TAVERNA, KUZINA, LLC d/b/a GOLDEN FLEECE, VIN ROUGE, INC. d/b/a VIN ROUGE, KIPOS ROSE GARDEN CLUB LLC d/b/a ROSEWATER, and GIRA SOLE, INC. d/b/a FARM TABLE and GATEHOUSE TAVERN,

Plaintiffs,

v.

THE CINCINNATI INSURANCE COMPANY; THE CINCINNATI CASUALTY COMPANY; MORRIS INSURANCE AGENCY INC.; and DOES 1 THROUGH 20, INCLUSIVE,

Defendants.

EXHIBIT A

From Durham County
No. COA 21-293

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AMICUS CURAE BRIEF FOR DISCRETIONARY REVIEW
BEFORE DETERMINATION BY THE COURT OF APPEALS

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INDEX

TABLE OF AUTHORITIES

No. _____ FOURTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

NORTH STATE DELI, LLC d/b/a LUCKY'S DELICATESSEN, MOTHERS & SONS, LLC d/b/a MOTHERS & SONS TRATTORIA, MATEO TAPAS, L.L.C. d/b/a MATEO BAR DE TAPAS, SAINT JAMES SHELLFISH LLC d/b/a SAINT JAMES SEAFOOD, CALAMARI ENTERPRISES, INC. d/b/a PARIZADE, BIN 54, LLC d/b/a BIN 54, ARYA, INC. d/b/a CITY KITCHEN and VILLAGE BURGER, GRASSHOPPER LLC d/b/a NASHER CAFE, VERDE CAFE INCORPORATED d/b/a LOCAL 22, FLOGA, INC. d/b/a KIPOS GREEK TAVERNA, KUZINA, LLC d/b/a GOLDEN FLEECE, VIN ROUGE, INC. d/b/a VIN ROUGE, KIPOS ROSE GARDEN CLUB LLC d/b/a ROSEWATER, and GIRA SOLE, INC. d/b/a FARM TABLE and GATEHOUSE TAVERN,

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AMICUS CURAE BRIEF FOR DISCRETIONARY REVIEW
BEFORE DETERMINATION BY THE COURT OF APPEALS

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

The North Carolina Restaurant and Lodging Association ("NCRLA") respectfully submits this *Amicus Curae* brief in support of *the North State Deli, LLC v. The Cincinnati Insurance Company* Plaintiffs and on behalf of its thousands of small business and other members throughout North Carolina whose restaurants and hotels have been devastated by the Covid-19 event and resulting Government Orders mandating physical closure.[1]

NCRLA, on behalf of its thousands of members, has a strong interest in the outcome of Plaintiffs' Petition for Discretionary Review Before Determination by the Court of Appeals (the "Petition") and offers its unique perspective to the Court regarding the issues raised therein. NCRLA's brief expounds on the importance of immediate review of this coverage dispute as it directly impacts North Carolina's restaurant and lodging industry. Specifically, resolution of this dispute is of significant public interest to NCRLA's members – and by extension North Carolina; the case involves legal principles of continuing import to the restaurant and hospitality industry; and, perhaps most importantly, delay in resolution of this dispute will continue to cause substantial harm to North Carolina's businesses. NCRLA's members need to know if the grant of Plaintiffs' Motion for Partial Summary Judgment will be upheld such that Cincinnati Insurance Company

[1] Specifically, NCRLA has 3,000 members and works on behalf of 20,000 restaurants and hotels statewide. NCRLA's members employ roughly 250,000 of the North Carolina restaurant and lodging industry's 500,000-strong workforce (which comprises 11% of North Carolina's workforce).

("Cincinnati") and similar insurers will be bound to their coverage promise to pay for the direct physical loss caused by COVID-19 and the related civil authority orders.

INTRODUCTION

Expeditious review of the Durham County Superior Court's partial summary judgment ruling is critical for all parties – and thousands of policyholders in North Carolina. The lower court's October 9, 2020, ruling (the "Opinion") considered axiomatic principles of insurance contract interpretation, applying them to the present pandemic, to find that certain causes of loss – namely, COVID-19 and the related civil authority orders – constitute "physical loss" to property so as to require coverage for Plaintiffs and others similarly situated.

Like numerous property insurance policies issued in North Carolina and elsewhere, Plaintiffs' policies are "all risk" policies that broadly cover loss resulting from any kind of direct "physical loss" to "Covered Property" unless expressly excluded. Importantly, Defendant Cincinnati chose not to exclude coverage for viruses or virus-related perils, despite the industry norm to do so. As a result, Plaintiffs (and similarly situated policyholders) are covered for their losses stemming from North Carolina's mandatory closure orders (the "Government Orders") issued as a result of the Coronavirus.

In improperly denying coverage, Cincinnati and other insurance companies with similarly broad policies (1) compare Covid-19 to something ephemeral or fleeting that supposedly has no physical impact, and (2) ignore the Government

Orders and their impact on insured properties entirely. But Covid-19 is real and ***physical***, with real, physical effects on Plaintiffs' properties. Similarly, the Government Orders effectively shut down Plaintiffs' (and NCRLA members') businesses and prohibited use as intended. For nearly a year, a patron could not venture inside restaurants because they were physically dangerous ***and*** had been forbidden to do so. Plaintiffs' business interruptions were caused by the loss of use and access from the virus and the Government Orders.

This Court's review of the Opinion will resolve a year-long dispute about whether all-risk property insurance policies which do not expressly exclude viruses and/or Government Orders cover these "physical losses." Under North Carolina's law, they do, and the Opinion should be reviewed and upheld.

LEGAL STANDARD

Under North Carolina Gen. Stat. § 7A-31(b) and Rule 15(a) of the North Carolina Rules of Appellate Procedure, certification may be made by the Supreme Court before determination of a cause by the Court of Appeals when, in the opinion of the Supreme Court, ***any*** of the following apply:

> (1) The subject matter of the appeal has significant public interest.
> (2) The cause involves legal principles of major significance to the jurisprudence of the State.
> (3) Delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm.
> (4) The workload of the courts of the appellate division is such that the expeditious administration of justice requires certification.
> (5) The subject matter of the appeal is important in overseeing the jurisdiction and integrity of the court system.

Here, the first three factors apply and weigh in favor of the Court's certification for discretionary review and final resolution.

ARGUMENT

A. The Subject Matter of *North State Deli* Has Significant Public Interest.

Review and resolution of the *North State Deli* litigation is of significant public interest, in North Carolina and nationally.

***First*,** although the case was brought on behalf of Plaintiffs' sixteen restaurants, the Opinion affected far more than those establishments. The *North State Deli* court determined that Cincinnati's attempt to avoid its coverage obligations was wrong; under Cincinnati's standard form property insurance policy, Covid-19 and the related Government Orders constituted a covered direct physical loss. Plaintiffs' Appendix ("App.") at 2. Cincinnati issued and collected premiums on thousands of all-risk property insurance policies without a virus exclusion – including dozens (or even hundreds) issued to North Carolina businesses. Other insurers also made the decision to market and bind this type of broad coverage, then shirked their responsibility for paying claims throughout the pandemic. The Opinion provides authoritative guidance to insurers with North Carolina policyholders to honor their coverage promises.

Of the North Carolina policyholder businesses, North Carolina's hospitality industry has suffered dire financial consequences during the pandemic and is most in need of its insurance proceeds to survive. During the pandemic, lodging occupancy has been down over 31.2% compared to 2019, with room revenues down

41% in 2020. Similarly, consumer spending in restaurants remained well below normal levels. Indeed, 79% of restaurant operators reported their total dollar sales volume in October 2020 was lower than it was in October 2019. Overall, sales are down 29% on average. Meanwhile, labor costs have not fallen proportionately and in some instances, costs were even higher during the COVID-19 pandemic. With costs rising and sales falling, the result is added damage to the bottom line. Eighty-six percent of operators reported that their profit margin was lower than it was before the pandemic.

The devastation of the hospitality industry in North Carolina has a broader impact on North Carolina. North Carolina has over 20,000 restaurants and lodging establishments, which are a driving force of North Carolina's economy. Pre-pandemic, the hospitality industry provided jobs for thousands of people and played, and continues to play, a vital role in local communities throughout the state. Combined, pre-pandemic, the North Carolina restaurant and lodging industry provided 531,000 jobs, equal to 11 percent of the state's workforce, and generated approximately $27.3 billion in sales annually. The hospitality sector also generated over $3 billion for North Carolina in state and local taxes. Many of these businesses protected their interests (and North Carolina's interests) by purchasing all-risk property insurance with the understanding that this insurance would supplement covered losses. The Opinion supports their understanding. Immediate review (and upholding) of the Opinion by this Court would provide the North Carolina

hospitality industry certainty for how to proceed in 2021, ideally with affirmance that their losses are covered.

Second, the impact of the Opinion has had far-reaching effects beyond North Carolina. Nationally, the Opinion has been cited by dozens of courts. For both policyholders and insurers, the decision is significant as the first summary judgment ruling providing coverage for damages related to Covid-19 and Government Orders. For the hospitality industry nationally, the Opinion was a watershed moment; over 700 lawsuits have been brought by lodging and restaurant policyholders nationally. And, Defendant Cincinnati is directly affected by the decision as well, as Cincinnati has over 160 lawsuits against it related to interpretation of the same policy language at issue in the Opinion. Upholding the Opinion will hold Cincinnati accountable to its policyholders, even as it claims across the country that its policy language is not ambiguous and provides no coverage, ann attempt to distract from the Opinion that rules to the contrary.

In short, expeditious resolution of this litigation will have a ripple effect on resolving coverage disputes – and potentially saving businesses in North Carolina.

B. *North State Deli* Involves Legal Principles of Major Significance to North Carolina.

Certification and immediate review of *North State Deli* is important to confirm that the underlying court correctly applied foundational principles of contract interpretation and insurance analysis. Specifically, the Opinion utilized key principles of insurance policy interpretation in ruling that the phrase in Cincinnati's all-risk policy "direct physical loss" applied to the Plaintiffs' loss of

their space resulting from the virus and the Government Orders. While Plaintiffs' (and NCRLA) believe the policy language established coverage (or was otherwise ambiguous), Cincinnati argued that there was no coverage. In response, the court examined the language for ambiguity, applying the principles of contra proferentem, and in so doing, weighed in on the national, fifty-year long dispute on the meaning of the standard form property insurance policy phrase "direct physical loss or damage." Expeditious review of how the *North State Deli* court applied these principles will guide North Carolina courts in resolving a plethora of other pandemic insurance cases and future physical loss coverage disputes.

In in conducting its analysis, the *North State Deli* court recognized that North Carolina law requires that any policy ambiguity must be construed in favor of coverage. Opinion (App. 4-5, 6); *see also Grant v. Emmco Ins. Co.*, 295 N.C. 39, 43, 243 S.E.2d 894, 897 (1978); *Southeast Airmotive Corp. v. U.S. Fire Ins. Co.*, 78 N.C. App. 418, 420, 337 S.E.2d 167, 169 (1985), *disc. review denied*, 316 N.C. 196, 341 S.E.2d 583 (1986). This principle means that if there are two reasonable interpretations of the same language, then the Court *must* favor the pro-coverage view. *See, e.g.*, *W & J Rives, Inc. v. Kemper Ins. Grp.*, 92 N.C. App. 313, 316, 374 S.E.2d 430, 433 (1988), *disc. review denied*, 324 N.C. 342, 378 S.E.2d 809 (1989) ("If the language used in the policy is reasonably susceptible to different constructions, it must be given the construction most favorable to the insured."). Additionally, when interpreting insurance policies, North Carolina courts have held that provisions of insurance policies extending coverage must be liberally construed so as

to maximize coverage while provisions excluding coverage should be strictly construed against the insurer. *State Capital Ins. Co. v Nationwide Mutual Ins. Co.*, 318 N.C. 534, 350 S.E. 2d (1986).

Notably, Defendant Cincinnati could have chosen to specifically exclude viral contamination such as Covid-19 from its all-risk coverage. Cincinnati's failure to do so was a considered part of the court's policy language interpretation. Opinion (App. 7). Viral contamination is not an unknown risk in the restaurant or insurance industry, further emphasized by the 2006 SARS epidemic. For this reason, the insurance industry developed a "virus exclusion" that explicitly precludes coverage for losses associated with viruses. Despite this exclusion being commonplace in all-risk property policies, Cincinnati chose not to include such an exclusion in the policies at issue in this litigation. By failing to exclude virus-related losses from coverage, Cincinnati conveyed to its policyholders that they would be protected from risks arising from viruses such as Covid-19. Many of NCRLA's members, like Plaintiffs, specifically purchased insurance *without* a virus exclusion thus ensuring this protection. Upholding the Opinion would validate the court's application of the insurance principle that ambiguity should be construed in favor of a policyholder, and that the insurer's intentional omission of certain language in policies is important to contract interpretation and evidence of ambiguity.

Additionally, the *North State Deli* court evaluated the specific phrase "physical loss" in the context of COVID-19 and related Government Orders, drawing

from the history of other courts finding "physical loss" (as opposed to physical damage) in similar circumstances. In particular, the court evaluated whether coverage was available for a suspension of operations "caused by direct 'loss' to property," with "loss" defined as "accidental physical loss or accidental physical damage." The court started with the policy language and noted that it was significant that Defendant chose to connect the two defining phrases with "or," meaning one or the other, but not necessarily both. Opinion (App. 7) The court also drew on a long-running record of courts distinguishing between what constitutes "physical *loss*" as distinct from "physical *damage*," with policyholders logically demonstrating that the word "loss" cannot be collapsed into and mean the same thing as "damage." Indeed, while "damage" indisputably includes tangible or structural physical damage such as inflicted by a tornado, "loss" must mean something different from "damage" or else it would not be separated from "damage." Here, Covid-19's actual or suspected physical presence at or in the vicinity of a property like Plaintiffs' restaurants—as well as the ensuing Government Orders—prevents the policyholders from making full use of their properties, especially in cases where the business (as here) had to close in full or in part. This kind of loss constitutes a "*physical loss*" to the property because it cannot be used for its insured purpose.

Although the first North Carolina court to consider this policy language in the pandemic context, the *North State Deli* court was not the first court nationally to interpret Cincinnati's policy language. In *Studio 417, Inc. v. The Cincinnati*

Insurance Company, No. 6:20-cv-03127-SRB (W.D. Mo. Aug. 8, 2020), the Western District of Missouri interpreted the same language against Cincinnati. There, the court determined that because "physical loss" was undefined, under traditional policy interpretation principles, it should be afforded its ordinary meaning as supplied by standard definitions. In denying Cincinnati's motion to dismiss, the court referred to the standard dictionary definition of "physical," meaning to have "material existence." The court recognized the meaning of "loss" as including either "the act of losing possession" or "deprivation" of use for an intended purpose. *Id.* Because Covid-19 is alleged to be a physical substance that lives on and is active on inert physical surfaces (as well as airborne), and its presence resulted in direct loss of property (and the resulting governmental orders), the policyholder had suffered a covered loss. The imminent threat of, or actual attachment of, the virus droplets to the surfaces of Plaintiffs' properties in *North State Deli* likewise rendered their properties unsafe and unusable for their intended purpose.

The distinction between "physical loss" and "physical damage" has been made in other contexts analogous to Covid-19. Additional examples include *Motorist Mutual Insurance Co. v. Hardinger*, 131 F. App'x 823 (3d Cir. 2005) (applying Pennsylvania law), where the court found that bacterial contamination of a home's water supply constituted a "direct physical loss to property" because, despite the lack of physical *damage*, it rendered the home too dangerous to inhabit. Similarly, in *Cooper v. Travelers Indemnity Company of Illinois*, No. C-01-2400-VRW, 2002 WL 32775680 (N.D. Cal. Nov. 4, 2002), where a tavern was forced to close due to E.

coli contamination in its well water, the court held that the E. coli constituted "direct physical damage to the property" and ordered the insurer to pay time element/extra expense coverage. Likewise, in *Total Intermodal Services v. Travelers Property Casualty Company of America*, No. CV 17-04908, 2018 WL 3829767 (C.D. Cal. July 11, 2018), the court interpreted a similar requirement of "direct physical loss of or damage to" as encompassing "loss of use." In that case, cargo was lost during shipment but was not physically damaged, and the court held this event constituted "physical loss of" insured property, stating that "'loss of' property contemplates that the property is misplaced and unrecoverable, without regard to whether it was damaged." And, in *U.S. Airways v. Commonwealth Insurance Co.*, No. 03–587, 2004 WL 1094684 (Va. Cir. Ct. May 14, 2004), *rev'd on other grounds sub nom.*, *PMA Capital Ins. Co. v. US Airways, Inc.*, 626 S.E. 2d 369, 374 (Va. 2006), an airline sought coverage for business interruption losses sustained as a result of the government's closure of National Airport during the September 11, 2001 attacks on the World Trade Center. The insurer argued that actual damage to the airline's property was required to recover under the Civil Authority part of business interruption coverage. The court rejected this argument, ruling in favor of the policyholder and distinguishing the insurer's cases that involved policies with language requiring "physical damage."[2]

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[2] The Virginia Supreme Court later reversed on other, unrelated grounds having to do with the policyholder not being able to claim insurance for amounts received through a governmental relief fund (which mooted the coverage otherwise found to

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Moreover, there is a long line of majority-rule cases holding that property affected by an odor alone has experienced "physical loss" sufficient to trigger insurance even without physical alteration or damage to the property itself. For example, in *TRAVCO Insurance Co. v. Ward*, 715 F. Supp. 2d 699, 709 (E.D. Va.2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013), the court found "direct physical loss" where a "home was rendered uninhabitable by the toxic gases" released by defective drywall, regardless of lasting physical damage to the property itself. In another case, *Gregory Packaging, Inc. v. Travelers Property Casualty Co.*, No. 2:12-cv-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014), the court held that an ammonia discharge inflicted direct physical loss or damage to a manufacturing plant because the ammonia physically rendered the facility temporarily unfit for occupancy despite a lack of any structural alteration. Here, the presence of COVID-19 – now purportedly airborne – creates an analogous physical loss at Plaintiffs' restaurants.

Dozens of courts across the country, both state and federal have found "physical loss" in fact patterns where there was no tangible physical damage to the covered property but the presence of a disease-causing agent that must be cleaned from the property still constituted a covered physical loss.[3] As one among many

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be available under the policy). *PMA Capital Ins. Co. v. US Airways, Inc.*, 626 S.E. 2d 369, 374 (Va. 2006).

[3] *See, e.g.*, *Cooper v. Travelers Indem. Co.*, No. C-01-2400, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002) (addressing E. coli bacteria in well water); *Am. Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957) (radioactive dust); *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, 2005 WL 600021, at *4 (N.Y. Super. Mar. 4, 2005) (noxious particles from dust, soot, and smoke); *Sentinel Mgmt.*

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examples, in *Columbiaknit, Inc. v. Affiliated FM Insurance Co.*, No. Civ. 98-434-HU, 1999 WL 619100 (D. Or. Aug. 4, 1999), the court found that mildew exposure qualified as direct "physical loss" sufficient to trigger business interruption coverage. In *Columbiaknit*, as in the context of Covid-19 here, there is *more* at stake than "the mere adherence of molecules to porous surfaces" (*id.* at *7): specifically, the prospect of illness or death due to the presence of the virus on surfaces or in the restaurants' air.

Ultimately, interpreting Plaintiffs' policies as Cincinnati suggested (and the *North State Deli* court rejected) would deprive Plaintiffs of the full coverage they purchased. This Court should certify the dispute to uphold the lower court's application of the principle of interpreting ambiguous language and interpreting the commonplace phrase "physical loss" in line with decades of similar insurance cases.

C. Delay Will Cause Substantial Harm to the Hospitality Industry of North Carolina.

Delay in reaching a final, binding decision in *North State Deli* will substantially harm the Plaintiffs and NCRLA's members. The Opinion set the bar for what was required of Cincinnati: the losses were covered losses and Cincinnati

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Co. v. Aetna Cas. & Sur. Co., 615 N.W.2d 819, 825-26 (Minn. 2000) (asbestos fibers); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *8-9 (D. Or. June 18, 2002) (toxic mold); *Pillsbury Co. v. Underwriters of Lloyd's*, 705 F. Supp. 1396, 1401 (D. Minn. 1989) (health-threatening organisms); *Henri's Food Prods. v. Home Ins. Co.*, 474 F. Supp. 889, 892 (E.D. Wis. 1979) (agricultural chemicals in vapor form); *Gen. Mills. Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. App. 2001) (pesticides).

owed the respective insurance proceeds under each policy.[4] Cincinnati, however, has yet to make any payments to Plaintiffs. Indeed, Cincinnati is fighting its coverage obligations across the country, hoping to outlast its policyholders. By appealing the Opinion, Cincinnati attempts to buy itself more time before it pays a single policyholder the coverage due.

This delay is fatal to the hospitality industry. As noted, in North Carolina, the hospitality industry continues to suffer the effects of Covid-19 and the impact of the Government Orders. For example, initially, the Government Orders resulted in 300,000 restaurant employees being laid off or furloughed and nearly 70% of all restaurant locations closed or operating at very limited capacity. The losses to the industry continued into 2020. In a December 2020 survey, 36% of restaurant operators were considering temporarily closing their restaurant until the pandemic passes. This is on top of the dozens of businesses that already closed permanently. Such additional closures would result in more unemployed hospitality sector workers and continued financial losses for North Carolinians. Indeed, although many restaurants added back employees after the initial lockdowns, overall staffing levels remain below normal. Eighty-one percent of restaurant operators say their current staffing level is lower than what it would normally be in the absence of COVID-19, and forty-five percent of restaurants reported being *more than 20% below* normal staffing levels. Ultimately, the industry needs finality on what will

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[4] The respective claim amounts due under each policy still needs to be determined, but the threshold of liability was established by the Opinion.

happen next – can restaurants and lodging establishments (and their employees) expect to receive insurance proceeds or will they be abandoned by their insurers and left to fend on their own?[5] Such uncertainty can be just as devastating for these businesses as they are unable to plan long-term for hiring and overhead costs. Review and swift resolution of the *North State Deli* litigation will allow NCRLA members to prepare for the future.

CONCLUSION

For these reasons stated herein, NCRLA respectfully requests the Court grant Plaintiffs' Petition for Discretionary Review and uphold the Opinion.

Respectfully submitted,

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[5] Notably, NCRLA restaurant members reported that only 35% of those who applied for the PPP federal relief program received loans. The majority — 65% who applied — did not receive loans. For those members insured by Cincinnati or similarly broad policies, this means insurance proceeds are the only viable relief during the crisis.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the attorney is, and at all times hereinafter mentioned was, more than eighteen (18) years of age; and that on this day, copies of the foregoing will be served on the following by electronic mail:

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The undersigned attorney certifies under penalty of perjury that the forgoing is true and correct.

This the 24th day of June, 2021.

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I certify that the attorney listed below has authorized me to list his name on this document as if he had personally signed it.

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