

IN THE
New Hampshire Supreme Court

Case No. 2022-0155

SCHLEICHER AND STEBBINS HOTEL, LLC, *ET AL.*,
Plaintiffs-Appellees,
v.
STARR SURPLUS LINES INSURANCE COMPANY, *ET AL.*,
Defendants-Appellants.

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

***AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN
SUPPORT OF APPELLEES AND AFFIRMANCE***

Michael A. Kostiew
NH Bar No. 17712
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, PA 15222
Tel: 412-288-3131
mkostiew@reedsmith.com

*Attorneys for Amicus Curiae
United Policyholders*

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT..... 4

ARGUMENT 6

I. THE INSURANCE INDUSTRY PARTIES
MISREPRESENT THE ORIGIN AND NATURE OF
STANDARD-FORM TIME ELEMENT COVERAGE. 6

 A. In the Mid-1980s, the Insurance Industry Broadened the
 Trigger for Time Element Coverage from “Damage” to or
 “Destruction” of Property to “Loss” of or “Damage” to
 Property, To Match Its Customers’ Migration from Named
 Peril to Broader All Risk Coverage.7

 B. The Insurance Industry Parties Misrepresent the Nature of
 Time Element Coverage.10

 C. For Sixty Years, the Insurance Industry Has Known That Its
 Standard-Form Language Covers Loss Rendering Property
 Unfit for Its Intended Use. 16

II. THE COURT SHOULD NOT BE DISTRACTED BY CRIES
OF “WOLF” FROM THE INSURANCE INDUSTRY PARTIES. 24

 A. Rather Than Applying State Rules of Construction to the
 Policy Language Before Them, Federal Courts Have Applied
 What Can Best Be Described as a Federal Common Law of
 COVID-19 Insurance.25

 B. The Insurance Industry Has Historically Argued That
 Findings of Coverage Threaten Its Existence.26

 C. Since 2020, Courts Have Used a Structural Alteration
 Standard for COVID-19 Coverage Cases but Apply the
 Historic, Broader Standard to Non-COVID-19 Coverage
 Cases.30

CONCLUSION 38

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Allstate Prop. & Cas. Ins. Co. v. Wolfe</i> , 105 A.3d 1181 (Pa. 2014).....	3
<i>Am. All. Ins. Co. v. Keleket X-Ray</i> , 248 F.2d 920 (6th Cir. 1957)	17, 23
<i>Arbeiter v. Cambridge Mut. Fire Ins. Co.</i> , No. 9400837, 1996 WL 1250616 (Mass. Super. Ct. Mar. 15, 1996)	17
<i>Ass'n of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.</i> , 939 F. Supp. 2d 1059 (D. Haw. 2013).....	20
<i>Azalea Ltd. v. Am. States Ins. Co.</i> , 656 So. 2d 600 (Fla. Dist. Ct. App. 1995)	17
<i>Bd. of Educ. v. Int'l Ins. Co.</i> , 720 N.E.2d 622 (Ill. App. Ct. 1999)	17
<i>Blaine Richards & Co. v. Marine Indem. Ins. Co.</i> , 635 F.2d 1051 (2d Cir. 1980)	21
<i>Brand Mgmt., Inc. v. Md. Cas. Co.</i> , No. 05-cv-02293, 2007 WL 1772063 (D. Colo. June 18, 2007)	16, 19
<i>Brecher Furniture Co. v. Firemen's Ins. Co. of Newark</i> , 191 N.W. 912 (Minn. 1923)	7
<i>Burdett Oxygen Co. v. Employers Surplus Lines Ins. Co.</i> , 419 F.2d 247 (6th Cir. 1969)	8
<i>Chatfield v. Aetna Ins. Co.</i> , 75 N.Y.S. 620 (N.Y. App. Div. 1902)	7

<i>In re Chinese Manufactured Drywall Prods. Liab. Litig.</i> , 759 F. Supp. 2d 822 (E.D. La. 2010).....	20
<i>Cont'l Ins. Co. v. Honeywell Int'l, Inc.</i> , 188 A.3d 297 (N.J. 2018)	3
<i>Cook v. Allstate Ins. Co.</i> , No. 48D02-0611-PL-01156. 2007 Ind. Super. LEXIS 32 (Nov. 30, 2007).....	19, 23
<i>Cooper v. Travelers Indem. Co. of Ill.</i> , No. C-01-2400, 2002 WL 32775680 (N.D. Cal. Nov. 4, 2002).....	18, 23
<i>Crisco v. Foremost Ins. Co.</i> , No. C 19-07320 WHA, 2020 WL 7122476 (N.D. Cal. Dec. 4, 2020)	30, 31
<i>Cyclops Corp. v. Home Ins. Co.</i> , 352 F. Supp. 931 (W.D. Pa. 1973).....	17
<i>Datatab, Inc. v. St. Paul Fire & Marine Ins. Co.</i> , 347 F. Supp. 36 (S.D.N.Y. 1972)	8, 14, 15, 16
<i>De Laurentis v. United Servs. Auto. Ass'n</i> , 162 S.W.3d 714 (Tex. Ct. App. 2005).....	19
<i>Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.</i> , 411 F.3d 384 (2d Cir. 2005)	12
<i>EMOI Servs., LLC v. Owners Ins. Co.</i> , 2021-Ohio-3942 (Ohio App. 2021)	34, 35, 36
<i>Farmers Ins. Co. v. Trutanich</i> , 858 P.2d 1332 (Or. Ct. App. 1993).....	17
<i>Fidelity-Phenix Fire Ins. Co. v. Benedict Coal Corp.</i> , 64 F.2d 347 (4th Cir. 1933)	7
<i>Graff v. Allstate Ins. Co.</i> , 54 P.3d 1266 (Wash. Ct. App. 2002).....	18

<i>Grand Pac. Hotel Co. v. Mich. Com. Ins. Co.</i> , 90 N.E. 244 (Ill. 1909).....	7
<i>Great N. Oil Co. v. St. Paul Fire & Marine Ins. Co.</i> , 227 N.W.2d 789 (Minn. 1975)	8
<i>Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.</i> , 787 F.2d 349 (8th Cir. 1986)	17, 21
<i>Hetrick v. Valley Mut. Ins. Co.</i> , 15 Pa. D. & C. 4th 271 (Ct. Com. Pl. 1992)	17
<i>Hughes v. Potomac Ins. Co. of D.C.</i> , 18 Cal. Rptr. 650 (Ct. App. 1962)	17
<i>Humana Inc. v. Forsyth</i> , 525 U.S. 299 (1999).....	3
<i>Intermetal Mexicana, S.A. v. Ins. Co. of N. Am.</i> , 866 F.2d 71 (3d Cir. 1989)	8
<i>James W. Fowler Co. v. QBE Ins. Corp.</i> , No. 3:18-cv-1705-S1, 2020 WL 4291272 (D. Or. July 24, 2020)	32, 33, 34
<i>Julian v. Hartford Underwriters Ins. Co.</i> , 110 P.3d 903 (Cal. 2005).....	3
<i>Largent v. State Farm Fire & Cas. Co.</i> , 842 P.2d 445 (Or. Ct. App. 1992).....	7
<i>Mama Jo’s, Inc. v. Sparta Ins. Co.</i> , 823 Fed. Appx. 868 (11th Cir. 2020).....	36
<i>Manpower Inc. v. Ins. Co. of State of Pa.</i> , No. 08C0085, 2009 WL 3738099 (E.D. Wis. Nov. 3, 2009)	20
<i>Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.</i> , 98 N.W.2d 280 (Minn. 1959)	21

<i>Matzner v. Seaco Ins. Co.</i> , No. 96-0498-B, 1998 WL 566658 (Mass. Super. Ct. Aug. 12, 1998)	17, 23
<i>Mellin v. Northern Security Ins. Co.</i> , 115 A.3d 799 (N.H. 2015)	4, 5, 6, 20, 23, 24
<i>Motorists Mut. Ins. Co. v. Hardinger</i> , 131 F. App'x 823 (3d Cir. 2005)	19
<i>Murray v. State Farm Fire & Cas. Co.</i> , 509 S.E.2d 1 (W. Va. 1998).....	17
<i>National Children's Expositions Corp. v. Anchor Ins. Co.</i> , 279 F.2d 428 (2d Cir. 1960)	8
<i>National Ink & Stitch, LLC v. State Auto Prop. & Cas. Ins. Co.</i> , No. SAG-18-2138, 2020 WL 374460 (D. Md. Jan. 23, 2020)	33, 34
<i>Noranda Aluminum Holding Co. v. XL Ins. Am., Inc.</i> , No. N17C-01-152 WCC CCLD, 2019 WL 1399956 (Del. Super. Mar. 21, 2019)	13
<i>Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co.</i> , No. 1:15-cv-01932-CL 2016 WL 3267247 (D. Or. June 7, 2016) <i>vacated by joint stipulation</i> , 2017 WL 1034203 (D. Or. Mar. 6, 2017).....	11, 20
<i>Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts</i> , No. CV-01-1362-ST, 2002 WL 31495830 (D. Or. June 18, 2002)	18
<i>Real Hosp., LLC v. Travelers Cas. Ins. Co.</i> , 499 F. Supp. 3d 288 (S.D. Miss. 2020)	12
<i>S. Wallace Edwards & Sons, Inc. v. Cincinnati Ins. Co.</i> , 353 F.3d 367 (4th Cir. 2003)	21
<i>Schlamm Stone & Dolan LLP v. Seneca Ins. Co.</i> , 800 N.Y.S.2d 356 (Sup. Ct. 2005).....	11, 19

<i>Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.</i> , 615 N.W.2d 819 (Minn. 2000)	18, 23
<i>Sentinel Mgmt. Co. v. N.H. Ins. Co.</i> , 563 N.W.2d 296 (Minn. Ct. App. 1997).....	17
<i>Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.</i> , 93 Cal. Rptr. 2d 364 (Ct. App. 2000)	7
<i>Sproull v. State Farm Fire & Cas. Co.</i> , No. 126446, 2021 WL 4314060 (Ill. Sept. 23, 2021).....	3
<i>Stack Metallurgical Servs., Inc. v. Travelers Indem. Co.</i> , No. 05-1315, 2007 WL 464715 (D. Or. Feb. 7, 2007)	19
<i>TRAVCO Ins. Co. v. Ward</i> , 715 F. Supp. 2d 699 (E.D. Va. 2010)	20
<i>W. Fire Ins. Co. v. First Presbyterian Church</i> , 437 P.2d 52 (Colo. 1968).....	17
<i>Woolworth LLC v. Cincinnati Ins. Co.</i> , 535 F. Supp. 3d 1149 (N.D. Ala. 2021).....	10
<i>Yale Univ. v. CIGNA Ins. Co.</i> , 224 F. Supp. 2d 402 (D. Conn. 2002).....	18
<i>Zurich Am. Ins. Co. v. ABM Indus., Inc.</i> , 397 F.3d 158 (2d Cir. 2005)	12

INTEREST OF *AMICUS CURIAE*

United Policyholders (“UP”) is a highly respected non-profit 501(c)(3) organization. Since its founding in 1991, UP has been a dedicated advocate and information resource for individual and commercial insurance consumers. UP assists consumers purchasing policies or pursuing claims. UP hosts a library of publications and videos related to personal and commercial insurance products, coverage, and the claims process at www.uphelp.org.

Grants, donations, and volunteers support UP’s work, which is divided into three program areas: Roadmap to Recovery (disaster recovery and claim help), Roadmap to Preparedness (insurance and financial literacy and disaster preparedness), and Advocacy and Action (advancing pro-consumer laws and public policy). Public officials, state insurance regulators, academics and journalists routinely seek UP’s input on insurance and legal matters. UP’s Executive Director has been appointed to twelve consecutive terms as an official consumer representative to the National Association of Insurance Commissioners (“NAIC”). In that role, UP works with regulators on matters related to insurance policy sales, claims, and consumer rights. UP also serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and the Treasury Department.

On Time Element claims related to COVID-19, UP gave three separate NAIC presentations in 2020.¹ UP called attention to the uniform

¹ NAIC Special Session on COVID-19 Lessons Learned, Testimony of Amy Bach on Business Interruption Policies and Claims, Summer

pattern of coverage denials by insurance companies nationwide (even where policy language differed and policies contained no virus or pandemic exclusion), coupled with unsupported assertions that paying claims would bankrupt the insurance industry. UP also presented evidence that insurance companies were not candid with regulators about the significance of virus and pandemic-related limitations and exclusions they added to their policies.² Specifically, although insurance companies had paid Time Element claims stemming from the SARS-CoV-1 outbreak in 2002-2003, and insurance companies had paid Time Element claims for loss from harmful substances for decades, insurance industry drafting organizations told regulators that their standard-form policies did not respond to loss or damage caused by “disease-causing” agents; thereby avoiding rate cuts when their members added virus and bacteria exclusions after 2006.³

UP chooses cases cautiously and appears as *amicus curiae* nationwide. UP’s briefs provide a counterweight to the claims of the insurance industry and facilitate evenhanded development of the law. UP’s

National Meeting Property and Casualty Insurance (C) Committee August 12th, 2020, Testimony of Amy Bach on COVID-19 Related Business Interruption Claims, Coverage Issues, Disputes and Litigation, Summer National Meeting, Consumer Liaison Committee, August 14th, 2020.

² See Lewis *et al.*, *Here We Go Again: Virus Exclusion for COVID-19 and Insurers*, NU PROP. CAS. 360 (Apr. 7, 2020), <https://www.propertycasualty360.com/2020/04/07/here-we-go-again-virus-exclusion-for-covid-19-and-insurers/?slreturn=20200927114442>.

³ *Id.*

briefs have been cited in the opinions of multiple state supreme courts as well as the U.S. Supreme Court.⁴

In this brief, UP seeks to fulfill the classic role of *amicus curiae*, supplementing the efforts of counsel and drawing the Court's attention to law and drafting history that might otherwise escape consideration. As commentators have stressed, an *amicus* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings."⁵ The issues presented in this case will affect coverage not just for the limited number of New Hampshire policyholders with COVID-19-related insurance claims in litigation; it will dramatically affect future New Hampshire policyholders that suffer losses caused by things like toxic fumes, smoke, asbestos fibers, bacteria and other invisible materials that render property unusable without causing structural alteration. As shown in this brief, insurance companies are already using arguments from COVID-19 cases to argue against coverage for other types of losses which have been covered under the insurance industry's standard promises for sixty years. This Court should consider the full scope of what will be lost if the insurance industry's arguments are accepted here.

⁴ See *Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Sproull v. State Farm Fire & Cas. Co.*, No. 126446, 2021 WL 4314060 (Ill. Sept. 23, 2021); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 105 A.3d 1181, 1185-6 (Pa. 2014).

⁵ Stern, Greggman & Shapiro, SUPREME COURT PRACTICE, 570-71 (1986) (*quoting* Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).

SUMMARY OF ARGUMENT

The Insurance Industry Parties⁶ seek to convince this Court to reverse the decision below – a straightforward application of this Court’s holding in *Mellin v. Northern Security Insurance Co.*, 115 A.3d 799, 805-06 (N.H. 2015) – by misrepresenting (1) the drafting history of the standard-form policy language at issue; (2) the nature and purpose of coverages for losses that occur over time (“Time Element” coverages); and (3) the legal construction of standard-form Time Element provisions by courts over the last sixty years.

As detailed below, the insurance industry switched to the modern “loss” and “damage” triggers for Time Element coverage from more limited triggers; namely, “damage” or “destruction” triggers in policies sold through the middle of the last century. The earlier triggers were limited because the policies at issue only covered “fire” or named perils like “lightning,” “collapse” or “earthquake” (*i.e.*, events likely to cause “damage” or “destruction”). The insurance industry expanded the Time Element triggers to match the coverage its customers preferred: “all risk” coverage, which covers any loss or damage to property unless expressly excluded. The Insurance Industry Parties urge this Court not only to ignore their own intent, but to contradict it by construing “loss” **to mean** “destruction” when in fact “loss” **replaced** “destruction.”

⁶ This brief will refer to Defendants-Appellants and the American Property Casualty Insurance Association as the “Insurance Industry Parties.”

Next, the Insurance Industry Parties misrepresent the nature of the Time Element coverage provided by their modern standard forms, claiming that these forms are concerned primarily with damage to property and that any Time Element coverage is incidental and certainly does not insure a policyholder's operations or the best use of its property. In fact, Time Element coverage is wholly distinct and independent from coverage for property damage and absolutely insures a policyholder's ideal use of property at which it conducts operations. This is why, for instance, a lessee can make a Time Element claim for loss incurred at a leased space in which it has no ownership interest. Further, it is no answer to a policyholder's claim of lost income at its bar as a result of a carbon monoxide leak to say that the bar space could be used to store lumber; the policyholder insured, and paid premium based upon, its operation of a bar. If the policyholder mitigates its loss by storing lumber at the empty bar that may mitigate but will not terminate its loss.

Third, the Insurance Industry Parties ignore that, for sixty years, they have known that courts like this Court in *Mellin* have found that “‘physical loss’ was not limited to ‘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,’ as long as they are ‘distinct and demonstrable.’”⁷ Despite this, the insurance industry did not change the “loss” or “damage” trigger for Time Element coverage to require some sort of “structural alteration” of property.

⁷ 115 A.3d at 805.

Last, the Insurance Industry Parties argue that this Court should consider the threat to the insurance industry if this Court affirms the decision below. This argument has clearly, and inappropriately, impacted federal courts putatively predicting state law. Such cries of “wolf” are nothing new; the insurance industry makes them every time there is a run of similar widespread claims (asbestos, environmental, *etc.*). While these doomsday predictions are irrelevant to the legal construction of a contract, the doom has never materialized. The real threat here is that the insurance industry will use the results in nationwide COVID-19 litigation to claw back the coverage courts have confirmed in *Mellin* and related decisions over the last 60 years.

In its Motion for Leave, the insurance industry *amicus* American Property Casualty Insurance Association averred its interest in the “clear, consistent and reasoned development of law.”⁸ UP shares that goal, and the way for this Court to achieve it is to render a decision consistent with *Mellin* and sixty years of common law decisions about which the insurance industry drafters of the language at issue were fully conversant.

ARGUMENT

I. THE INSURANCE INDUSTRY PARTIES MISREPRESENT THE ORIGIN AND NATURE OF STANDARD-FORM TIME ELEMENT COVERAGE.

This case involves Time Element coverages, the most common one being “Business Income” or “Business Interruption” coverage. Modern

⁸ Motion of the American Property Casualty Insurance Association for Leave To File an Amicus Brief in Support of Appellants and Reversal, at 2.

Time Element coverage developed relatively recently – in the 1960s, 1970s and 1980s – but the core language in standard forms and in this case was drafted by insurance industry organizations in the mid-1980s and has remained relatively static since that time. In their arguments to this Court, the Insurance Industry Parties grossly misrepresent the origin and nature of the broad Time Element promises in Schleicher’s Insurance Policies. UP will address these distortions by evaluating them in light of the actual insurance industry drafting history of the standard-form language, along with what the insurance industry has known – for decades – that it covers.

A. In the Mid-1980s, the Insurance Industry Broadened the Trigger for Time Element Coverage from “Damage” to or “Destruction” of Property to “Loss” of or “Damage” to Property, To Match Its Customers’ Migration from Named Peril to Broader All Risk Coverage.

The first forms providing Time Element coverage in the United States were “Use and Occupancy” forms, which were triggered by “damage” to or “destruction” of business property.⁹ This limited trigger was a function of the fact these policies covered only the peril of “fire” (which inexorably causes “damage” or “destruction”).¹⁰ In the middle of

⁹ See, e.g., *Brecher Furniture Co. v. Firemen’s Ins. Co. of Newark*, 191 N.W. 912, 912 (Minn. 1923) (noting that Use and Occupancy policy was triggered when building was “destroyed or damaged” by fire); *Chatfield v. Aetna Ins. Co.*, 75 N.Y.S. 620, 620 (N.Y. App. Div. 1902) (“It is a condition of this contract that if said building, or any part thereof, shall be destroyed or so damaged by fire....”).

¹⁰ See, e.g., *Fidelity-Phenix Fire Ins. Co. v. Benedict Coal Corp.*, 64 F.2d 347, 349-50 (4th Cir. 1933); *Grand Pac. Hotel Co. v. Mich. Com. Ins. Co.*, 90 N.E. 244, 244 (Ill. 1909).

the last century, insurance companies increasingly sold Use and Occupancy coverage triggered by damage or destruction by additional named perils, including “lightning, strikers, riot, explosion, falling aircraft, (including part, parts or cargo thereof) collapse, earthquake, water or the elements.”¹¹ Again, given that these named perils all wreak “damage” or “destruction,” there was no need to employ a broader trigger for Time Element coverage.

In the late 1960s and early 1970s, however, some insurance companies began to add Time Element coverage to their “all risks” forms.¹² All risks insurance policies cover loss from all fortuitous causes unless expressly excluded.¹³ As a general matter, because the insurance industry expanded coverage beyond certain named perils to all risks, it also had to expand the trigger for Time Element coverage from “damage” or “destruction” of property to “all risks of physical loss or damage to” property,¹⁴ so as to cover all the ways in which any risk might cause loss or damage to property.

The primary insurance industry drafting organization, the Insurance Services Office (“ISO”), went further, adopting the “direct physical loss of or damage to property” trigger in its standard forms that combined

¹¹ See, e.g., *National Children’s Expositions Corp. v. Anchor Ins. Co.*, 279 F.2d 428, 429 n.1 (2d Cir. 1960).

¹² See, e.g., *Datatab, Inc. v. St. Paul Fire & Marine Ins. Co.*, 347 F. Supp. 36, 37 (S.D.N.Y. 1972); *Burdett Oxygen Co. v. Employers Surplus Lines Ins. Co.*, 419 F.2d 247, 249 (6th Cir. 1969).

¹³ *Intermetal Mexicana, S.A. v. Ins. Co. of N. Am.*, 866 F.2d 71, 72 (3d Cir. 1989).

¹⁴ See, e.g., *Great N. Oil Co. v. St. Paul Fire & Marine Ins. Co.*, 227 N.W.2d 789, 792 (Minn. 1975).

coverage for both property damage and for Time Element. ISO did so because its “named perils” form already specifically covered “direct physical loss or damage” from burglary (defined by the policy as “the taking of property from inside the described premises”) and “looting” (defined as “to seize and carry away”¹⁵), and because the form expressly contemplated that lost property might be “recovered.”¹⁶ ISO’s all risks form necessarily covered these non-excluded risks, expressly including “theft” and also contemplating lost property might be “recovered.”¹⁷

In short, the insurance industry’s new forms expressly covered loss from “loss” of property, and for this reason contained no requirement that lost property be “damaged,” “destroyed,” or “structurally altered.” The insurance industry’s expansion of the trigger for Time Element coverage from “damage” or “destruction” to “loss” or “damage” was purposeful, and designed to permit policyholders to recover from any fortuitous loss not excluded, including the inability to use property which had not been damaged or “structurally altered” in any way.

This drafting history demonstrates that Insurance Industry Parties have made two misrepresentations. First, they state that “physical damage” means “perceptible, material harm to property,” while “physical loss” means “a material, perceptible destruction or ruin of property,” and thus “a person of ordinary understanding would read the policy to cover a spectrum

¹⁵ *Loot*, MERRIAM-WEBSTER ONLINE DICTIONARY (last visited Dec. 19, 2021), available at www.merriam-webster.com/dictionary/loot.

¹⁶ See Form BP 00 01 05 87, at 2, 10, 13 (**Exhibit 1** hereto).

¹⁷ See Form BP 00 02 01 87, at 7, 11, 13 (**Exhibit 2** hereto).

of property damage that ranges from lesser harm (*i.e.*, physical damage) to total ruin (*i.e.*, physical loss).”¹⁸ As explained above, early in the last century, the standard-form Time Element wording did expressly require “damage” or “destruction,” but the insurance industry purposefully broadened the trigger of coverage to “loss” of property, with no requirement of damage or destruction. “Loss” cannot mean “destruction” because “loss” replaced “destruction.”

Second, the Insurance Industry Parties assert that “[e]ven when called “all-risk” policies, as these policies sometimes are, they still cover only risks that lead to tangible “physical” loss or damages, say by fire, water, wind, freezing and overheating, or vandalism.”¹⁹ This is not true: the change to “loss” of property was purposeful, to match the broad nature of “all risk” coverage where Time Element coverage could be triggered simply by inability to use property (*e.g.*, after burglary, theft or looting). All risk means what it says – any risk, unless it is expressly excluded.

B. The Insurance Industry Parties Misrepresent the Nature of Time Element Coverage.

The Insurance Industry Parties also misrepresents the nature of Time Element coverage. They do so in three ways. First, they seek to downgrade Time Element coverage as a lesser, dependent coverage by stating that “[w]hen purchasing property insurance, a business can add

¹⁸ Amicus Brief of American Property Casualty Insurance Association in Support of Appellants and Reversal (“Insurer *Amicus Br.*”), at 22 (*quoting Woolworth LLC v. Cincinnati Ins. Co.*, 535 F. Supp. 3d 1149, 1153 (N.D. Ala. 2021)).

¹⁹ Brief for Certain Defendants-Appellants (“Insurer Br.”), at 24.

Business Income and Extra Expense coverage,” which “provides another layer, secondary to and dependent on direct physical loss or damage to property at the insured premises that requires repair or replacement.”²⁰ This statement is wrong in two ways. First, as shown by Exhibits 1 and 2 and the policies in this case, overwhelmingly, what the industry sells and what policyholders buy are first-party insurance policies that provide both coverage for Time Element loss and coverage for damage to property. Second, these coverages are wholly independent. For instance, there commonly are circumstances where a policyholder does not make a property damage claim but makes a Time Element claim; *e.g.*, where the loss or damage to property is minimal, or below the deductible, but the Time Element loss is large,²¹ or where the condition at issue resolves itself without remediation, like wildfire smoke at an outdoor theatre, but causes a Time Element loss.²²

²⁰ Insurer *Amicus* Br. at 12.

²¹ *See, e.g., Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, 800 N.Y.S.2d 356, 356 (N.Y. Supr. Ct. 2005) (“The insurance contract does not condition a business interruption claim upon the filing of property damage claim. The [insurance company] has not cited, nor has the court found, any clause in the body of the contract to the contrary. Moreover, an insured may have valid reasons for not filing a claim with its insurer. For instance, the transaction costs for recovering the claim may be higher than the value of the claim itself.”).

²² *Or. Shakespeare Festival Ass’n v. Great Am. Ins. Co.*, No. 1:15-cv-01932-CL 2016 WL 3267247, at *5-6 (D. Or. June 7, 2016). Note this decision was *vacated by joint stipulation*, 2017 WL 1034203 (D. Or. Mar. 6, 2017) – *i.e.*, the insurance company paid a premium to get the policyholder to agree to depublish this decision in an attempt to warp the common law.

Relatedly, the Insurance Industry Parties state that “[p]roperty insurance covers property, such as an insured’s building or its business personal property (e.g., equipment, furniture), against risks of direct physical loss or damage.”²³ “In other words, the insured’s ‘operations are not what is insured – the building and the personal property in or on the building are.’”²⁴ Nonsense. The **entire purpose** of Time Element insurance is to insure a policyholder’s operations, not its real and personal property:

This is why a janitorial business servicing the World Trade Center could make a Business Income claim for the destruction of WTC space owned or leased by others where it performed janitorial operations.²⁵

This is why a lessee can make a Business Income claim at its place of operation, despite not having an ownership interest in the property they lease.²⁶

²³ Insurer Br. at 23.

²⁴ Insurer *Amicus* Br. at 11 (citing *Real Hosp., LLC v. Travelers Cas. Ins. Co.*, 499 F. Supp. 3d 288, 296 (S.D. Miss. 2020)).

²⁵ *Zurich Am. Ins. Co. v. ABM Indus., Inc.*, 397 F.3d 158, 166 (2d Cir. 2005) (“To deny [the policyholder’s] loss-of-income coverage simply because its income is derived from labor that occurs outside of its own cubicles and offices artificially excludes service providers when the contract itself does not limit coverage in such a manner. The nature of [the policyholder’s] business requires movement from its own leased spaces onto another’s property.”).

²⁶ See, e.g., *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 394 (2d Cir. 2005).

This is why a policyholder who elects not to rebuild or replace its property can make a Business Income claim.²⁷

This is why (under nearly every Time Element policy) policyholders can make a claim for loss after their property is repaired or replaced and operations are resumed for continuing operations losses until their operations are restored.²⁸ This is typically called the Extended Period of Restoration or Extended Period of Indemnity and is for the continued shortfall in operations after an interruption (*e.g.*, because customers have moved to competitors, have gotten out of the habit of frequenting the policyholder's business, *etc.*).

²⁷ *Noranda Aluminum Holding Co. v. XL Ins. Am., Inc.*, No. N17C-01-152 WCC CCLD, 2019 WL 1399956, at *4 (Del. Super. Ct. Mar. 21, 2019).

²⁸ In one of the policies at issue, the Extended Period of Restoration appears as follows:

The Period of Restoration shall include such additional length of time to restore the Insured's business to the condition that would have existed had no loss occurred, commencing with the later of the following dates:

- i) the date on which the liability of the Company for loss or damage would otherwise terminate; or
- ii) the date on which repair, replacement, or rebuilding of such part of the property as has been damaged is actually completed

terminating no more than 365 days from said later commencement date.

Appendix of Defendants-Appellants Starr Surplus Lines Insurance Co., *et al.*, Vol. I, at 111.

Time Element clauses cover operations that are affected by events occurring at property where the policyholder conducts those operations, whether or not the policyholder owns, rents or insures that property.

The Insurance Industry Parties' next assert that "[e]ven though Appellees may not have been able to use the hotels for their preferred and most lucrative use, they were still 'at all times' able to use the hotels for other purposes 'consistent with the closure orders,'" and "[t]he fact is that Appellants insured their individual property, not the 'ideal use of that property.'"²⁹ This same theory was rejected years ago in *Datatab, Inc. v. St. Paul Fire & Marine Insurance Co.*, 347 F. Supp. 36 (S.D.N.Y. 1972), in which the policyholder was a data processor, operating computers and data processing equipment at its leased space on the fifth and sixth floors of a building, whose business was interrupted when flooding in the basement of that building rendered the air conditioning inoperative, preventing the policyholder from conducting operations. The policyholder did not suffer damage to any property it owned or leased. The policyholder sought coverage under the following Time Element coverage:

1. SUBJECT OF INSURANCE AND PERILS INSURED:

This Insuring Agreement covers against lost resulting directly from necessary interruption of business as a direct result of all risk of physical loss or damage from any cause (except as hereinafter excluded) to the following property owned, leased, rented or under the control of the Insured:

...

This Insuring Agreement is extended to include actual loss as covered hereunder when as a direct result of a peril insured

29 Insurer Amicus Br. at 13-14.

against the premises in which the property is located is so damaged as to prevent access to such property.³⁰

In the coverage action, the insurance company took the position that “since there was no direct physical damage to [the policyholder’s] premises on the fifth and sixth floors, and since *physical* access to the equipment was unimpaired after the breakdown, the triggering contingencies did not occur.”³¹ The policyholder argued both that (1) “‘premises’ refers to the entire building, not just the fifth and sixth floors” and (2) “the word ‘access’ does not refer to the ability of a person physically to enter the computer room on the fifth floor, but rather contemplates the ability to utilize the equipment normally in the operation of its business.”³²

The court found that the terms were ambiguous, and found that the policyholder's reading was not only reasonable, but more reasonable than the insurance company’s:

To construe the words as narrowly as [the insurance company] suggests would lead to bizarre consequences. For example, under [the insurance company’s] construction of the word “premises,” if an explosion or fire totally destroyed the first four floors of the building, without reaching the fifth floor, and thereby causing a total cessation of [the policyholder’s] business, the loss would not be covered since the damage would not be to the “premises in which the property is located.” [The insurance company’s] interpretation of the word “access” is equally strained. *Obviously, what was relevant and important to [the policyholder] when it bought the [insurance company] policy*

30 *Id.* at 37.

31 *Id.*

32 *Id.*

*was the ability to utilize the computers in its business on a normal basis. [The policyholder] could not have been less interested in whether, following a peril insured against, it had the ability to physically touch a non-functioning mass of metal.*³³

Of course a policyholder purchases Time Element coverage based on the best use of its property. Where a sushi seller cannot sell sushi because of listeria contamination,³⁴ its Time Element claim cannot be rejected because it could still sell alcohol at the bar. Policyholders apply for Time Element coverage by submitting their expectations of performance based on their historic performance – their best use of their property – and risks of loss that affect that performance cause covered Time Element losses.

C. For Sixty Years, the Insurance Industry Has Known That Its Standard-Form Language Covers Loss Rendering Property Unfit for Its Intended Use.

Policyholders, courts, insurers, and insurance industry drafting organizations – for decades – have concluded that insurance policies triggered by “physical loss” or “damage” covered events rendering property unfit or unsafe for its intended use, without any “structural alteration.” At a minimum, the Insurance Industry Parties knew that courts had interpreted the trigger language that way; *i.e.*, that it was reasonably susceptible of that interpretation. Evidence of that knowledge is overwhelming.

First, from 1957 through the early 2000s, courts repeatedly found that events other than a fire, collapse, or tornado caused “physical loss” or

³³ *Id.* at 38 (emphasis added).

³⁴ *Brand Mgmt., Inc. v. Md. Cas. Co.*, No. 05-cv-022932007, WL 1772063, at *1 (D. Colo. June 18, 2007).

“damage” to property, without any structural alteration requirement, applying the plain meaning of those terms.³⁵

³⁵ In chronological order: *Am. All. Ins. Co. v. Keleket X-Ray*, 248 F.2d 920, 923-25 (6th Cir. 1957) (instruments measuring radioactivity suffered property damage from release of radon dust and gas which made building unsafe); *Hughes v. Potomac Ins. Co. of D.C.*, 18 Cal. Rptr. 650, 655 (Ct. App. 1962) (policyholder’s home perched on edge of cliff after a sudden landslide was damaged because it became useless); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968) (finding “direct physical loss” where a church complied with order to close when gasoline vapors made use of building “dangerous”); *Cyclops Corp. v. Home Ins. Co.*, 352 F. Supp. 931, 937 (W.D. Pa. 1973) (vibration of motor, without apparent damage, caused shutdown); *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 351-52 (8th Cir. 1986) (enforcing BI coverage due to risk of collapse); *Hetrick v. Valley Mut. Ins. Co.*, 15 Pa. D. & C. 4th 271, 274 (Ct. Com. Pl. 1992) (outside oil spill made house uninhabitable); *Largent v. State Farm Fire & Cas. Co.*, 842 P.2d 445, 446 (Or. Ct. App. 1992) (insurer conceded methamphetamine fumes could cause “accidental direct physical loss”); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. Ct. App. 1993) (methamphetamine odor caused direct physical loss or damage); *Azalea Ltd. v. Am. States Ins. Co.*, 656 So. 2d 600, 602 (Fla. Dist. Ct. App. 1995) (damage to bacteria colony necessary for sewage-treatment plant amounted to “direct damage to the structure”); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, No. 9400837, 1996 WL 1250616, at *2 (Mass. Super. Ct. Mar. 15, 1996) (oil fumes from oil leak constituted physical damage); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (direct physical loss or damage from presence of asbestos); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 16-17 (W. Va. 1998) (home rendered dangerous by falling rocks suffered “direct physical loss”); *Matzner v. Seaco Ins. Co.*, No. 96-0498-B, 1998 WL 566658, at *3-4 (Mass. Super. Ct. Aug. 12, 1998) (“carbon monoxide contamination constitutes ‘direct physical loss of or damage to’ property”); *Bd. of Educ. v. Int’l Ins. Co.*, 720 N.E.2d 622, 625-26 (Ill. App. Ct. 1999) (citing liability coverage cases finding that incorporation of asbestos into buildings caused “property damage”); *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 93 Cal. Rptr. 2d 364, 376-77 (Ct. App. 2000) (intermingling of a

Second, consistent with all those cases, insurers paid claims for loss caused by SARS-CoV-1, which caused a pandemic in 2002-2004.³⁶ Some settlements were highly publicized,³⁷ and demonstrated that insurers knew that courts had found coverage for such claims under standard-form property insurance forms.³⁸

quarter pound of wood shavings in 80,000 pounds of almonds without structural change caused physical loss or damage); *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 826 (Minn. 2000) (“[i]f rental property is contaminated by asbestos fibers and presents a health hazard to the tenants, its function is seriously impaired” (citation omitted)); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-57, 2002 WL 31495830, at *8-9 (D. Or. June 18, 2002) (inability to inhabit contaminated building may constitute “direct, physical loss”); *Yale Univ. v. CIGNA Ins. Co.*, 224 F. Supp. 2d 402, 413 (D. Conn. 2002) (“variety of contaminating conditions [encapsulated asbestos, lead] could constitute ‘physical loss or damage to property’” (citation omitted)); *Graff v. Allstate Ins. Co.*, 54 P.3d 1266, 1269 (Wash. Ct. App. 2002) (methamphetamine vapors); *Cooper v. Travelers Indem. Co. of Ill.*, No. C-01-2400, 2002 WL 32775680, at *1, *3 (N.D. Cal. Nov. 4, 2002) (coliform bacteria and E-coli).

³⁶ Frankel, *Insurers Knew the Damage a Viral Pandemic Could Wreak on Businesses. So They Excluded Coverage*, WASH. POST, Apr. 2, 2020 (**Exhibit 3** hereto).

³⁷ See, e.g., SEC Disclosure, *Mandarin Oriental Reaches Settlement on SARS Ins. Claims* (Oct. 24, 2003), <https://www.sec.gov/Archives/edgar/vpr/0303/03037259.pdf>.

³⁸ *Id.*; see also Souter, *Hotel Chain to Get Payout for SARS-Related Losses*, BUS. INS., Nov. 2, 2003, <https://www.businessinsurance.com/article/20031102/story/100013638/hotel-chain-to-get-payout-for-sars-related-losses>.

Third, in 2006, ISO – which admitted that it tracked these case law developments,³⁹ which would have included additional cases finding coverage from 2002 to 2006,⁴⁰ – drafted the Exclusion for Loss Due to Virus or Bacteria.⁴¹ After falsely stating that standard-form wording had not been found to cover loss from disease-causing agents,⁴² ISO stated that it sought to prevent efforts to “expan[d]” coverage under standard-form wordings; *i.e.*, remove what was at least an ambiguity:

While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are

³⁹ ISO Circular, New Endorsements Filed To Address Exclusion of Loss Due to Virus or Bacteria 7 of 13 (2006) (“ISO Circular”) (**Exhibit 4** hereto).

⁴⁰ In chronological order: *Schlam*, 800 N.Y.S.2d at 356 (noxious particles, in air and on surfaces); *De Laurentis v. United Servs. Auto. Ass’n*, 162 S.W.3d 714, 722-23 (Tex. Ct. App. 2005) (mold); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App’x 823, 824–27 (3d Cir. 2005) (*E. coli*); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co.*, No. 05-1315, 2007 WL 464715, at *8 (D. Or. Feb. 7, 2007) (lead contamination); *Brand Mgmt., Inc. v. Md. Cas. Co.*, 2007 WL 1772063, at *1 (D. Colo. June 18, 2007) (*listeria* contamination; insurer voluntarily paid); *Cook v. Allstate Ins. Co.*, No. 48 DOZ-0611-PL-01156, 2007 Ind. Super. LEXIS 32, at *9-10 (Nov. 30, 2007) (brown recluse spider infestation).

⁴¹ De Paoli, Chiglinsky, & Robertson, *Insurance Unlikely to Cushion Coronavirus Losses – But There Are Exceptions*, *INS. J.*, Mar. 4, 2020 (**Exhibit 5** hereto).

⁴² *See, e.g.*, nn. 35, 40.

efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.⁴³

Another insurance-drafting organization, the American Association of Insurance Services (“AAIS”), filed a memorandum with state regulators stating the new “mandatory” exclusion was intended to “clarify policy intent” *i.e.*, to remove ambiguity.⁴⁴ This is exactly what drafters are supposed to do – fix ambiguous language by making it clearer – but they never changed the “loss” or “damage” trigger for Time Element coverage.

Fourth, after the insurance industry drafted the express virus exclusion, courts across the country, including this Court, continued to rule for policyholders in circumstances like those here.⁴⁵

Fifth, courts had also repeatedly held that property which is perceived by the public to be damaged or dangerous has suffered physical

⁴³ ISO Circular (**Exhibit 4** hereto) at 7 of 13.

⁴⁴ AAIS, Commercial Properties: Virus or Bacteria Exclusion – Filing Memorandum, Property Lines - PA 10/06 (2006) (**Exhibit 6** hereto).

⁴⁵ In chronological order: *Manpower Inc. v. Ins. Co. of State of Pa.*, No. 08C0085, 2009 WL 3738099, at *1-2 (E.D. Wis. Nov. 3, 2009) (finding coverage for building adjacent to building that collapsed without noticeable damage to policyholder’s space); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010) (Chinese drywall emitting toxic gases rendering property unusable); *In re Chinese Manufactured Drywall Prods. Liab. Litig.*, 759 F. Supp. 2d 822, 831-32 (E.D. La. 2010) (fumes rendered some homes “useless and/or uninhabitable”); *Ass’n of Apartment Owners of Imperial Plaza v. Fireman’s Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1068 (D. Haw. 2013) (intrusion of arsenic into roof); *Mellin*, 115 A.3d at 805-06 (pervasive odor of cat urine); *Or. Shakespeare Festival*, 2016 WL 3267247, at *5-6 (loss from smoke from wildfires).

loss or physical damage despite the fact that it actually is safe.⁴⁶ This concept has been the subject of a paper by the author of COUCH ON INSURANCE.⁴⁷ It is also at the heart of the holding in *Hampton Foods*, where the risk of a collapse, even though no collapse occurred, nonetheless supported a finding of Time Element coverage.⁴⁸

⁴⁶ *S. Wallace Edwards & Sons, Inc. v. Cincinnati Ins. Co.*, 353 F.3d 367, 374–75 (4th Cir. 2003) (affirming finding of the district court that meat exposed to ammonia had suffered property damage, agreeing that “the exposure to ammonia caused an odor and discoloration that reduced the quality of the product whether or not it may not have been directly injurious to health or adulterated under the regulations”); *Blaine Richards & Co. v. Marine Indem. Ins. Co.*, 635 F.2d 1051, 1055–56 (2d Cir. 1980) (finding that policyholder would have coverage for beans, which had been fumigated with a substance not acceptable in the United States, noting “[t]he fact that the beans were not marketable in this state suggests that they were damaged in an important respect,” and holding that policyholder could recover for both (1) beans found to be contaminated and (2) beans not contaminated but not accepted by customers); *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 98 N.W.2d 280, 295, 300 (Minn. 1959) (finding that egg powder in cans, that had been exposed to smoke which affected the packaging but not the egg powder, but was rejected by Quartermaster Corps and could not be resold without a dramatic loss, was physically damaged because it had suffered a loss of market value, and noting: “It needs no further citation to support the statement that there is a well-established line of authorities in this country holding that where a stock of merchandise is partially destroyed or physically damaged by fire, and as a result, the balance of the merchandise is made valueless from a practical standpoint, the insurer is liable as for a total loss of all the property”).

⁴⁷ Plitt, *All-Risk Coverage for Stigma Claims Involving Real Property*, 35 No. 9 INS. LITIG. REP. 253 (June 5, 2013).

⁴⁸ 787 F.2d at 351-52.

Sixth, before the claims by policyholders stemming from SARS-CoV-2, insurance companies confirmed the status of the law discussed above. Just before the pandemic, Factory Mutual (“FM”) admitted that “physical loss or damage” to property exists when the presence of a physical substance renders property unfit for its intended use without structural alteration.⁴⁹ FM argued the mold infestation – involving mold spores which, like SARS-CoV-2 virions, can exist on surfaces and in the air – constituted “physical loss or damage” under another insurance company’s property policy because mold “destroyed the aseptic environment and rendered [the clean room] unfit for its intended use”⁵⁰ FM relied on much of the case law cited above which “broadly interprets the term ‘physical loss or damage’ in property insurance policies,” arguing that loss of use “constitutes physical loss or damage.”⁵¹ FM reiterated that the key was whether property could be used as it was used before the occurrence, and, essentially, that the Period of Restoration was the period that lasted until customers viewed the policyholder’s location as safe.⁵² At a minimum, FM argued, as Schleicher does here, that the trigger was ambiguous,⁵³ requiring a construction favoring coverage.

⁴⁹ Factory Mutual’s Mot. in Limine No. 5 Re Physical Loss or Damage, *Factory Mut. Ins. Co. v. Fed. Ins. Co.*, No. 1:17-cv-00760-GJF-LF (D.N.M. Nov. 19, 2019) (**Exhibit 7** hereto).

⁵⁰ *Id.* at 3.

⁵¹ *Id.*

⁵² *Id.* at 4-5.

⁵³ *Id.* at 3 n.1.

In short, at the beginning of 2020, the insurance industry knew, and had known for decades, that courts like this Court in *Mellin* had found “physical loss” or “physical damage” in circumstances like those here and had not required a finding of “structural alteration” to property. This extended to property which was thought by the public to be dangerous, whether or not it was actually dangerous. The insurance industry drafting organizations like ISO read these cases but did not change the wording of the Time Element trigger to require something other than physical loss or physical damage.

Ignoring this, the Insurance Industry Parties now claims that because “[t]he Coronavirus harms people, not property,” there is no “physical loss or damage.”⁵⁴ That is clearly wrong. From radon gas (*Keleket X-Ray*), to gasoline vapors (*First Presbyterian Church*) to asbestos (*Sentinel Mgmt.*) to carbon monoxide (*Matzner*) to e-coli bacteria (*Cooper, Hardinger*) to Brown Recluse spiders (*Cook*), courts have found time and time again that conditions that harm people make property dangerous and thus harm property. None of these substances (or spiders) structurally alters property.

The Insurance Industry Parties next argue that because “Coronavirus can be removed with basic household cleaners or allowed to dissipate on its own after a short period of time without any remediation whatsoever,” there is no “physical loss or damage.”⁵⁵ This position is just divorced from

⁵⁴ Insurer Br. at 19; *see also id.* at 26 (“Property insurance policies ‘do not cover losses indirectly caused by a virus that insures *people*, not property.’”).

⁵⁵ Insurer Br. at 20.

reality: no one in March 2020 believed that SARS-CoV-2 could be completely remediated with household cleaners. People thought they could minimize their risk by, for instance, wiping down the outside of their boxes of delivered groceries with disinfectant, but people in the United States did not, for years, understand the risks they faced. This is why bars, restaurants, hotels and other businesses failed by the thousands and why office buildings nationwide are still empty. Certainly, the Civil Authorities believed it was dangerous to their citizens to use contaminated or potentially-contaminated property. Under those circumstances, courts have routinely concluded that property that has been rendered unsafe or is perceived to be dangerous has suffered physical loss or physical damage.

II. THE COURT SHOULD NOT BE DISTRACTED BY CRIES OF “WOLF” FROM THE INSURANCE INDUSTRY PARTIES.

The Insurance Industry Parties seek to pressure this Court into reversing by arguing that failing to do so will threaten the solvency of the insurance industry. Even if there were any truth to this prediction, that would be a matter for the legislature not the courts. This Court will establish New Hampshire law, as it did in *Mellin*, but it is unlikely indeed that the handful of Time Element cases in New Hampshire arising from SARS-CoV-2 or consequent orders of Civil Authority will bankrupt the insurance industry, given that *Mellin* did not. And this is nothing new. The insurance industry has repeatedly cried “wolf” when confronted with a large run of covered claims – from asbestos to environmental to Y2K to September 11 – and each time the industry emerges stronger, as a result of using the perceived threat from a subset of policyholders to increase

premiums for all policyholders. As shown below, however, it is clear that fears for the insurance industry's solvency are driving decisions in COVID-19 insurance claims, and this Court should not follow suit.

A. Rather than Applying State Rules of Construction to the Policy Language Before Them, Federal Courts Have Applied What Can Best Be Described as a Federal Common Law of COVID-19 Insurance.

The insurance industry executed a concerted public relations campaign as soon as the SARS-CoV-2 virus began to spread. Its goal was to shape a single message in the legal press, the insurance trade press, the business press, and the mainstream media: SARS-CoV-2 cannot cause “direct physical loss or damage to property.”⁵⁶ Part of this push was to deter policyholders from filing pandemic claims in the first place.

The other part was to persuade courts to dismiss the claims of those few policyholders who brought suit. By collapsing the distinct concepts of “loss” and “damage,” insurers have been able to sway jurists away from rigorous insurance policy interpretation, and to minimize reasonable expectations of coverage while maximizing sympathy for the insurance industry's supposed plight should they be held accountable for their “all risks” promises.⁵⁷ In turn, the insurance industry's early successes created a snowball effect, causing a consensus bias in which later courts have engaged

⁵⁶ Knutsen & Stempel (2021) *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 CONN. INS. L. J. 185, 201-06.

⁵⁷ See *id.* at 230-60.

in little or no examination of the actual contract language in front of them under governing rules of construction.

Federal courts appear particularly prone to ignore state law in favor of the federal law snowball. A recent analysis of COVID-19 pandemic insurance cases found that federal district courts disagreed with state courts' decisions applying their own law 63% of the time.⁵⁸ This Court should not be overly influenced by the federal court cases cited by the Insurance Industry Parties misapplying state insurance law, as they are clearly influenced by an inappropriate consideration – fear for the solvency of the insurance industry – a fear which, as shown below, has no basis.

B. The Insurance Industry Has Historically Argued that Findings of Coverage Threaten Its Existence.

For decades, insurance companies skewed the analysis of environmental coverage by arguing they would be rendered bankrupt if required to cover such claims. They alleged that the costs would be five times their total “surplus” and could ruin the industry.⁵⁹ Although the industry was held accountable for many such clean-ups, the collapse never arrived. In response to the pandemic, insurance companies are “crying wolf” again, as the insurance industry lobbyists do in the *amicus* brief they filed in this Court. This Court has good reason to be skeptical of the

⁵⁸ Salisbury (Apr. 6, 2021) *Federal COVID-19 Decisions Ignore State Law*, LAW360.COM

<https://www.law360.com/insurance/articles/1372499/federal-covid-19-insurance-decisions-ignore-state-law>.

⁵⁹ See *Insurer Liability for Cleanup Costs of Hazardous Waste Sites*, No. 101-175 (101st Cong., 2d Sess., Sept. 27, 1990) (Committee on Banking, Finance, and Urban Affairs), at pgs. 18-29 and 75-76.

assertion that a decision favoring the policyholder in this case will bankrupt the entire insurance industry.

As an initial matter, such outcome-driven arguments have no place in contract disputes, where the rights and obligations of the parties are decided by the terms of the contract to which the parties agreed. As important, the insurance industry's claims, though irrelevant, are deceptive.

A June 2020 analysis by Reuters confirms that the insurance industry's enormous cost estimates for COVID-related losses are inflated.⁶⁰ Meanwhile, the insurance industry has used the pandemic to extract premium increases that have resulted in enormous profits. For example, in July 2020, Progressive Insurance Company “boasted about an 83% year over year increase in net income” which works out to about \$800 million per quarter.⁶¹ Chubb Limited reported net income of \$1.19 billion in its third quarter, in 2020—up 9.4%, or \$100 million, from the year before.⁶² CNA Insurance similarly reported a \$106 million increase in net income in

⁶⁰ See Scott and Barlyn, “U.S. insurers use lofty estimates to beat back coronavirus claims” REUTERS BUSINESS NEWS (June 12, 2020) (available at <https://www.reuters.com/article/us-health-coronavirus-insurance-claims-a/u-s-insurers-use-lofty-estimates-to-beat-back-coronavirus-claims-idUSKBN23J0T6>).

⁶¹ Holober, *Progressive Insurance Hoards Covid-19 Windfall Profits*, Consumer Federation of California (Aug. 13, 2020) (available at https://uphelp.org/wp-content/uploads/2021/02/cfc_progressive.pdf).

⁶² Wilkinson, *Chubb reports gains in Q3 profit, net premium written*, Business Insurance (Oct. 28, 2020) (available at <https://www.businessinsurance.com/article/20201028/NEWS06/912337411/Chubb-reports-gains-in-Q3-profit,-net-premium-written>).

the same period.⁶³ W.R. Berkley Corporation reported a massive 161% increase in its fourth quarter, in 2020.⁶⁴ Overall, the insurance industry is now sitting on a record surplus of over \$1 trillion, up over \$110 billion since the beginning of 2020.⁶⁵

In fact, insurance companies significantly *increased* their rates in 2020 and 2021 across all lines of business – all while refusing to pay COVID-related Time Element claims. One broker reported that 89% of its clients saw a rate increase for their property insurance—the “highest number recorded since the early 2000s.”⁶⁶ From April through June 2020,

⁶³ Childers, *CNA Reports Higher Net Income Despite Cat Losses*, Business Insurance (Nov. 2, 2020) (available at <https://www.businessinsurance.com/article/%2020201102/NEWS06/912337508/CNA-reports-higher-net-income-despite-cat-losses>).

⁶⁴ Greenwald, *Berkley Reports 161% Jump in Profits*, Business Insurance (Jan. 26, 2021) (available at <https://www.businessinsurance.com/article/00010101/NEWS06/912339367/Berkley-reports-161-jump-in-profits>).

⁶⁵ See National Association of Insurance Commissioners, *U.S. Property & Casualty and Title Insurance Industries – 2021 First Half Results* at p. 1 (showing a record surplus of over \$1 Trillion, representing an increase of about \$110 Billion since the onset of the pandemic) and p. 6 (“Net cash provided by operating activities totaled \$63.7 billion for the first six months of 2021 compared to \$45.9 billion for the same period in 2020, representing a 39.1% increase.”) (available at <https://content.naic.org/sites/default/files/inline-files/Property-Casualty-and-Title-Insurance-Industries-2021-Mid-Year-Report.pdf>).

⁶⁶ Lerner, *Most Policyholders See Rate Hikes Across Multiple Lines*, Business Insurance (Oct. 26, 2020) (available at <https://www.businessinsurance.com/article/20201026/NEWS06/912337341/Most-policyholders-see-rates-hikes-across-multiple-lines-Arthur-J-Gallagher-Re>).

property insurance rates spiked by 22%.⁶⁷ Insurance companies ratcheted up prices again between July and September, with a total increase of 24% for commercial property coverage.⁶⁸ From October to December 2020, premiums increased another 20%.⁶⁹ In late 2020, insurance companies told consumers to expect increases of 15% to 25% in the coming year,⁷⁰ and rates rose as predicted in 2021, with property insurance seeing the sharpest rate hikes.⁷¹

⁶⁷ Lerner, *U.S. Commercial Property Pricing up 22% in Q2*, Business Insurance (Aug. 10, 2020) (available at <https://www.businessinsurance.com/article/00010101/NEWS06/912336034/US-commercial-property-pricing-up-22-in-Q2>).

⁶⁸ Wilkinson, *Insurance Prices Increased Sharply in Third Quarter*, Business Insurance (Nov. 5, 2020) (available at <https://www.businessinsurance.com/article/00010101/NEWS06/912337590/Insurance-prices-increased-sharply-in-third-quarter-Marsh>).

⁶⁹ Lerner, *Global Prices Rise 22% in Q4: Marsh*, Business Insurance (Feb. 4, 2021) (available at <https://www.businessinsurance.com/article/20210204/NEWS06/912339588/Global-prices-rise-22-in-Q4-Marsh-Global-Insurance-Market-Index->).

⁷⁰ Greenwald, *Continued Rate Increases Expected: Willis*, BUSINESS INSURANCE (Nov. 19, 2020) (available at <https://www.businessinsurance.com/article/20201119/NEWS06/912337904/%20Continued-rate-increases-expected-Willis-Towers-Watson>).

⁷¹ Souter, *Insurance Premium Renewal Rates Continue To Rise*, BUSINESS INSURANCE (Dec. 7, 2021) (available at <https://www.businessinsurance.com/article/20211207/NEWS06/912346421/Insurance-premium-renewal-rates-continue-to-rise>).

The practice of using catastrophes to increase profits has been a cornerstone of the insurance playbook for decades.⁷² The enormous profits that insurance companies are reaping from the pandemic show that nothing has changed.

C. Since 2020, Courts Have Used a Structural Alteration Standard for COVID-19 Coverage Cases But Apply the Historic, Broader Standard to Non-COVID-19 Coverage Cases.

UP submits that the insurance industry’s cries of “wolf” are working, however. Courts are using different rules of interpretation for COVID-19 coverage cases than for non-COVID-19 ones. We can see this because, in non-COVID-19 coverage cases decided since March 2020, courts continue to broadly (and properly) interpret “direct physical loss or damage” as including covered loss for events rendering property unfit for its intended use.

For instance, in *Crisco v. Foremost Insurance Co.*, No. C 19-07320 WHA, 2020 WL 7122476 (N.D. Cal. Dec. 4, 2020), the policyholders owned mobile homes at a park where a fire destroyed most of the park but

⁷² See Hunter, THE INSURANCE INDUSTRY’S INCREDIBLE DISAPPEARING WEATHER CATASTROPHE RISK: HOW INSURERS HAVE SHIFTED RISK AND COSTS ASSOCIATED WITH WEATHER CATASTROPHES TO CONSUMERS AND TAXPAYERS (Consumer Federation of America, Feb. 17, 2012) (“industry data demonstrates that insurers have significantly and methodically decreased their financial responsibility for [catastrophic] events in recent years and shifted much of this risk to consumers and taxpayers. . . . most of these savings have been achieved by hollowing out the coverage . . . and raising rates”) (<https://consumerfed.org/pdfs/InsuranceRegulationHurricaneRiskDisappearingCoverageStudy2-12.pdf>).

did not damage the policyholder's mobile homes. Specifically, the fire destroyed the electric, gas, sewer, and potable water infrastructure that serviced the policyholders' mobile homes.⁷³ Thereafter, various civil authorities prohibited living in the mobile homes.⁷⁴

The policyholders sought coverage for the “total loss” of their mobile homes, and the issue was whether they had shown “direct, sudden and accidental physical loss” to their property.⁷⁵ The insurance company argued that the policyholder had not shown “distinct, demonstrable physical alteration” to their mobile homes, noting that the property which was destroyed was owned by the park owner not the policyholders.⁷⁶ The court rejected this argument:

Our [policyholders] do not seek to recover repair costs, loss of income, or even damages for their loss of use while they could not reside in their homes. Rather, [the policyholders] seek to recover for the loss of their insured dwellings. As discussed, the fire caused a “distinct, demonstrable, physical alteration” to the insured dwellings. *MRI Healthcare*, 187 Cal. App. 4th at 779. While the infrastructure belonged to the park, it physically interconnected with the units it serviced. The fire destroyed that infrastructure, such that the sewage, electricity, water, and gas did not physically run, as it previously had, in the unit itself. [The policyholders'] homes were destroyed just as suddenly, just as directly, and just as accidentally as those

73 *Id.* at *1.

74 *Id.* at *2.

75 *Id.* at *4.

76 *Id.* at *4-5.

immediately burned by the fire, for the fire destroyed the viability of the entire park.⁷⁷

Citing *Hughes*, the court concluded that when the fire destroyed the utilities infrastructure, “the sewage, electricity, water, and gas did not physically run, as it previously had” in the mobile homes, and “[s]uch constitutes an insured physical loss under the policy.”⁷⁸ In other words, events and conditions external to the insured property had rendered that property unfit for its intended use.

Similarly, in *James W. Fowler Co. v. QBE Insurance Corp.*, No. 3:18-cv-1705-S1, 2020 WL 4291272 (D. Or. July 24, 2020), at issue was coverage for a “micro-tunnel boring machine” (“MTBM”) which was being used to bore a tunnel deep underground when it became immobilized, with no potentially cost-effective way to recover it, although it had not been physically damaged in any way.⁷⁹ The policyholder sought to recover the cost of the MTBM under a policy providing coverage for “direct physical loss caused by a covered peril.”⁸⁰ In the coverage action, the court noted that “[t]he primary legal question before the Court is whether the burial deep underground of covered property that remains intact and undamaged constitutes a ‘direct physical loss.’”⁸¹ The insurance company argued that

77 *Id.* at *5.

78 *Id.*

79 *Id.* at *2.

80 *Id.* at *3.

81 *Id.*

“direct physical loss” required “physical damage.”⁸² The policyholder's argument was primarily based on definitions of “direct” (“proximate” as opposed to “remote”), “physical” (“meant to exclude intangible loss, such as depreciation of value”), and “loss” (“the state or act of being destroyed or placed beyond recovery”).⁸³ Again, the court found coverage:

But [the policyholder’s] alleged loss is not intangible or incorporeal, nor a mere detrimental economic effect. [The policyholder] alleges that the MTBM is permanently buried underground. [The policyholder’s] alleged loss is much more analogous to the loss in *Western Fire*, where the church structure remained intact and undamaged, but was rendered uninhabitable by gasoline contamination. The MTBM, while intact and undamaged, is rendered useless to [the policyholder] if it is stuck underground.⁸⁴

No structural alteration was required; what was required was that the policyholder lost the ability to use its property for its intended purpose.

In *National Ink & Stitch, LLC v. State Auto Property & Casualty Insurance Co.*, No. SAG-18-2138, 2020 WL 374460 (D. Md. Jan. 23, 2020), the policyholder suffered a ransomware attack on its computer server; as a result, the policyholder permanently lost access to its art files and other data, and its computers were permanently slower.⁸⁵ At issue was whether either of these effects constituted “direct physical loss of or

82 *Id.* at *4.

83 *Id.*

84 *Id.* at *6.

85 *Id.* at *1.

damage to” property.⁸⁶ The insurance company argued “that because [the policyholder] only lost data, an intangible asset, and could still use its computer system to operate its business, it did not experience ‘direct physical loss’ as covered by the Policy.”⁸⁷ The court rejected the insurance company’s argument that the policyholder did not suffer “direct physical loss of or damage to” its computer system because the policyholder could still use it to operate its business.⁸⁸ Citing cases holding that loss of functionality constitutes “physical loss or damage,” the court found that the computer system had suffered “physical loss or damage”:

In the instant case, [the insurance company] seems to equate “physical loss or damage” to [the policyholder’s] computer system to require an utter inability to function. The Policy language, and the relevant case law, impose no such prerequisite. The more persuasive cases are those suggesting that loss of use, loss of reliability, or impaired functionality demonstrate the required damage to a computer system, consistent with the “physical loss or damage to” language in the Policy (emphasis added). Indeed, in many instances, a computer will suffer “damage” without becoming completely inoperable. Here, not only did [the policyholder] sustain a loss of its data and software, but [the policyholder] is left with a slower system, which appears to be harboring a dormant virus, and is unable to access a significant portion of software and stored data. Because the plain language of the Policy provides coverage for such losses and damage, summary judgment will

86 *Id.* at *2.

87 *Id.*

88 *Id.*

be granted in favor of [the policyholder's] interpretation of the Policy terms.⁸⁹

In short, an event that, without causing structural alteration, impairs a policyholder's operations but does not cause a total cessation of operations can cause physical loss or damage.

Last, in *EMOI Services, LLC v. Owners Insurance Co.*, 2021-Ohio-3942, P5-7 (Ohio Ct. App. 2021), the policyholder, which provided medical billing services and support to medical providers, was a victim of a computer hacking attack, which prevented it from accessing individual files until it paid a ransom.⁹⁰ After determining that it would cost more to decrypt its files without paying the ransom, the policyholder paid the ransom, and the hacker provided a link to a program to decrypt the files, and the policyholder decrypted the files.⁹¹

Thereafter, the encryption program ran again, but the policyholder successfully re-ran the decryption program.⁹² In the coverage action, the insurance company moved for summary judgment, primarily on the ground that "no direct physical loss or damage had occurred."⁹³ The trial court, in a decision clearly impacted by opinions on claims for coverage for loss or damage from SARS-CoV-2, granted summary judgment to the insurance company, concluding "[a]ssuming arguendo that the software was

89 *Id.* at *5.

90 *Id.* at 5-7.

91 *Id.*

92 *Id.* at 8.

93 *Id.* at 14.

‘damaged’ while it was encrypted, given the fact that [the policyholder] has all the data it did before the ransomware attack, and that its software is now fully functional, the Court finds that the ‘media’ is no longer damaged.”⁹⁴

On appeal, the court reversed, rejecting the insurance company’s arguments that the policyholder did not suffer “direct physical loss of or damage to” its software. First, the court rejected the insurance company’s argument that “‘physical loss or damage’ [sic] does not occur when the insured merely loses access or use,” concluding that:

[The policyholder’s witness’s] description of the “damage” caused by the encryption went beyond aesthetic [i.e., the mold damage in Mastellone]. [The policyholder’s witness] stated in his deposition that all of the files had “weird extensions” that prevented access to the files. When he tried to open the encrypted files, a ransom note appeared. As a result of the encryption, [the policyholder] and its clients were unable to access [the policyholder’s] system for a significant period of time.⁹⁵

Next, the court rejected the argument, based upon COVID-19 decisions and *Mama Jo’s, Inc. v. Sparta Insurance Co.* 823 Fed. Appx. 868 (11th Cir. 2020), that “physical loss or damage does not occur when the item can be restored by cleaning.”⁹⁶

UP submits that there are two things this Court can take away from these recent decisions. *First*, when courts consider events other than the presence of SARS-CoV-2 and resultant orders, they apply, correctly, the

94 *Id.* at 17.

95 *Id.* at 47.

96 *Id.* at 43.

majority rule as it has existed for 60 years: events which render property unfit for its intended use cause physical loss or damage even if those events do not cause any structural alteration of the property. This indicates that the driving force behind federal courts' decisions, which are predicting state law based on something other than rules of contract interpretation, is their adherence to the federal COVID-19 common law. *Second*, insurance companies – to date, unsuccessfully – are attempting to use those federal decisions to reverse the majority rule in all contexts, including those outside of the COVID-19 context. In other words, the federal common law of COVID-19 is not only depriving policyholders of coverage for interruptions caused by SARS-CoV-2, it is rewriting future policies to constrict coverage in advance.

CONCLUSION

This Court should affirm the decision of the trial court.

June 23, 2022

By: /s/ Michael A. Kostiew

Michael A. Kostiew
NH Bar No. 17712
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, PA 15222
Tel: 412-288-3131
mkostiew@reedsmith.com

*Attorneys for Amicus Curiae
United Policyholders*

CERTIFICATE OF WORD COUNT

Pursuant to Rule 26 of the New Hampshire Supreme Court, I certify that this brief complies with the 9,500-word limit imposed by Rule 16(11). This *amicus* brief contains 6,632 words, exclusive of pages containing the Table of Contents and Table of Authorities.

Dated: June 23, 2022

/s/ Michael A. Kostiew

CERTIFICATE OF SERVICE

I am filing this *amicus* brief electronically. I certify that a copy of this *amicus* brief is being or has been served on all other parties or their counsel, in accordance with the rules of the Supreme Court, as follows: I am serving registered e-filers through the Court's electronic filing system.

Dated: June 23, 2022

/s/ Michael A. Kostiew

EXHIBIT 1

BUSINESSOWNERS STANDARD PROPERTY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to SECTION H – PROPERTY DEFINITIONS.

A. COVERAGE

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

1. Covered Property

Covered Property, as used in this policy, means the following types of property for which a Limit of Insurance is shown in the Declarations:

a. Buildings, meaning the buildings and structures at the premises described in the Declarations, including:

- (1) Completed additions;
- (2) Permanently installed fixtures, machinery and equipment;
- (3) Your personal property in apartments or rooms furnished by you as landlord;
- (4) Outdoor fixtures;
- (5) Personal property owned by you that is used to maintain or service the buildings or structures or the premises, including:
 - (a) Fire extinguishing equipment;
 - (b) Outdoor furniture;
 - (c) Floor coverings; and
 - (d) Appliances used for refrigerating, ventilating, cooking, dishwashing or laundering;
- (6) If not covered by other insurance:
 - (a) Additions under construction, alterations and repairs to the buildings or structures;
 - (b) Materials, equipment, supplies and temporary structures, on or within 100 feet of the described premises, used for making additions, alterations or repairs to the buildings or structures.

b. Business Personal Property located in or on the buildings at the described premises or in the open (or in a vehicle) within 100 feet of the described premises, including:

- (1) Property you own that is used in your business;
- (2) Property of others that is in your care, custody or control; but this property is not covered for more than the amount for which you are legally liable, plus the cost of labor, materials or services furnished or arranged by you on personal property of others; and
- (3) Tenant's improvements and betterments. Improvements and betterments are fixtures, alterations, installations or additions:
 - (a) Made a part of the building or structure you occupy but do not own; and
 - (b) You acquired or made at your expense but cannot legally remove.

2. Property Not Covered

Covered Property does not include:

- a. Aircraft, automobiles, motortrucks and other vehicles subject to motor vehicle registration;
- b. Bullion, money or securities;
- c. Contraband, or property in the course of illegal transportation or trade;
- d. Land (including land on which the property is located), water, growing crops or lawns;
- e. Outdoor fences, radio or television antennas, including their lead-in wiring, masts or towers, signs (other than signs attached to buildings), trees, shrubs or plants, all except as provided in the:

(1) Outdoor Property Coverage Extension;
or

(2) Outdoor Signs Optional Coverage;

f. Watercraft (including motors, equipment and accessories) while afloat.

3. Covered Causes of Loss

a. Fire.

b. Lightning.

c. **Explosion**, including the explosion of gases or fuel within the furnace of any fired vessel or within the flues or passages through which the gases of combustion pass. This cause of loss does not include loss or damage by:

(1) Rupture, bursting or operation of pressure relief devices; or

(2) Rupture or bursting due to expansion or swelling of the contents of any building or structure, caused by or resulting from water.

d. **Windstorm or Hail**, but not including:

(1) Frost or cold weather;

(2) Ice (other than hail), snow or sleet, whether driven by wind or not;

(3) Loss of or damage to awnings or canopies of fabric or slat construction, including their supports, outside of buildings; or

(4) Loss of or damage to the interior of any building or structure, or the property inside the building or structure, caused by rain, snow, sand or dust, whether driven by wind or not, unless the building or structure first sustains wind or hail damage to its roof or walls through which the rain, snow, sand or dust enters.

e. **Smoke**, causing sudden and accidental loss or damage. This cause of loss does not include smoke from agricultural smudging or industrial operations.

f. **Aircraft or Vehicles**, meaning only physical contact of an aircraft, a spacecraft, a self-propelled missile, a vehicle or an object thrown up by a vehicle with the Covered Property or with the building or structure containing the Covered Property. This cause of loss includes loss or damage by objects falling from aircraft.

We will not pay for loss or damage caused by or resulting from vehicles you own or operate.

g. **Riot or Civil Commotion**, including:

(1) Acts of striking employees while occupying the described premises; and

(2) Looting occurring at the time and place of a riot or civil commotion.

h. **Vandalism**, meaning willful and malicious damage to, or destruction of, Covered Property.

We will not pay for loss or damage:

(1) To glass (other than glass building blocks) that is part of a building, structure, or an outdoor sign; but we will pay for loss of or damage to other property caused by or resulting from breakage of glass by vandals.

(2) Caused by or resulting from theft, except for building damage caused by the breaking in or exiting of burglars.

i. **Sprinkler Leakage**, meaning leakage or discharge of any substance from an Automatic Sprinkler System, including collapse of a tank that is part of the system.

If the building or structure containing the Automatic Sprinkler System is Covered Property, we will also pay the cost to:

(1) Repair or replace damaged parts of the Automatic Sprinkler System if the damage:

(a) Results in sprinkler leakage; or

(b) Is directly caused by freezing.

(2) Tear out and replace any part of the building or structure to repair damage to the Automatic Sprinkler System that has resulted in sprinkler leakage.

Automatic Sprinkler System means:

- (a) Any automatic fire protective or extinguishing system, including connected:
 - (i) Sprinklers and discharge nozzles;
 - (ii) Ducts, pipes, valves and fittings;
 - (iii) Tanks, their component parts and supports; and
 - (iv) Pumps and private fire protection mains.
- (b) When supplied from an automatic fire protective system:
 - (i) Non-automatic fire protective systems; and
 - (ii) Hydrants, standpipes and outlets.
- j. **Sinkhole Collapse**, meaning loss or damage caused by the sudden sinking or collapse of land into underground empty spaces created by the action of water on limestone or similar rock formations. This cause of loss does not include the cost of filling sinkholes.
- k. **Volcanic Action**, meaning direct loss or damage resulting from the eruption of a volcano when the loss or damage is caused by:
 - (1) Airborne volcanic blast or airborne shock waves;
 - (2) Ash, dust or particulate matter; or
 - (3) Lava flow.All volcanic eruptions that occur within any 72-hour period will constitute a single occurrence.
This cause of loss does not include the cost to remove ash, dust or particulate matter that does not cause direct physical loss of or damage to Covered Property.
- l. **Transportation**, meaning loss or damage caused by:
 - (1) Collision, derailment or overturn of a vehicle;
 - (2) Stranding or sinking of vessels; and
 - (3) Collapse of bridges, culverts, piers, wharves or docks.This cause of loss applies only to Covered Property in course of transit.

4. Additional Coverages

a. Debris Removal

- (1) We will pay your expense to remove debris of Covered Property caused by or resulting from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the earlier of:
 - (a) The date of direct physical loss or damage; or
 - (b) The end of the policy period.
- (2) The most we will pay under this Additional Coverage is 25% of:
 - (a) The amount we pay for the direct loss or damage; plus
 - (b) The deductible in this policy applicable to that loss or damage.But this limitation does not apply to any additional debris removal limit provided in paragraph (4) below.
- (3) This Additional Coverage does not apply to costs to:
 - (a) Extract "pollutants" from land or water; or
 - (b) Remove, restore or replace polluted land or water.
- (4) If:
 - (a) The sum of loss or damage and debris removal expense exceeds the Limit of Insurance; or
 - (b) The debris removal expense exceeds the amount payable under the 25% Debris Removal coverage limitation in paragraph (2) above:we will pay up to an additional \$5,000 for each location in any one occurrence under the Debris Removal Additional Coverage.

b. Preservation of Property

If it is necessary to move Covered Property from the described premises to preserve it from loss or damage by a Covered Cause of Loss, we will pay for any direct physical loss of or damage to that property:

- (1) While it is being moved or while temporarily stored at another location; and

- (2) Only if the loss or damage occurs within 10 days after the property is first moved.

c. Fire Department Service Charge

When the fire department is called to save or protect Covered Property from a Covered Cause of Loss, we will pay up to \$1,000 for your liability for fire department service charges:

- (1) Assumed by contract or agreement prior to loss; or
(2) Required by local ordinance.

d. Business Income

We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration". The suspension must be caused by direct physical loss of or damage to property at the described premises, including personal property in the open (or in a vehicle) within 100 feet, caused by or resulting from any Covered Cause of Loss.

We will only pay for loss of Business Income that occurs within 12 consecutive months after the date of direct physical loss or damage. This Additional Coverage is not subject to the Limits of Insurance.

Business Income means the:

- (1) Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
(2) Continuing normal operating expenses incurred, including payroll.

e. Extra Expense

We will pay necessary Extra Expense you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property at the described premises, including personal property in the open (or in a vehicle) within 100 feet, caused by or resulting from a Covered Cause of Loss.

Extra Expense means expense incurred:

- (1) To avoid or minimize the suspension of business and to continue "operations":
(a) At the described premises; or

- (b) At replacement premises or at temporary locations, including:

- (i) Relocation expenses; and
(ii) Costs to equip and operate the replacement or temporary locations.

- (2) To minimize the suspension of business if you cannot continue "operations".

- (3) (a) To repair or replace any property; or

- (b) To research, replace or restore the lost information on damaged valuable papers and records;

to the extent it reduces the amount of loss that otherwise would have been payable under this Additional Coverage or Additional Coverage d., Business Income.

We will only pay for Extra Expense that occurs within 12 consecutive months after the date of direct physical loss or damage. This Additional Coverage is not subject to the Limits of Insurance.

f. Pollutant Clean Up and Removal

We will pay your expense to extract "pollutants" from land or water at the described premises if the release, discharge or dispersal of the "pollutants" is caused by or results from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the earlier of:

- (1) The date of direct physical loss or damage; or
(2) The end of the policy period.

The most we will pay for each location under this Additional Coverage is \$10,000 for the sum of all such expenses arising out of Covered Causes of Loss occurring during each separate 12 month period of this policy.

5. Coverage Extensions

In addition to the Limits of Insurance, you may extend the insurance provided by this policy as follows:

a. Personal Property at Newly Acquired Premises

- (1) You may extend the insurance that applies to Business Personal Property to apply to that property at any premises you acquire.

The most we will pay for loss or damage under this Extension is \$10,000 at each premises.

- (2) Insurance under this Extension for each newly acquired premises will end when any of the following first occurs:

- (a) This policy expires.
- (b) 30 days expire after you acquire or begin construction at the new premises; or
- (c) You report values to us.

We will charge you additional premium for values reported from the date you acquire the premises.

b. Personal Property Off Premises

You may extend the insurance that applies to Business Personal Property to apply to covered Business Personal Property, other than money and securities, while it is in course of transit or temporarily at a premises you do not own, lease or operate. The most we will pay for loss or damage under this Extension is \$1,000.

c. Outdoor Property

You may extend the insurance provided by this policy to apply to your outdoor fences, radio and television antennas, signs (other than signs attached to buildings), trees, shrubs and plants, including debris removal expense, caused by or resulting from any of the following causes of loss:

- (1) Fire;
- (2) Lightning;
- (3) Explosion;
- (4) Riot or Civil Commotion; or
- (5) Aircraft.

The most we will pay for loss or damage under this Extension is \$1,000, but not more than \$250 for any one tree, shrub or plant.

d. Valuable Papers and Records – Cost of Research

You may extend the insurance that applies to Business Personal Property to apply to your costs to research, replace or restore the lost information on lost or damaged valuable papers and records, including those which exist on electronic or magnetic media, for which duplicates do not exist. The most we will pay under this Extension is \$1,000 at each described premises.

B. EXCLUSIONS

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

a. Building Ordinance

The enforcement of any ordinance or law:

- (1) Regulating the construction, use or repair of any property; or
- (2) Requiring the tearing down of any property, including the cost of removing its debris.

b. Earth Movement

- (1) Any earth movement (other than sink-hole collapse), such as an earthquake, landslide or earth sinking, rising or shifting. But if loss or damage by fire or explosion results, we will pay for that resulting loss or damage.
- (2) Volcanic eruption, explosion or effusion. But if loss or damage by fire or volcanic action results, we will pay for that resulting loss or damage.

c. Governmental Action

Seizure or destruction of property by order of governmental authority.

But we will pay for acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread, if the fire would be covered under this policy.

d. Nuclear Hazard

Nuclear reaction or radiation, or radioactive contamination, however caused.

But if loss or damage by fire results, we will pay for that resulting loss or damage.

e. Power Failure

The failure of power or other utility service supplied to the described premises, however caused, if the failure occurs away from the described premises.

But if loss or damage by a Covered Cause of Loss results, we will pay for that resulting loss or damage.

f. War and Military Action

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

g. Water

- (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;
- (2) Mudslide or mudflow;
- (3) Water that backs up from a sewer or drain; or
- (4) Water under the ground surface pressing on, or flowing or seeping through:
 - (a) Foundations, walls, floors or paved surfaces;
 - (b) Basements, whether paved or not; or
 - (c) Doors, windows or other openings.

But if loss or damage by fire, explosion or sprinkler leakage results, we will pay for that resulting loss or damage.

2. We will not pay for loss or damage caused by or resulting from:

- a. **Electrical Apparatus:** Artificially generated electrical current, including electric arcing, that disturbs electrical devices, appliances or wires.

But if loss or damage by fire results, we will pay for that resulting loss or damage.

- b. **Burst Piping:** Rupture or bursting of water pipes (other than Automatic Sprinkler Systems) unless caused by a Covered Cause of Loss.

- c. **Water Discharge:** Leakage or discharge of water or steam resulting from the breaking or cracking of any part of a system or appliance containing water or steam (other than an Automatic Sprinkler System), unless the system or appliance is damaged by a Covered Cause of Loss.

- d. **Steam Apparatus:** Explosion of steam boilers, steam pipes, steam engines or steam turbines owned or leased by you, or operated under your control.

But if loss or damage by fire or combustion explosion results, we will pay for that resulting loss or damage.

- e. **Mechanical Breakdown:** Mechanical breakdown, including rupture or bursting caused by centrifugal force.

But if loss or damage by a Covered Cause of Loss results, we will pay for that resulting loss or damage.

3. Business Income and Extra Expense Exclusions. We will not pay for:

- a. Any Extra Expense, or increase of Business Income loss, caused by or resulting from:

- (1) Delay in rebuilding, repairing or replacing the property or resuming "operations", due to interference at the location of the rebuilding, repair or replacement by strikers or other persons; or
- (2) Suspension, lapse or cancellation of any license, lease or contract. But if the suspension, lapse or cancellation is directly caused by the suspension of "operations", we will cover such loss that affects your Business Income during the "period of restoration".

- b. Any other consequential loss.

C. LIMITS OF INSURANCE

1. The most we will pay for loss or damage in any one occurrence is the applicable Limit of Insurance shown in the Declarations.
2. The most we will pay for loss of or damage to outdoor signs attached to buildings is \$1,000 per sign in any one occurrence.
3. The limits applicable to the Coverage Extensions and the Fire Department Service Charge and Pollutant Clean Up and Removal Additional Coverages are in addition to the Limits of Insurance.
4. **Building Limit – Automatic Increase**
 - a. The Limit of Insurance for Buildings will automatically increase by the annual percentage shown in the Declarations.
 - b. The amount of increase will be:
 - (1) The Building limit that applied on the most recent of the policy inception date, the policy anniversary date, or any other policy change amending the Building limit, times
 - (2) The percentage of annual increase shown in the Declarations, expressed as a decimal (example: 8% is .08), times
 - (3) The number of days since the beginning of the current policy year or the effective date of the most recent policy change amending the Building limit, divided by 365.

Example:

If: The applicable Building limit is \$100,000.
The annual percentage increase is 8%.
The number of days since the beginning of the policy year (or last policy change) is 146.

The amount of increase is
 $\$100,000 \times .08 \times 146 \div 365 = \$3,200.$

5. Business Personal Property Limit – Seasonal Increase

- a. The Limit of Insurance for Business Personal Property will automatically increase by 25% to provide for seasonal variations.

- b. This increase will apply only if the Limit of Insurance shown for Business Personal Property in the Declarations is at least 100% of your average monthly values during the lesser of:

- (1) The 12 months immediately preceding the date the loss or damage occurs; or
- (2) The period of time you have been in business as of the date the loss or damage occurs.

D. DEDUCTIBLES

1. We will not pay for loss or damage in any one occurrence until the amount of loss or damage exceeds the Deductible shown in the Declarations. We will then pay the amount of loss or damage in excess of the Deductible up to the applicable Limit of Insurance.
2. Regardless of the amount of the Deductible, the most we will deduct from any loss or damage under all of the following Optional Coverages in any one occurrence is \$250:
 - a. Burglary and Robbery;
 - b. Employee Dishonesty;
 - c. Exterior Grade Floor Glass; and
 - d. Outdoor Signs.

But this \$250 deductible will not increase the deductible shown in the Declarations. This deductible will be used to satisfy the requirements of the deductible in the Declarations.

3. No deductible applies to the following Additional Coverages:
 - a. Fire Department Service Charge;
 - b. Business Income; and
 - c. Extra Expense.

E. PROPERTY LOSS CONDITIONS

1. Abandonment

There can be no abandonment of any property to us.

2. Appraisal

If we and you disagree on the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

- a. Pay its chosen appraiser; and
- b. Bear the other expenses of the appraisal and umpire equally.

If we submit to an appraisal, we will still retain our right to deny the claim.

3. Duties In The Event Of Loss Or Damage

You must see that the following are done in the event of loss or damage to Covered Property:

- a. Notify the police if a law may have been broken.
- b. Give us prompt notice of the loss or damage. Include a description of the property involved.
- c. As soon as possible, give us a description of how, when and where the loss or damage occurred.
- d. Take all reasonable steps to protect the Covered Property from further damage by a Covered Cause of Loss. If feasible, set the damaged property aside and in the best possible order for examination. Also keep a record of your expenses for emergency and temporary repairs, for consideration in the settlement of the claim. This will not increase the limit of insurance.
- e. At our request, give us complete inventories of the damaged and undamaged property. Include quantities, costs, values and amount of loss claimed.
- f. Permit us to inspect the property and records proving the loss or damage.

- g. If requested, permit us to question you under oath at such times as may be reasonably required about any matter relating to this insurance or your claim, including your books and records. In such event, your answers must be signed.
- h. Send us a signed, sworn statement of loss containing the information we request to settle the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.
- i. Cooperate with us in the investigation or settlement of the claim.
- j. Resume all or part of your "operations" as quickly as possible.

4. Legal Action Against Us

No one may bring a legal action against us under this insurance unless:

- a. There has been full compliance with all of the terms of this insurance; and
- b. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

5. Limitation – Electronic Media and Records

We will not pay for any loss of Business Income caused by direct physical loss of or damage to Electronic Media and Records after the longer of:

- a. 60 consecutive days from the date of direct physical loss or damage; or
- b. The period, beginning with the date of direct physical loss or damage; necessary to repair, rebuild or replace with reasonable speed and similar quality, other property at the described premises due to loss or damage caused by the same occurrence.

Electronic Media and Records are:

- (1) Electronic data processing, recording or storage media such as films, tapes, discs, drums or cells;
- (2) Data stored on such media; or
- (3) Programming records used for electronic data processing or electronically controlled equipment.

Example No. 1:

A Covered Cause of Loss damages a computer on June 1. It takes until September 1 to replace the computer, and until October 1 to restore the data that was lost when the damage occurred. We will only pay for the Business Income loss sustained during the period June 1-September 1. Loss during the period September 2-October 1 is not covered.

Example No. 2:

A Covered Cause of Loss results in the loss of data processing programming records on August 1. The records are replaced on October 15. We will only pay for the Business Income loss sustained during the period August 1-September 29 (60 consecutive days). Loss during the period September 30-October 15 is not covered.

6. Loss Payment

In the event of loss or damage covered by this policy:

- a. We will not pay you more than your financial interest in the Covered Property.
- b. We will either:
 - (1) Pay the value of lost or damaged property, as described in paragraph d. below;
 - (2) Pay the cost of repairing or replacing the lost or damaged property, plus any reduction in value of repaired items;
 - (3) Take all or any part of the property at an agreed or appraised value; or
 - (4) Repair, rebuild or replace the property with other property of like kind and quality.
- c. We will give notice of our intentions within 30 days after we receive the sworn statement of loss.
- d. We will determine the value of Covered Property as follows:
 - (1) At replacement cost (without deduction for depreciation), except as provided in (2) through (7) below.

(a) You may make a claim for loss or damage covered by this insurance on an actual cash value basis instead of on a replacement cost basis. In the event you elect to have loss or damage settled on an actual cash value basis, you may still make a claim on a replacement cost basis if you notify us of your intent to do so within 180 days after the loss or damage.

(b) We will not pay on a replacement cost basis for any loss or damage:

(i) Until the lost or damaged property is actually repaired or replaced; and

(ii) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.

(c) We will not pay more for loss or damage on a replacement cost basis than the least of:

(i) The cost to replace, on the same premises, the lost or damaged property with other property:

i. Of comparable material and quality; and

ii. Used for the same purpose; or

(ii) The amount you actually spend that is necessary to repair or replace the lost or damaged property.

(2) If the "Actual Cash Value-Buildings" option applies, as shown in the Declarations, paragraph (1) above does not apply to Buildings. Instead, we will determine the value of Buildings at actual cash value.

(3) The following property at actual cash value:

(a) Used or secondhand merchandise held in storage or for sale;

(b) Property of others;

- (c) Household contents, except personal property in apartments or rooms furnished by you as landlord;
 - (d) Manuscripts;
 - (e) Works of art, antiques or rare articles, including etchings, pictures, statuary, marbles, bronzes, porcelains and bric-a-brac.
- (4) Glass at the cost of replacement with safety glazing material if required by law.
- (5) Tenants' Improvements and Betterments at:
- (a) Replacement cost if you make repairs promptly.
 - (b) A proportion of your original cost if you do not make repairs promptly. We will determine the proportionate value as follows:
 - (i) Multiply the original cost by the number of days from the loss or damage to the expiration of the lease; and
 - (ii) Divide the amount determined in (i) above by the number of days from the installation of improvements to the expiration of the lease.

If your lease contains a renewal option, the expiration of the renewal option period will replace the expiration of the lease in this procedure.
 - (c) Nothing if others pay for repairs or replacement.
- (6) Valuable Papers and Records, including those which exist on electronic or magnetic media (other than prepackaged software programs), at the cost of:
- (a) Blank materials for reproducing the records; and
 - (b) Labor to transcribe or copy the records.
- (7) Applicable only to the Optional Coverages:
- (a) Money at its face value; and

- (b) Securities at their value at the close of business on the day the loss is discovered.

The value of United States Government Internal Revenue taxes and custom duties and refundable state and local taxes paid or fully determined on the following property held for sale will not be considered in determining the value of Covered Property:

- (a) Distilled spirits;
 - (b) Wines;
 - (c) Rectified products; or
 - (d) Beer.
- e. Our payment for loss of or damage to personal property of others will only be for the account of the owners of the property. We may adjust losses with the owners of lost or damaged property if other than you. If we pay the owners, such payments will satisfy your claims against us for the owners' property. We will not pay the owners more than their financial interest in the Covered Property.
- f. We may elect to defend you against suits arising from claims of owners of property. We will do this at our expense.
- g. We will pay for covered loss or damage within 30 days after we receive the sworn statement of loss, if:
- (1) You have complied with all of the terms of this policy; and
 - (2) (a) We have reached agreement with you on the amount of loss; or
 - (b) An appraisal award has been made.

7. Recovered Property

If either you or we recover any property after loss settlement, that party must give the other prompt notice. At your option, you may retain the property. But then you must return to us the amount we paid to you for the property. We will pay recovery expenses and the expenses to repair the recovered property, subject to the Limit of Insurance.

8. Resumption of Operations

We will reduce the amount of your:

- a. Business Income loss, other than Extra Expense, to the extent you can resume your "operations", in whole or in part, by using damaged or undamaged property (including merchandise or stock) at the described premises or elsewhere.
- b. Extra Expense loss to the extent you can return "operations" to normal and discontinue such Extra Expense.

9. Vacancy

If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage, we will:

- a. Not pay for any loss or damage caused by:
 - (1) Vandalism; or
 - (2) Sprinkler leakage, unless you have protected the system against freezing.
- b. Reduce the amount we would otherwise pay for the loss or damage by 15%.

Buildings under construction are not considered vacant.

F. PROPERTY GENERAL CONDITIONS

1. Control of Property

Any act or neglect of any person other than you beyond your direction or control will not affect this insurance.

If you violate a condition of this policy, we will not pay for loss or damage at the involved location. But your coverage will continue for other locations at which the violation does not apply.

2. Mortgage Holders

- a. The term "mortgage holder" includes trustee.
- b. We will pay for covered loss of or damage to buildings or structures to each mortgage holder shown in the Declarations in their order of precedence, as interests may appear.
- c. The mortgage holder has the right to receive loss payment even if the mortgage holder has started foreclosure or similar action on the building or structure.

- d. If we deny your claim because of your acts or because you have failed to comply with the terms of this policy, the mortgage holder will still have the right to receive loss payment if the mortgage holder:
 - (1) Pays any premium due under this policy at our request if you have failed to do so;
 - (2) Submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so; and
 - (3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the mortgage holder.

All of the terms of this policy will then apply directly to the mortgage holder.

- e. If we pay the mortgage holder for any loss or damage and deny payment to you because of your acts or because you have failed to comply with the terms of this policy:
 - (1) The mortgage holder's rights under the mortgage will be transferred to us to the extent of the amount we pay; and
 - (2) The mortgage holder's right to recover the full amount of the mortgage holder's claim will not be impaired.

At our option, we may pay to the mortgage holder the whole principal on the mortgage plus any accrued interest. In this event, your mortgage and note will be transferred to us and you will pay your remaining mortgage debt to us.

- f. If we cancel this policy, we will give written notice to the mortgage holder at least:
 - (1) 10 days before the effective date of cancellation if we cancel for your non-payment of premium; or
 - (2) 30 days before the effective date of cancellation if we cancel for any other reason.

- g. If we do not renew this policy, we will give written notice to the mortgage holder at least 10 days before the expiration date of this policy.

3. No Benefit to Bailee

No person or organization, other than you, having custody of Covered Property will benefit from this insurance.

4. Policy Period, Coverage Territory

Under this form:

- a. We cover loss or damage commencing:
- (1) During the policy period shown in the Declarations; and
 - (2) Within the coverage territory or, with respect to property in transit, while it is between points in the coverage territory.
- b. The coverage territory is:
- (1) The United States of America (including its territories and possessions);
 - (2) Puerto Rico; and
 - (3) Canada.

G. OPTIONAL COVERAGES

If shown as applicable in the Declarations, the following Optional Coverages also apply. These coverages are subject to the terms and conditions applicable to property coverage in this policy, except as provided below.

1. Outdoor Signs

- a. We will pay for direct physical loss of or damage to all outdoor signs at the described premises:
- (1) Owned by you; or
 - (2) Owned by others but in your care, custody or control.
- b. Paragraph A.3., Covered Causes of Loss, and Section B., Exclusions, do not apply to this Optional Coverage, except for:
- (1) Paragraph B.1.c., Governmental Action;
 - (2) Paragraph B.1.d., Nuclear Hazard; and
 - (3) Paragraph B.1.f., War and Military Action.

- c. We will not pay for loss or damage caused by or resulting from:

- (1) Wear and tear;
- (2) Hidden or latent defect;
- (3) Rust;
- (4) Corrosion; or
- (5) Mechanical breakdown.

- d. The most we will pay for loss of or damage in any one occurrence is the Limit of Insurance for Outdoor Signs shown in the Declarations.

- e. The provisions of this Optional Coverage supersede all other references to outdoor signs in this policy:

2. Exterior Grade Floor Glass

- a. We will pay for direct physical loss of or damage to all exterior grade floor and basement glass, including all lettering and ornamentation, located at the described premises and:

- (1) Owned by you; or
- (2) Owned by others but in your care, custody or control.

- b. We will also pay for necessary:

- (1) Expenses incurred to put up temporary plates or board up openings;
- (2) Repair or replacement of encasing frames; and
- (3) Expenses incurred to remove or replace obstructions.

- c. Paragraph A.3., Covered Causes of Loss, and Section B., Exclusions, do not apply to this Optional Coverage, except for:

- (1) Paragraph B.1.c., Governmental Action;
- (2) Paragraph B.1.d., Nuclear Hazard; and
- (3) Paragraph B.1.f., War and Military Action.

- d. We will not pay for loss or damage caused by or resulting from:

- (1) Wear and tear;
- (2) Hidden or latent defect;

(3) Corrosion; or

(4) Rust.

3. Burglary and Robbery

a. We will pay for direct physical loss of or damage to Business Personal Property, including money and securities, at the described premises resulting directly from actual or attempted:

(1) Burglary, meaning the taking of property from inside the described premises by a person unlawfully entering or leaving the premises as evidenced by marks of forcible entry or exit; or

(2) Robbery, meaning the taking of property from the care and custody of a person by one who has:

(a) Caused or threatened to cause that person bodily harm; or

(b) Committed an obviously unlawful act witnessed by the person from whom the property was taken.

b. Coverage for money and securities extends to that property while at a bank or savings institution, within your living quarters or the living quarters of your partners or any employee having care and custody of the property, at the described premises, or in transit between any of these places.

c. We will not pay for loss or damage:

(1) To household and personal effects in living quarters occupied by you, your partner, officer, director, or stockholder or any relative of any of these.

(2) To accounts, deeds, evidences of debt and manuscripts.

(3) Of property that is missing when there is no physical evidence to show what happened to it, such as shortage disclosed on taking inventory.

(4) Resulting from any dishonest or criminal act:

(a) That you or any of your partners commit whether acting alone or in collusion with other persons; or

(b) Committed by any of your employees, directors, trustees or authorized representatives:

(i) Acting alone or in collusion with other persons; or

(ii) While performing services for you or otherwise.

(5) Resulting from voluntary parting with any property by you or anyone else to whom you have entrusted the property if induced to do so by any fraudulent scheme, trick, device or false pretense.

(6) Of property that has been transferred to a person or place outside the described premises on the basis of unauthorized instructions.

(7) Resulting from delay, loss of use or loss of market.

(8) Occurring during a fire at the described premises.

d. The most we will pay for loss or damage in any one occurrence is:

(1) The limit shown in the Declarations for Inside the Premises for money and securities while:

(a) In or on the described premises; or

(b) Within a bank or savings institution;

(2) The limit shown in the Declarations for Outside the Premises for money and securities while anywhere else; and

(3) 25% of the Business Personal Property Limit of Insurance for all other property. But each of the following types of property are covered only up to \$2,500:

(a) Furs, fur garments and garments trimmed with fur;

(b) Jewelry, watches, watch movements, jewels, precious and semi-precious stones, gold, silver, platinum and other precious alloys or metals. This limit does not apply to jewelry and watches worth \$100 or less per item; and

(c) Patterns, dies, molds and forms.

e. All loss or damage:

- (1) Caused by one or more persons; or
- (2) Involving a single act or series of related acts;

is considered one occurrence.

4. Employee Dishonesty

a. We will pay for direct loss of or damage to Business Personal Property, including money and securities, resulting from dishonest acts committed by any of your employees acting alone or in collusion with other persons (except you or your partner) with the manifest intent to:

- (1) Cause you to sustain loss or damage; and also
- (2) Obtain financial benefit (other than salaries, commissions, fees, bonuses, promotions, awards, profit sharing, pensions or other employee benefits earned in the normal course of employment) for:

- (a) Any employee; or
- (b) Any other person or organization.

b. We will not pay for loss or damage:

- (1) Resulting from any dishonest or criminal act that you or any of your partners commit whether acting alone or in collusion with other persons.
- (2) The only proof of which as to its existence or amount is:
 - (a) An inventory computation; or
 - (b) A profit and loss computation.

c. The most we will pay for loss or damage in any one occurrence is the Limit of Insurance for Employee Dishonesty shown in the Declarations.

d. All loss or damage:

- (1) Caused by one or more persons; or

- (2) Involving a single act or series of related acts;

is considered one occurrence.

e. We will pay only for loss or damage you sustain through acts committed or events occurring during the Policy Period. Regardless of the number of years this policy remains in force or the number of premiums paid, no Limit of Insurance cumulates from year to year or period to period.

f. This Optional Coverage does not apply to any employee immediately upon discovery by:

- (1) You; or
- (2) Any of your partners, officers or directors not in collusion with the employee; of any dishonest act committed by that employee before or after being hired by you.

g. We will pay only for covered loss or damage discovered no later than one year from the end of the Policy Period.

h. If you (or any predecessor in interest) sustained loss or damage during the period of any prior insurance that you could have recovered under that insurance except that the time within which to discover loss or damage had expired, we will pay for it under this Optional Coverage, provided:

- (1) This Optional Coverage became effective at the time of cancellation or termination of the prior insurance; and
- (2) The loss or damage would have been covered by this Optional Coverage had it been in effect when the acts or events causing the loss or damage were committed or occurred.

i. The insurance under paragraph h. above is part of, not in addition to, the Limit of Insurance applying to this Optional Coverage and is limited to the lesser of the amount recoverable under:

- (1) This Optional Coverage as of its effective date; or
- (2) The prior insurance had it remained in effect.

5. Mechanical Breakdown

a. We will pay for direct damage to Covered Property caused by an Accident to an Object. The Object must be:

- (1) Owned by you or in your care, custody or control; and
- (2) At the described premises.

b. Accident means a sudden and accidental breakdown of the Object or a part of the Object. At the time the breakdown occurs, it must manifest itself by physical damage to the Object that necessitates repair or replacement.

c. None of the following is an Accident:

- (1) Depletion, deterioration, corrosion or erosion;
- (2) Wear and tear;
- (3) Leakage at any valve, fitting, shaft seal, gland packing, joint or connection;
- (4) Breakdown of any vacuum tube, gas tube or brush;
- (5) Breakdown of any electronic computer or electronic data processing equipment;
- (6) Breakdown of any structure or foundation supporting the Object or any of its parts;
- (7) The functioning of any safety or protective device; or
- (8) The explosion of gases or fuel within the furnace of any Object or within the flues or passages through which the gases of combustion pass.

d. Object means any of the following equipment:

- (1) Boiler and Pressure Vessels:
 - (a) Steam heating boilers and condensate return tanks used with them;

- (b) Hot water heating boilers and expansion tanks used with them;

- (c) Hot water supply boilers;

- (d) Other fired or unfired vessels used for maintenance or service of the described premises but not used for processing or manufacturing;

- (e) Steam boiler piping, valves, fittings, traps and separators, but only if they:

- (i) Are on your premises or between parts of your premises;

- (ii) Contain steam or condensate of steam; and

- (iii) Are not part of any other vessel or apparatus;

- (f) Feed water piping between any steam boiler and a feed pump or injector.

- (2) Air Conditioning Units – Any air conditioning unit that has a capacity of 60,000 Btu or more, including:

- (a) Inductors, converters and coils that make use of a refrigerant and form part of a cooling, humidity control or space heating system;

- (b) Interconnecting piping, valves and fittings containing only a refrigerant, water, brine or other solution;

- (c) Vessels heated directly or indirectly that:

- (i) Form part of an absorption type system; and

- (ii) Function as a generator, refrigerator or concentrator;

- (d) Compressors, pumps, fans and blowers used solely with the system together with their driving electric motors; and

- (e) Control equipment used solely with the system.

e. Object does not mean:

(1) As Boiler and Pressure Vessels:

- (a) Equipment that is not under internal vacuum or internal pressure other than weight of contents;
- (b) Boiler settings;
- (c) Insulating or refractory material; or
- (d) Electrical, reciprocating or rotating apparatus within or forming a part of the boiler or vessel.

(2) As Air Conditioning Units, any:

- (a) Vessel, cooling tower, reservoir or other source of cooling water for a condenser or compressor, or any water piping leading to or from that source; or
- (b) Wiring or piping leading to or from the unit.

f. We will not pay for an Accident to any Object while being tested.

g. Suspension

Whenever an Object is found to be in, or exposed to, a dangerous condition, any of our representatives may immediately suspend the insurance against loss from an Accident to that Object. This can be done by delivering or mailing a written notice of suspension to:

- (1) Your last known address; or
- (2) The address where the Object is located.

If we suspend your insurance, you will get a pro rata refund of premium. But the suspension will be effective even if we have not yet made or offered a refund.

H. PROPERTY DEFINITIONS

1. **"Operations"** means your business activities occurring at the described premises.

2. **"Period of Restoration"** means the period of time that:

- a. Begins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and
- b. Ends on the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality.

"Period of restoration" does not include any increased period required due to the enforcement of any law that:

- (1) Regulates the construction, use or repair, or requires the tearing down of any property; or
- (2) Regulates the prevention, control, repair, clean-up or restoration of environmental damage.

The expiration date of this policy will not cut short the "period of restoration".

3. **"Pollutants"** means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

EXHIBIT 2

BUSINESSOWNERS SPECIAL PROPERTY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to SECTION H – PROPERTY DEFINITIONS.

A. COVERAGE

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

1. Covered Property

Covered Property, as used in this policy, means the following types of property for which a Limit of Insurance is shown in the Declarations:

a. **Buildings**, meaning the buildings and structures at the premises described in the Declarations, including:

- (1) Completed additions;
- (2) Permanently installed fixtures, machinery and equipment;
- (3) Your personal property in apartments or rooms furnished by you as landlord;
- (4) Outdoor fixtures;
- (5) Personal property owned by you that is used to maintain or service the buildings or structures or the premises, including:
 - (a) Fire extinguishing equipment;
 - (b) Outdoor furniture;
 - (c) Floor coverings; and
 - (d) Appliances used for refrigerating, ventilating, cooking, dishwashing or laundering;
- (6) If not covered by other insurance:
 - (a) Additions under construction, alterations and repairs to the buildings or structures;
 - (b) Materials, equipment, supplies and temporary structures, on or within 100 feet of the described premises, used for making additions, alterations or repairs to the buildings or structures.

b. **Business Personal Property** located in or on the buildings at the described premises or in the open (or in a vehicle) within 100 feet of the described premises, including:

- (1) Property you own that is used in your business;
- (2) Property of others that is in your care, custody or control; but this property is not covered for more than the amount for which you are legally liable, plus the cost of labor, materials or services furnished or arranged by you on personal property of others; and
- (3) Tenant's improvements and betterments. Improvements and betterments are fixtures, alterations, installations or additions:
 - (a) Made a part of the building or structure you occupy but do not own; and
 - (b) You acquired or made at your expense but cannot legally remove.

2. Property Not Covered

Covered Property does not include:

- a. Aircraft, automobiles, motortrucks and other vehicles subject to motor vehicle registration;
- b. Bullion, money or securities;
- c. Contraband, or property in the course of illegal transportation or trade;
- d. Land (including land on which the property is located), water, growing crops or lawns;
- e. Outdoor fences, radio or television antennas, including their lead-in wiring, masts or towers, signs (other than signs attached to buildings), trees, shrubs or plants, all except as provided in the:

(1) Outdoor Property Coverage Extension;
or

(2) Outdoor Signs Optional Coverage;

f. Watercraft (including motors, equipment and accessories) while afloat.

3. Covered Causes of Loss

RISKS OF DIRECT PHYSICAL LOSS unless the loss is:

a. Excluded in Section B., Exclusions; or

b. Limited in Paragraph A.4., Limitations; that follow.

4. Limitations

a. We will not pay for loss of or damage to:

(1) Steam boilers, steam pipes, steam engines or steam turbines caused by or resulting from any condition or event inside such equipment. But we will pay for loss of or damage to such equipment caused by or resulting from an explosion of gases or fuel within the furnace of any fired vessel or within the flues or passages through which the gases of combustion pass.

(2) Hot water boilers or other water heating equipment caused by or resulting from any condition or event inside such boilers or equipment, other than an explosion.

(3) Property that is missing, but there is no physical evidence to show what happened to it, such as shortage disclosed on taking inventory. This limitation does not apply to the Optional Coverage for Money and Securities.

(4) Property that has been transferred to a person or to a place outside the described premises on the basis of unauthorized instructions.

b. We will not pay more for loss of or damage to glass that is part of a building or structure than \$100 for each plate, pane, multiple plate insulating unit, radiant or solar heating panel, jalousie, louver or shutter. We will not pay more than \$500 for all loss of or damage to building glass that occurs at any one time.

This Limitation does not apply to loss or damage by the "specified causes of loss", except vandalism.

c. We will not pay for loss of or damage to fragile articles such as glassware, statuary, marbles, chinaware and porcelains, if broken, unless caused by the "specified causes of loss" or building glass breakage. This restriction does not apply to:

(1) Glass that is part of a building or structure;

(2) Containers of property held for sale; or

(3) Photographic or scientific instrument lenses.

d. For loss or damage, by theft, the following types of property are covered only up to the limits shown:

(1) \$2,500 for furs, fur garments and garments trimmed with fur.

(2) \$2,500 for jewelry, watches, watch movements, jewels, pearls, precious and semi-precious stones, bullion, gold, silver, platinum and other precious alloys or metals. This limit does not apply to jewelry and watches worth \$100 or less per item.

(3) \$2,500 for patterns, dies, molds and forms.

5. Additional Coverages

a. Debris Removal

(1) We will pay your expense to remove debris of Covered Property caused by or resulting from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the earlier of:

(a) The date of direct physical loss or damage; or

(b) The end of the policy period.

(2) The most we will pay under this Additional Coverage is 25% of:

(a) The amount we pay for the direct loss or damage; plus

(b) The deductible in this policy applicable to that loss or damage.

But this limitation does not apply to any additional debris removal limit provided in paragraph (4) below.

(3) This Additional Coverage does not apply to costs to:

- (a) Extract "pollutants" from land or water; or
- (b) Remove, restore or replace polluted land or water.

(4) If:

- (a) The sum of loss or damage and debris removal expense exceeds the Limit of Insurance; or
- (b) The debris removal expense exceeds the amount payable under the 25% Debris Removal coverage limitation in paragraph (2) above;

we will pay up to an additional \$5,000 for each location in any one occurrence under the Debris Removal Additional Coverage.

b. Preservation of Property

If it is necessary to move Covered Property from the described premises to preserve it from loss or damage by a Covered Cause of Loss, we will pay for any direct physical loss of or damage to that property:

- (1) While it is being moved or while temporarily stored at another location; and
- (2) Only if the loss or damage occurs within 10 days after the property is first moved.

c. Fire Department Service Charge

When the fire department is called to save or protect Covered Property from a Covered Cause of Loss, we will pay up to \$1,000 for your liability for fire department service charges:

- (1) Assumed by contract or agreement prior to loss; or
- (2) Required by local ordinance.

d. Collapse

We will pay for loss or damage caused by or resulting from risks of direct physical loss involving collapse of a building or any part of a building caused only by one or more of the following:

- (1) The "specified causes of loss" or breakage of building glass, all only as insured against in this policy;

(2) Hidden decay;

(3) Hidden insect or vermin damage;

(4) Weight of people or personal property;

(5) Weight of rain that collects on a roof;

(6) Use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation.

We will not pay for loss of or damage to the following types of property, if otherwise covered in this policy, under items (2), (3), (4), (5) and (6) unless the loss or damage is a direct result of the collapse of a building:

awnings; gutters and downspouts; yard fixtures; outdoor swimming pools; piers, wharves and docks; beach or diving platforms or appurtenances; retaining walls; walks, roadways and other paved surfaces.

Collapse does not include settling, cracking, shrinkage, bulging or expansion.

e. Water Damage

If loss or damage caused by or resulting from a covered water damage loss occurs, we will also pay the cost to tear out and replace any part of the building or structure to repair damage to the system or appliance from which the water or steam escapes.

We will not pay the cost of repairing or replacing the system or appliance itself; but we will pay the cost to repair or replace damaged parts of fire extinguishing equipment if the damage:

- (1) Results in sprinkler leakage; or
- (2) Is directly caused by freezing.

f. Business Income

We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration". The suspension must be caused by direct physical loss of or

damage to property at the described premises, including personal property in the open (or in a vehicle) within 100 feet, caused by or resulting from any Covered Cause of Loss.

We will only pay for loss of Business Income that occurs within 12 consecutive months after the date of direct physical loss or damage. This Additional Coverage is not subject to the Limits of Insurance.

Business Income means the:

- (1) Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
- (2) Continuing normal operating expenses incurred, including payroll.

g. Extra Expense

We will pay necessary Extra Expense you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property at the described premises, including personal property in the open (or in a vehicle) within 100 feet, caused by or resulting from a Covered Cause of Loss.

Extra Expense means expense incurred:

- (1) To avoid or minimize the suspension of business and to continue "operations":
 - (a) At the described premises, or
 - (b) At replacement premises or at temporary locations, including:
 - (i) Relocation expenses; and
 - (ii) Costs to equip and operate the replacement or temporary locations.
- (2) To minimize the suspension of business if you cannot continue "operations".
- (3) (a) To repair or replace any property; or
(b) To research, replace or restore the lost information on damaged valuable papers and records;

to the extent it reduces the amount of loss that otherwise would have been payable under this Additional Coverage or Additional Coverage f., Business Income.

We will only pay for Extra Expense that occurs within 12 consecutive months after the date of direct physical loss or damage. This Additional Coverage is not subject to the Limits of Insurance.

h. Pollutant Clean Up and Removal

We will pay your expense to extract "pollutants" from land or water at the described premises if the release, discharge or dispersal of the "pollutants" is caused by or results from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the earlier of:

- (1) The date of direct physical loss or damage; or
- (2) The end of the policy period.

The most we will pay for each location under this Additional Coverage is \$10,000 for the sum of all such expenses arising out of Covered Causes of Loss occurring during each separate 12 month period of this policy.

6. Coverage Extensions

In addition to the Limits of Insurance, you may extend the insurance provided by this policy as follows:

a. Personal Property at Newly Acquired Premises

- (1) You may extend the insurance that applies to Business Personal Property to apply to that property at any premises you acquire.

The most we will pay for loss or damage under this Extension is \$10,000 at each premises.

(2) Insurance under this Extension for each newly acquired premises will end when any of the following first occurs:

- (a) This policy expires.
- (b) 30 days expire after you acquire or begin construction at the new premises; or
- (c) You report values to us.

We will charge you additional premium for values reported from the date you acquire the premises.

b. Personal Property Off Premises

You may extend the insurance that applies to Business Personal Property to apply to covered Business Personal Property, other than money and securities, while it is in course of transit or temporarily at a premises you do not own, lease or operate. The most we will pay for loss or damage under this Extension is \$1,000.

c. Outdoor Property

You may extend the insurance provided by this policy to apply to your outdoor fences, radio and television antennas, signs (other than signs attached to buildings), trees, shrubs and plants, including debris removal expense, caused by or resulting from any of the following causes of loss:

- (1) Fire;
- (2) Lightning;
- (3) Explosion;
- (4) Riot or Civil Commotion; or
- (5) Aircraft.

The most we will pay for loss or damage under this Extension is \$1,000, but not more than \$250 for any one tree, shrub or plant.

d. Valuable Papers and Records – Cost of Research

You may extend the insurance that applies to Business Personal Property to apply to your costs to research, replace or restore the lost information on lost or damaged valuable papers and records, including those which exist on electronic or magnetic media, for which duplicates do not exist. The most we will pay under this Extension is \$1,000 at each described premises.

B. EXCLUSIONS

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

a. Building Ordinance

The enforcement of any ordinance or law:

- (1) Regulating the construction, use or repair of any property; or
- (2) Requiring the tearing down of any property, including the cost of removing its debris.

b. Earth Movement

(1) Any earth movement (other than sink-hole collapse), such as an earthquake, landslide or earth sinking, rising or shifting. But if loss or damage by fire or explosion results, we will pay for that resulting loss or damage.

(2) Volcanic eruption, explosion or effusion. But if loss or damage by fire, building glass breakage or volcanic action results, we will pay for that resulting loss or damage.

Volcanic action means direct loss or damage resulting from the eruption of a volcano when the loss or damage is caused by:

- (a) Airborne volcanic blast or airborne shock waves;
- (b) Ash, dust, or particulate matter; or
- (c) Lava flow.

All volcanic eruptions that occur within any 72-hour period will constitute a single occurrence.

Volcanic action does not include the cost to remove ash, dust or particulate matter that does not cause direct physical loss of or damage to Covered Property.

c. Governmental Action

Seizure or destruction of property by order of governmental authority.

But we will pay for acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread, if the fire would be covered under this policy.

d. Nuclear Hazard

Nuclear reaction or radiation, or radioactive contamination, however caused.

But if loss or damage by fire results, we will pay for that resulting loss or damage.

e. Power Failure

The failure of power or other utility service supplied to the described premises, however caused, if the failure occurs away from the described premises.

But if loss or damage by a Covered Cause of Loss results, we will pay for that resulting loss or damage.

f. War and Military Action

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these

g. Water

- (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;
- (2) Mudslide or mudflow;
- (3) Water that backs up from a sewer or drain; or
- (4) Water under the ground surface pressing on, or flowing or seeping through:
 - (a) Foundations, walls, floors or paved surfaces;
 - (b) Basements, whether paved or not; or

(c) Doors, windows or other openings.

But if loss or damage by fire, explosion or sprinkler leakage results, we will pay for that resulting loss or damage.

- 2. We will not pay for loss or damage caused by or resulting from any of the following:

a. Electrical Apparatus: Artificially generated electric current, including electric arcing, that disturbs electrical devices, appliances or wires.

But if loss or damage by fire results, we will pay for that resulting loss or damage.

b. Consequential Losses: Delay, loss of use or loss of market.

c. Smoke, Vapor, Gas: Smoke, vapor or gas from agricultural smudging or industrial operations.

d. Maintenance Types of Loss:

- (1) Wear and tear;
- (2) Rust, corrosion, fungus, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;
- (3) Smog;
- (4) Settling, cracking, shrinking or expansion;
- (5) Insects, birds, rodents or other animals;
- (6) Mechanical breakdown, including rupture or bursting caused by centrifugal force; or
- (7) The following causes of loss to personal property:
 - (a) Dampness or dryness of atmosphere;
 - (b) Changes in or extremes of temperature; or
 - (c) Marring or scratching.

But if loss or damage by the "specified causes of loss" or building glass breakage results, we will pay for that resulting loss or damage.

e. Steam Apparatus: Explosion of steam boilers, steam pipes, steam engines or steam turbines owned or leased by you, or operated under your control. But if loss or damage by fire or combustion explosion results, we will pay for that resulting loss or damage.

We will also pay for loss or damage caused by or resulting from the explosion of gases or fuel within the furnace of any fired vessel or within the flues or passages through which the gases of combustion pass.

f. Frozen Plumbing: Water that leaks or flows from plumbing, heating, air conditioning or other equipment (except fire protective systems) caused by or resulting from freezing, unless:

- (1) You do your best to maintain heat in the building or structure; or
- (2) You drain the equipment and shut off the water supply if the heat is not maintained.

g. Dishonesty: Dishonest or criminal act by you, any of your partners, employees, directors, trustees, authorized representatives or anyone to whom you entrust the property for any purpose:

- (1) Acting alone or in collusion with others; or
- (2) Whether or not occurring during the hours of employment.

This exclusion does not apply to acts of destruction by your employees; but theft by employees is not covered.

h. False Pretense: Voluntary parting with any property by you or anyone else to whom you have entrusted the property if induced to do so by any fraudulent scheme, trick, device or false pretense.

i. Exposed Property: Rain, snow, ice or sleet to personal property in the open.

j. Collapse: Collapse, except as provided in the Additional Coverage for Collapse. But if loss or damage by a Covered Cause of Loss results at the described premises, we will pay for that resulting loss or damage.

k. Pollution: We will not pay for loss or damage caused by or resulting from the release, discharge or dispersal of "pollutants" unless the release, discharge or dispersal is itself caused by any of the "specified causes of loss". But if loss or dam-

age by the "specified causes of loss" results, we will pay for the resulting damage caused by the "specified cause of loss."

3. We will not pay for loss or damage caused by or resulting from any of the following. But if loss or damage by a Covered Cause of Loss results, we will pay for that resulting loss or damage.

a. Weather Conditions: Weather conditions. But this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in paragraph 1. above to produce the loss or damage.

b. Acts or Decisions: Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

c. Negligent Work: Faulty, inadequate or defective:

- (1) Planning, zoning, development, surveying, siting;
- (2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
- (3) Materials used in repair, construction, renovation or remodeling; or
- (4) Maintenance;
of part or all of any property on or off the described premises.

4. Business Income and Extra Expense Exclusions. We will not pay for:

a. Any Extra Expense, or increase of Business Income loss, caused by or resulting from:

- (1) Delay in rebuilding, repairing or replacing the property or resuming "operations", due to interference at the location of the rebuilding, repair or replacement by strikers or other persons; or
- (2) Suspension, lapse or cancellation of any license, lease or contract. But if the suspension, lapse or cancellation is directly caused by the suspension of "operations", we will cover such loss that affects your Business Income during the "period of restoration".

b. Any other consequential loss.

C. LIMITS OF INSURANCE

1. The most we will pay for loss or damage in any one occurrence is the applicable Limit of Insurance shown in the Declarations.
2. The most we will pay for loss of or damage to outdoor signs attached to buildings is \$1,000 per sign in any one occurrence.
3. The limits applicable to the Coverage Extensions and the Fire Department Service Charge and Pollutant Clean Up and Removal Additional Coverages are in addition to the Limits of Insurance.
4. **Building Limit – Automatic Increase**
 - a. The Limit of Insurance for Buildings will automatically increase by the annual percentage shown in the Declarations.
 - b. The amount of increase will be:
 - (1) The Building limit that applied on the most recent of the policy inception date, the policy anniversary date, or any other policy change amending the Building limit, times
 - (2) The percentage of annual increase shown in the Declarations, expressed as a decimal (example: 8% is .08), times
 - (3) The number of days since the beginning of the current policy year or the effective date of the most recent policy change amending the Building limit, divided by 365.

Example:

If: The applicable Building limit is \$100,000.
The annual percentage increase is 8%.
The number of days since the beginning of the policy year (or last policy change) is 146.

The amount of increase is
 $\$100,000 \times .08 \times 146 \div 365 = \$3,200.$

5. Business Personal Property Limit – Seasonal Increase

- a. The Limit of Insurance for Business Personal Property will automatically increase by 25% to provide for seasonal variations.
- b. This increase will apply only if the Limit of Insurance shown for Business Personal Property in the Declarations is at least 100% of your average monthly values during the lesser of:

(1) The 12 months immediately preceding the date the loss or damage occurs; or

(2) The period of time you have been in business as of the date the loss or damage occurs.

D. DEDUCTIBLES

1. We will not pay for loss or damage in any one occurrence until the amount of loss or damage exceeds the Deductible shown in the Declarations. We will then pay the amount of loss or damage in excess of the Deductible up to the applicable Limit of Insurance.
2. Regardless of the amount of the Deductible, the most we will deduct from any loss or damage under all of the following Optional Coverages in any one occurrence is \$250:
 - a. Money and Securities;
 - b. Employee Dishonesty;
 - c. Exterior Grade Floor Glass; and
 - d. Outdoor Signs.

But this \$250 deductible will not increase the deductible shown in the Declarations. This deductible will be used to satisfy the requirements of the deductible in the Declarations.

3. No deductible applies to the following Additional Coverages:
 - a. Fire Department Service Charge;
 - b. Business Income; and
 - c. Extra Expense.

E. PROPERTY LOSS CONDITIONS

1. Abandonment

There can be no abandonment of any property to us.

2. Appraisal

If we and you disagree on the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection

be made by a judge of a court having jurisdiction. The appraisers will state separately the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

- a. Pay its chosen appraiser; and
- b. Bear the other expenses of the appraisal and umpire equally.

If we submit to an appraisal, we will still retain our right to deny the claim.

3. Duties In The Event Of Loss Or Damage

You must see that the following are done in the event of loss or damage to Covered Property:

- a. Notify the police if a law may have been broken.
- b. Give us prompt notice of the loss or damage. Include a description of the property involved.
- c. As soon as possible, give us a description of how, when and where the loss or damage occurred.
- d. Take all reasonable steps to protect the Covered Property from further damage by a Covered Cause of Loss. If feasible, set the damaged property aside and in the best possible order for examination. Also keep a record of your expenses for emergency and temporary repairs, for consideration in the settlement of the claim. This will not increase the limit of insurance.
- e. At our request, give us complete inventories of the damaged and undamaged property. Include quantities, costs, values and amount of loss claimed.
- f. Permit us to inspect the property and records proving the loss or damage.
- g. If requested, permit us to question you under oath at such times as may be reasonably required about any matter relating to this insurance of your claim, including your books and records. In such event, your answers must be signed.

h. Send us a signed, sworn statement of loss containing the information we request to settle the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.

- i. Cooperate with us in the investigation or settlement of the claim.
- j. Resume all or part of your "operations" as quickly as possible.

4. Legal Action Against Us

No one may bring a legal action against us under this insurance unless:

- a. There has been full compliance with all of the terms of this insurance; and
- b. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

5. Limitation – Electronic Media and Records

We will not pay for any loss of Business Income caused by direct physical loss of or damage to Electronic Media and Records after the longer of:

- a. 60 consecutive days from the date of direct physical loss or damage; or
- b. The period, beginning with the date of direct physical loss or damage, necessary to repair, rebuild or replace with reasonable speed and similar quality, other property at the described premises due to loss or damage caused by the same occurrence.

Electronic Media and Records are:

- (1) Electronic data processing, recording or storage media such as films, tapes, discs, drums or cells;
- (2) Data stored on such media; or
- (3) Programming records used for electronic data processing or electronically controlled equipment.

Example No. 1:

A Covered Cause of Loss damages a computer on June 1. It takes until September 1 to replace the computer, and until October 1 to restore the data that was lost when the damage occurred. We will only pay for the Business

Income loss sustained during the period June 1 – September 1. Loss during the period September 2 – October 1 is not covered.

Example No. 2:

A Covered Cause of Loss results in the loss of data processing programming records on August 1. The records are replaced on October 15. We will only pay for the Business Income loss sustained during the period August 1 – September 29 (60 consecutive days). Loss during the period September 30 – October 15 is not covered.

6. Loss Payment

In the event of loss or damage covered by this policy:

- a. We will not pay you more than your financial interest in the Covered Property.
- b. We will either:
 - (1) Pay the value of lost or damaged property, as described in paragraph d. below;
 - (2) Pay the cost of repairing or replacing the lost or damaged property, plus any reduction in value of repaired items;
 - (3) Take all or any part of the property at an agreed or appraised value; or
 - (4) Repair, rebuild or replace the property with other property of like kind and quality.
- c. We will give notice of our intentions within 30 days after we receive the sworn statement of loss.
- d. We will determine the value of Covered Property as follows:
 - (1) At replacement cost (without deduction for depreciation), except as provided in (2) through (7) below.
 - (a) You may make a claim for loss or damage covered by this insurance on an actual cash value basis instead of on a replacement cost basis. In the event you elect to have loss or damage settled on an actual cash value basis, you may still make a claim on a replacement cost basis if you notify us of your intent to do so within 180 days after the loss or damage.

(b) We will not pay on a replacement cost basis for any loss or damage:

(i) Until the lost or damaged property is actually repaired or replaced; and

(ii) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.

(c) We will not pay more for loss or damage on a replacement cost basis than the least of:

(i) The cost to replace, on the same premises, the lost or damaged property with other property:

i. Of comparable material and quality; and

ii. Used for the same purpose; or

(ii) The amount you actually spend that is necessary to repair or replace the lost or damaged property.

(2) If the "Actual Cash Value – Buildings" option applies, as shown in the Declarations, paragraph (1) above does not apply to Buildings. Instead, we will determine the value of Buildings at actual cash value.

(3) The following property at actual cash value:

(a) Used or second-hand merchandise held in storage or for sale;

(b) Property of others;

(c) Household contents, except personal property in apartments or rooms furnished by you as landlord;

(d) Manuscripts;

(e) Works of art, antiques or rare articles, including etchings, pictures, statuary, marbles, bronzes, porcelain and bric-a-brac.

- (4) Glass at the cost of replacement with safety glazing material if required by law.
- (5) Tenants' Improvements and Betterments at:
- (a) Replacement cost if you make repairs promptly.
 - (b) A proportion of your original cost if you do not make repairs promptly. We will determine the proportionate value as follows:
 - (i) Multiply the original cost by the number of days from the loss or damage to the expiration of the lease; and
 - (ii) Divide the amount determined in (i) above by the number of days from the installation of improvements to the expiration of the lease.
- If your lease contains a renewal option, the expiration of the renewal option period will replace the expiration of the lease in this procedure.
- (c) Nothing if others pay for repairs or replacement.
- (6) Valuable Papers and Records, including those which exist on electronic or magnetic media (other than prepackaged software programs), at the cost of:
- (a) Blank materials for reproducing the records; and
 - (b) Labor to transcribe or copy the records.
- (7) Applicable only to the Optional Coverages:
- (a) Money at its face value; and
 - (b) Securities at their value at the close of business on the day the loss is discovered.
- e. Our payment for loss of or damage to personal property of others will only be for the account of the owners of the property. We may adjust losses with the owners of lost or damaged property if other than you.

If we pay the owners, such payments will satisfy your claims against us for the owners' property. We will not pay the owners more than their financial interest in the Covered Property.

- f. We may elect to defend you against suits arising from claims of owners of property. We will do this at our expense.
- g. We will pay for covered loss or damage within 30 days after we receive the sworn statement of loss, if:
 - (1) You have complied with all of the terms of this policy; and
 - (2) (a) We have reached agreement with you on the amount of loss; or
 - (b) An appraisal award has been made.

7. Recovered Property

If either you or we recover any property after loss settlement, that party must give the other prompt notice. At your option, you may retain the property. But then you must return to us the amount we paid to you for the property. We will pay recovery expenses and the expenses to repair the recovered property, subject to the Limit of Insurance.

8. Resumption of Operations

We will reduce the amount of your:

- a. Business Income loss, other than Extra Expense, to the extent you can resume your "operations", in whole or in part, by using damaged or undamaged property (including merchandise or stock) at the described premises or elsewhere.
- b. Extra Expense loss to the extent you can return "operations" to normal and discontinue such Extra Expense.

9. Vacancy

If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage, we will:

- a. Not pay for any loss or damage caused by:
 - (1) Vandalism;

(2) Sprinkler leakage, unless you have protected the system against freezing;

(3) Building glass breakage;

(4) Water damage;

(5) Theft; or

(6) Attempted Theft.

b. Reduce the amount we would otherwise pay for the loss or damage by 15%.

Buildings under construction are not considered vacant.

F. PROPERTY GENERAL CONDITIONS

1. Control of Property

Any act or neglect of any person other than you beyond your direction or control will not affect this insurance.

If you violate a condition of this policy, we will not pay for loss or damage at the involved location. But your coverage will continue for other locations at which the violation does not apply.

2. Mortgage Holders

a. The term "mortgage holder" includes trustee.

b. We will pay for covered loss of or damage to buildings or structures to each mortgage holder shown in the Declarations in their order of precedence, as interests may appear.

c. The mortgage holder has the right to receive loss payment even if the mortgage holder has started foreclosure or similar action on the building or structure.

d. If we deny your claim because of your acts or because you have failed to comply with the terms of this policy, the mortgage holder will still have the right to receive loss payment if the mortgage holder:

(1) Pays any premium due under this policy at our request if you have failed to do so;

(2) Submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so; and

(3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the mortgage holder.

All of the terms of this policy will then apply directly to the mortgage holder.

e. If we pay the mortgage holder for any loss or damage and deny payment to you because of your acts or because you have failed to comply with the terms of this policy:

(1) The mortgage holder's rights under the mortgage will be transferred to us to the extent of the amount we pay; and

(2) The mortgage holder's right to recover the full amount of the mortgage holder's claim will not be impaired.

At our option, we may pay to the mortgage holder the whole principal on the mortgage plus any accrued interest. In this event, your mortgage and note will be transferred to us and you will pay your remaining mortgage debt to us.

f. If we cancel this policy, we will give written notice to the mortgage holder at least:

(1) 10 days before the effective date of cancellation if we cancel for your non-payment of premium; or

(2) 30 days before the effective date of cancellation if we cancel for any other reason.

g. If we do not renew this policy, we will give written notice to the mortgage holder at least 10 days before the expiration date of this policy.

3. No Benefit to Bailee

No person or organization, other than you, having custody of Covered Property will benefit from this insurance.

4. Policy Period, Coverage Territory

Under this form:

a. We cover loss or damage commencing:

(1) During the policy period shown in the Declarations; and

- (2) Within the coverage territory or, with respect to property in transit, while it is between points in the coverage territory.

b. The coverage territory is:

- (1) The United States of America (including its territories and possessions);
- (2) Puerto Rico; and
- (3) Canada.

G. OPTIONAL COVERAGES

If shown as applicable in the Declarations, the following Optional Coverages also apply. These coverages are subject to the terms and conditions applicable to property coverage in this policy, except as provided below.

1. Outdoor Signs

- a. We will pay for direct physical loss of or damage to all outdoor signs at the described premises:
 - (1) Owned by you; or
 - (2) Owned by others but in your care, custody or control.
- b. Paragraph A.3., Covered Causes of Loss, and Section B., Exclusions, do not apply to this Optional Coverage, except for:
 - (1) Paragraph B.1.c., Governmental Action;
 - (2) Paragraph B.1.d., Nuclear Hazard; and
 - (3) Paragraph B.1.f., War and Military Action.
- c. We will not pay for loss or damage caused by or resulting from:
 - (1) Wear and tear;
 - (2) Hidden or latent defect;
 - (3) Rust;
 - (4) Corrosion; or
 - (5) Mechanical breakdown.
- d. The most we will pay for loss or damage in any one occurrence is the Limit of Insurance for Outdoor Signs shown in the Declarations.
- e. The provisions of this Optional Coverage supersede all other references to outdoor signs in this policy.

2. Exterior Grade Floor Glass

- a. We will pay for direct physical loss of or damage to all exterior grade floor and basement glass, including all lettering and ornamentation, located at the described premises and:
 - (1) Owned by you; or
 - (2) Owned by others but in your care, custody or control.
 - b. We will also pay for necessary:
 - (1) Expenses incurred to put up temporary plates or board up openings;
 - (2) Repair or replacement of encasing frames; and
 - (3) Expenses incurred to remove or replace obstructions.
 - c. Paragraph A.3., Covered Causes of Loss, and Section B., Exclusions, do not apply to this Optional Coverage, except for:
 - (1) Paragraph B.1.c., Governmental Action;
 - (2) Paragraph B.1.d., Nuclear Hazard; and
 - (3) Paragraph B.1.f., War and Military Action.
 - d. We will not pay for loss or damage caused by or resulting from:
 - (1) Wear and tear;
 - (2) Hidden or latent defect;
 - (3) Corrosion; or
 - (4) Rust.
 - e. This Optional Coverage supersedes all limitations in this policy that apply to exterior grade floor glass.
- ### 3. Money and Securities
- a. We will pay for loss of money and securities used in your business while at a bank or savings institution, within your living quarters or the living quarters of your partners or any employee having use and custody of the property, at the described premises, or in transit between any of these places, resulting directly from:
 - (1) Theft, meaning any act of stealing;

- (2) Disappearance; or
 (3) Destruction.
- b. In addition to the Limitations and Exclusions applicable to property coverage, we will not pay for loss:
- (1) Resulting from accounting or arithmetical errors or omissions;
 (2) Due to the giving or surrendering of property in any exchange or purchase; or
 (3) Of property contained in any money-operated device unless the amount of money deposited in it is recorded by a continuous recording instrument in the device.
- c. The most we will pay for loss in any one occurrence is:
- (1) The limit shown in the Declarations for Inside the Premises for money and securities while:
- (a) In or on the described premises; or
 (b) Within a bank or savings institution and
 (2) The limit shown in the Declarations for Outside the Premises for money and securities while anywhere else.
- d. All loss:
- (1) Caused by one or more persons; or
 (2) Involving a single act or series of related acts;
 is considered one occurrence.
- e. You must keep records of all money and securities so we can verify the amount of any loss or damage.
- 4. Employee Dishonesty**
- a. We will pay for direct loss of or damage to Business Personal Property, including money and securities, resulting from dishonest acts committed by any of your employees acting alone or in collusion with other persons (except you or your partner) with the manifest intent to:
- (1) Cause you to sustain loss or damage; and also
- (2) Obtain financial benefit (other than salaries, commissions, fees, bonuses, promotions, awards, profit sharing, pensions or other employee benefits earned in the normal course of employment) for:
- (a) Any employee; or
 (b) Any other person or organization.
- b. We will not pay for loss or damage:
- (1) Resulting from any dishonest or criminal act that you or any of your partners commit whether acting alone or in collusion with other persons.
 (2) The only proof of which as to its existence or amount is:
- (a) An inventory computation; or
 (b) A profit and loss computation.
- c. The most we will pay for loss or damage in any one occurrence is the Limit of Insurance for Employee Dishonesty shown in the Declarations.
- d. All loss or damage:
- (1) Caused by one or more persons; or
 (2) Involving a single act or series of related acts;
 is considered one occurrence.
- e. We will pay only for loss or damage you sustain through acts committed or events occurring during the Policy Period. Regardless of the number of years this policy remains in force or the number of premiums paid, no Limit of Insurance cumulates from year to year or period to period.
- f. This Optional Coverage does not apply to any employee immediately upon discovery by:
- (1) You; or
 (2) Any of your partners, officers or directors not in collusion with the employee;
 of any dishonest act committed by that employee before or after being hired by you.

g. We will pay only for covered loss or damage discovered no later than one year from the end of the Policy Period.

h. If you (or any predecessor in interest) sustained loss or damage during the period of any prior insurance that you could have recovered under that insurance except that the time within which to discover loss or damage had expired, we will pay for it under this Optional Coverage, provided:

- (1) This Optional Coverage became effective at the time of cancellation or termination of the prior insurance; and
- (2) The loss or damage would have been covered by this Optional Coverage had it been in effect when the acts or events causing the loss or damage were committed or occurred.

i. The insurance under paragraph h. above is part of, not in addition to, the Limit of Insurance applying to this Optional Coverage and is limited to the lesser of the amount recoverable under:

- (1) This Optional Coverage as of its effective date; or
- (2) The prior insurance had it remained in effect.

5. Mechanical Breakdown

a. We will pay for direct damage to Covered Property caused by an Accident to an Object. The Object must be:

- (1) Owned by you or in your care, custody or control; and
- (2) At the described premises.

b. Accident means a sudden and accidental breakdown of the Object or a part of the Object. At the time the breakdown occurs, it must manifest itself by physical damage to the Object that necessitates repair or replacement.

c. None of the following is an Accident:

- (1) Depletion, deterioration, corrosion or erosion;
- (2) Wear and tear;
- (3) Leakage at any valve, fitting, shaft seal, gland packing, joint or connection;
- (4) Breakdown of any vacuum tube, gas tube or brush;
- (5) Breakdown of any electronic computer or electronic data processing equipment;
- (6) Breakdown of any structure or foundation supporting the Object or any of its parts;
- (7) The functioning of any safety or protective device; or
- (8) The explosion of gases or fuel within the furnace of any Object or within the flues or passages through which the gases of combustion pass.

d. Object means any of the following equipment:

- (1) Boiler and Pressure Vessels:
 - (a) Steam heating boilers and condensate return tanks used with them;
 - (b) Hot water heating boilers and expansion tanks used with them;
 - (c) Hot water supply boilers;
 - (d) Other fired or unfired vessels used for maintenance or service of the discarded premises but not used for processing or manufacturing;
 - (e) Steam boiler piping, valves, fittings, traps and separators, but only if they:
 - (i) Are on your premises or between parts of your premises;

- (ii) Contain steam or condensate of steam; and
 - (iii) Are not part of any other vessel or apparatus;
 - (f) Feed water piping between any steam boiler and a feed pump or injector.
- (2) Air Conditioning Units – Any air conditioning unit that has a capacity of 60,000 Btu or more, including:
- (a) Inductors, converters and coils that make use of a refrigerant and form part of a cooling, humidity control or space heating system;
 - (b) Interconnecting piping, valves and fittings containing only a refrigerant, water, brine or other solution;
 - (c) Vessels heated directly or indirectly that:
 - (i) Form part of an absorption type system; and
 - (ii) Function as a generator, refrigerator or concentrator;
 - (d) Compressors, pumps, fans and blowers used solely with the system together with their driving electric motors; and
 - (e) Control equipment used solely with the system.
- e. Object does not mean:
- (1) As Boiler and Pressure Vessels:
- (a) Equipment that is not under internal vacuum or internal pressure other than weight of contents;
 - (b) Boiler settings;
 - (c) Insulating or refractory material; or
 - (d) Electrical, reciprocating or rotating apparatus within or forming a part of the boiler or vessel.

(2) As Air Conditioning Units, any:

- (a) Vessel, cooling tower, reservoir or other source of cooling water for a condenser or compressor, or any water piping leading to or from that source; or
 - (b) Wiring or piping leading to or from the unit.
- f. We will not pay for an Accident to any Object while being tested.

g. **Suspension**

Whenever an Object is found to be in, or exposed to, a dangerous condition, any of our representatives may immediately suspend the insurance against loss from an Accident to that Object. This can be done by delivering or mailing a written notice of suspension to:

- (1) Your last known address; or
- (2) The address where the Object is located.

If we suspend your insurance, you will get a pro rata refund of premium. But the suspension will be effective even if we have not yet made or offered a refund.

H. PROPERTY DEFINITIONS

1. **"Operations"** means your business activities occurring at the described premises.
2. **"Period of Restoration"** means the period of time that:

- a. Begins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and
- b. Ends on the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality.

"Period of restoration" does not include any increased period required due to the enforcement of any law that:

- (1) Regulates the construction, use or repair, or requires the tearing down of any property; or

-
- (2) Regulates the prevention, control, repair, clean-up or restoration of environmental damage.

The expiration date of this policy will not cut short the "period of restoration".

3. **"Pollutants"** means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
4. **"Specified Causes of Loss"** means the following:

Fire; lightning; explosion, windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.

- a. Sinkhole collapse means the sudden sinking or collapse of land into underground empty spaces created by the action of water on limestone or similar rock formations. It does not include the cost of filling sinkholes.
- b. Falling objects does not include loss of or damage to:
- (1) Personal property in the open; or
- (2) The interior of a building or structure, or property inside a building or structure, unless the roof or an outside wall of the building or structure is first damaged by a falling object.
- c. Water damage means accidental discharge or leakage of water or steam as the direct result of the breaking or cracking of any part of a system or appliance containing water or steam.

SAMPLE

EXHIBIT 3

Insurers knew the damage a viral pandemic could wreak on businesses. So they excluded coverage.

Some industry watchers predict 'a tidal wave of litigation' over whether policies should cover losses due to coronavirus closures

By Todd C. Frankel

April 2, 2020



The forced closure of businesses nationwide because of the novel coronavirus would seem to be the perfect scenario for filing a “business interruption” insurance claim.

But most companies will probably find it difficult to get an insurance payout because of policy changes made after the 2002-2003 SARS outbreak, according to insurance experts and regulators.

SARS, which infected 8,000 people mostly in Asia and is now seen as foreshadowing the current pandemic, led to millions of dollars in business-interruption insurance claims. Among the claims was a \$16 million payout to one hotel chain, Mandarin Oriental International.

As a result, many insurers added exclusions to standard commercial policies for losses caused by viruses or bacteria. Now, the added policy language will potentially allow insurance companies to avoid hundreds of billions of dollars in business-interruption claims because of the covid-19 pandemic.

“Insurers realized they would not be able to cover such a broad-scale event,” said Robert Gordon, a senior vice president at the American Property Casualty Insurance Association.

Other types of insurance policies may still have to pay out. Personal travel and event cancellation policies are expected to face huge claims from the coronavirus pandemic, according to industry reports. But few successful claims are expected to come from traditional business insurance lines because of the exclusion of virus-related damages.

The insurance industry said that its policies are tightly regulated by state authorities and that the exclusions were necessary given the overwhelming number of claims that can come from a single disease outbreak.

“This is a scale that only the federal government can bridge,” said David Sampson, president of the insurance trade group.

A global pandemic presents unique problems for insurers because, Sampson said, “by its very definition, you can’t diversify the risk.”

But property and casualty insurance companies are facing growing pressure to tap the industry’s \$822 billion in cash reserves.

Lawmakers in New Jersey, Massachusetts and Ohio are considering forcing retroactive policy changes to cover coronavirus business-interruption claims. Insurers said they object to this move because the additional cost of such claims were not included in policy premiums.

Attorneys said they expect disputes over the precise wording of business insurance policies to generate court fights — similar to the battles with insurers after Hurricane Katrina in 2005, when homeowners and insurance companies fought over whether damages were caused by flooding or wind.

Making the current insurance situation even more complicated are the many different kinds of business insurance policies, some with boilerplate language and others filled with personalized exclusions and endorsements.

“We’re going to see a tidal wave of litigation over the business interruption,” said Ross Angus Williams, an attorney with the Bell Nunnally & Martin firm in Dallas. “It’s really a Wild West situation for a lot of businesses as to whether they’ll have coverage.”

About one-third of U.S. businesses have “business interruption” insurance, which is intended to cover losses from an event that forces companies to suspend or stop operations. Many policies also have “civil authority” clauses that cover losses when a governmental agency stops a business from operating. A common example would be a fire that damages a restaurant and leads the fire marshal to close it down.

But most insurance policies require a physical loss to trigger coverage. A fire. A tornado.

“You can expect to hear, does contamination from a virus cause physical damage?” said Stephen Avila, professor of insurance at Ball State University.

That’s the argument being made by Oceana Grill, a restaurant in New Orleans’s French Quarter that, like every other restaurant in the city, has been ordered to stop offering sit-down service by an emergency declaration from the mayor.

Oceana Grill filed a lawsuit in a local court last month claiming the insurer should be required to pay a business-interruption claim because coronavirus had caused property damage by contaminating surfaces. An attorney for the restaurant did not respond to a request for comment.

A Native American tribe in Oklahoma, the Chickasaw Nation, also has sued insurers claiming that its losses from shuttering its casinos should be covered by its business-interruption insurance.

A well-known restaurant in California’s Napa Valley, the French Laundry, also filed a lawsuit recently making similar claims.

State insurance commissioners are looking into the potential limitations of business insurance coverage for coronavirus-related claims — with differing viewpoints.

“We understand the desire to have coverage in this space,” said North Dakota Insurance Commissioner Jon Godfread, “but many existing policies have specific exclusions to ‘viral pandemics,’ and business disruption coverage is generally triggered by actual physical damage. At this point, a pandemic is not considered physical damage.”

“This is really a contract issue and will ultimately be settled in the courts,” said Mississippi’s insurance commissioner, Mike Chaney.

Christina Haas, a spokeswoman for Delaware’s insurance office, recommended that business owners discuss their policies with insurers.

Avila, the Ball State professor, said the insurance disputes caused by coronavirus shows the need for a government-supported solution, such as a national pandemic insurance program, similar to the National Flood Insurance Program.

Pandemic business insurance — complete with virus coverage — is offered by the broker Marsh.

Interest in its PathogenRx insurance product has exploded in recent weeks — “it’s exponential,” said Chad Wright, the company’s head of risk analytics and alternative risk transfer.

The company began thinking about the problem several years ago and modeled the risks of different diseases. It launched its outbreak insurance in 2018.

A few companies in the hospitality and gaming industries showed interest.

But not a single policy was sold.

With reporting from Michael Majchrowicz in Fort Lauderdale, Kate Harrison Belz in Chattanooga and Sheila Eldred in Minneapolis.

EXHIBIT 4



Circular

FORMS - FILED

JULY 6, 2006

FROM: LARRY PODOSHEN, SENIOR ANALYST

COMMERCIAL PROPERTY

LI-CF-2006-175

NEW ENDORSEMENTS FILED TO ADDRESS EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This circular announces the submission of forms filings to address exclusion of loss due to disease-causing agents such as viruses and bacteria.

BACKGROUND

Commercial Property policies currently contain a pollution exclusion that encompasses contamination (in fact, uses the term *contaminant* in addition to other terminology). Although the pollution exclusion addresses contamination broadly, viral and bacterial contamination are specific types that appear to warrant particular attention at this point in time.

ISO ACTION

We have submitted forms filing CF-2006-OVBEF in all ISO jurisdictions and recommended the filing to the independent bureaus in other jurisdictions. This filing introduces new endorsement CP 01 40 07 06 - Exclusion Of Loss Due To Virus Or Bacteria, which states that there is **no coverage 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.**

Note: In Alaska, District of Columbia, Louisiana*, New York and Puerto Rico, we have submitted a different version of this filing, containing new endorsement CP 01 75 07 06 in place of CP 01 40. The difference relates to lack of implementation of the mold exclusion that was implemented in other jurisdictions under a previous multistate filing.

Both versions of CF-2006-OVBEF are attached to this circular.

* In Louisiana, the filing was submitted as a recommendation to the Property Insurance Association of Louisiana (PIAL), the independent bureau with jurisdiction for submission of property filings.

PROPOSED EFFECTIVE DATE

Filing CF-2006-OVBEF was submitted with a proposed effective date of January 1, 2007, in accordance with the applicable effective date rule of application in each state, with the exception of various states for which the insurer establishes its own effective date.

Upon approval, we will announce the actual effective date and state-specific rule of effective date application for each state.

RATING SOFTWARE IMPACT

New attributes being introduced with this revision:

- A new form is being introduced.
-

CAUTION

This filing has not yet been approved. If you print your own forms, do not go beyond the proof stage until we announce approval in a subsequent circular.

RELATED RULES REVISION

We are announcing in a separate circular the filing of a corresponding rules revision. Please refer to the **Reference(s)** block for identification of that circular.

REFERENCE(S)

LI-CF-2006-176 (7/6/06) - New Additional Rule Filed To Address Exclusion Of Loss Due To Virus Or Bacteria

ATTACHMENT(S)

- Multistate Forms Filing CF-2006-OVBEP
- State-specific version of Forms Filing CF-2006-OVBEP (Alaska, District of Columbia, Louisiana, New York, Puerto Rico)

We are sending these attachments only to recipients who asked to be put on the mailing list for attachments. If you need the attachments for this circular, contact your company's circular coordinator.

PERSON(S) TO CONTACT

If you have any questions concerning:

- the content of this circular, please contact:

Larry Podoshen
Senior Analyst
Commercial Property
(201) 469-2597 Fax: (201) 748-1637
comfal@iso.com
lpodoshen@iso.com

or

Loretta Newman, CPCU
Manager
Commercial Property
(201) 469-2582 Fax: (201) 748-1873
comfal@iso.com
lnewman@iso.com

- the mailing or distribution of this circular, please contact our Customer Service Division:

E-mail: info@iso.com
Fax: 201-748-1472
Phone: 800-888-4476
World Wide Web: <http://www.iso.com>
Write: See address on page 1

- products or services, please call or e-mail ISO Customer Service, or call your ISO representative.

Callers outside the United States may contact us using our global toll-free number (International Access Code + 800 48977489) or by e-mail at info.global@iso.com. For information on all ISO products, visit us at <http://www.iso.com>.



IMPORTANT NOTICE FOR USERS OF ISO PRODUCTS AND SERVICES

Please make sure that your company has authorized your use of this product and has complied with the requirements applicable in the jurisdiction where you plan to use it.

We distribute both state-specific and multi-state products and services. We do not distribute all the multi-state products and services for use in every jurisdiction due to corporate policy, regulatory preference, or variations or lack of clarity in state laws.

We provide participating insurers with information concerning the jurisdictions for which our products and services are distributed. Even in those jurisdictions, each insurer must determine what filing requirements, if any, apply and whether those requirements have been satisfied.

Now, as in the past, all of our products and services are advisory, and are made available for optional use by participating insurers as a matter of individual choice. Your company must decide for itself which, if any, ISO products or services are needed or useful to its operation and how those selected for use should be applied. We urge that you be guided by the advice of your attorneys on the legal requirements.

Copyright Explanation

The material distributed by Insurance Services Office, Inc. is copyrighted. All rights reserved. Possession of these pages does not confer the right to print, reprint, publish, copy, sell, file, or use same in any manner without the written permission of the copyright owner. Permission is hereby granted to members, subscribers, and service purchasers to reprint, copy, or otherwise use the enclosed material for purposes of their own business use relating to that territory or line or kind of insurance, or subdivision thereof, for which they participate, provided that:

- A. where ISO copyrighted material is reprinted, copied, or otherwise used **as a whole**, it must reflect the copyright notice actually shown on such material.
- B. where ISO copyrighted material is reprinted, copied, or otherwise used **in part**, the following credit legend must appear at the bottom of each page so used:

Includes copyrighted material of Insurance Services Office, Inc., with its permission.

Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

About This Filing

This filing addresses exclusion of loss due to disease-causing agents such as viruses and bacteria.

New Form

We are introducing:

- ◆ Endorsement CP 01 40 07 06 - Exclusion Of Loss Due To Virus Or Bacteria

Related Filing(s)

Rules Filing CF-2006- OVBEB

Introduction

The current pollution exclusion in property policies encompasses contamination (in fact, uses the term *contaminant* in addition to other terminology). Although the pollution exclusion addresses contamination broadly, viral and bacterial contamination are specific types that appear to warrant particular attention at this point in time.

An example of bacterial contamination of a product is the growth of listeria bacteria in milk. In this example, bacteria develop and multiply due in part to inherent qualities in the property itself. Some other examples of viral and bacterial contaminants are rotavirus, SARS, influenza (such as avian flu), legionella and anthrax. The universe of disease-causing organisms is always in evolution.

Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses.

Current Concerns

Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case. In addition, pollution exclusions are at times narrowly applied by certain courts. In recent years, ISO has filed exclusions to address specific exposures relating to contaminating or harmful substances. Examples are the mold exclusion in property and liability policies and the liability exclusion addressing silica dust. Such exclusions enable elaboration of the specific exposure and thereby can reduce the likelihood of claim disputes and litigation.

While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.

In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.

Features Of New Amendatory Endorsement

The amendatory endorsement presented in this filing states that there is **no coverage 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.** The exclusion (which is set forth in Paragraph B of the endorsement) applies to property damage, time element and all other coverages; introductory Paragraph A prominently makes that point. Paragraphs C and D serve to avoid overlap with other exclusions, and Paragraph E emphasizes that other policy exclusions may still apply.

Copyright Explanation

The material distributed by Insurance Services Office, Inc. is copyrighted. All rights reserved. Possession of these pages does not confer the right to print, reprint, publish, copy, sell, file or use same in any manner without the written permission of the copyright owner.

Important Note

Insurance Services Office, Inc. (ISO) makes available advisory services to property/casualty insurers. ISO has no adherence requirements. ISO policy forms and explanatory materials are intended solely for the information and use of ISO's participating insurers and their representatives, and insurance regulators. Neither ISO's general explanations of policy intent nor opinions expressed by ISO's staff necessarily reflect every insurer's view or control any insurer's determination of coverage for a specific claim. ISO does not intercede in coverage disputes arising from insurance policies. If there is any conflict between a form and any other part of the attached material, the provisions of the form apply.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART STANDARD PROPERTY POLICY

- A.** The exclusion set forth in Paragraph **B.** applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
- B.** We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.
- However, this exclusion does not apply to loss or damage caused by or resulting from "fungus", wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.
- C.** With respect to any loss or damage subject to the exclusion in Paragraph **B.**, such exclusion supersedes any exclusion relating to "pollutants".
- D.** The following provisions in this Coverage Part or Policy are hereby amended to remove reference to bacteria:
1. Exclusion of "Fungus", Wet Rot, Dry Rot And Bacteria; and
 2. Additional Coverage - Limited Coverage for "Fungus", Wet Rot, Dry Rot And Bacteria, including any endorsement increasing the scope or amount of coverage.
- E.** The terms of the exclusion in Paragraph **B.**, or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.

N

E

W

Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

About This Filing

This filing addresses exclusion of loss due to disease-causing agents such as viruses and bacteria.

New Form

We are introducing:

- ◆ Endorsement CP 01 75 07 06 - Exclusion Of Loss Due To Virus Or Bacteria

Related Filing(s)

Rules Filing CF-2006-OVBER

Introduction

The current pollution exclusion in property policies encompasses contamination (in fact, uses the term *contaminant* in addition to other terminology). Although the pollution exclusion addresses contamination broadly, viral and bacterial contamination are specific types that appear to warrant particular attention at this point in time.

An example of bacterial contamination of a product is the growth of listeria bacteria in milk. In this example, bacteria develop and multiply due in part to inherent qualities in the property itself. Some other examples of viral and bacterial contaminants are rotavirus, SARS, influenza (such as avian flu), legionella and anthrax. The universe of disease-causing organisms is always in evolution.

Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement

of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses.

Current Concerns

Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case. In addition, pollution exclusions are at times narrowly applied by certain courts. In recent years, ISO has filed exclusions to address specific exposures relating to contaminating or harmful substances. Examples are the mold exclusion in property and liability policies and the liability exclusion addressing silica dust. Such exclusions enable elaboration of the specific exposure and thereby can reduce the likelihood of claim disputes and litigation.

While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.

In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.

Features Of New Amendatory Endorsement

The amendatory endorsement presented in this filing states that there is **no coverage 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.** The exclusion (which is set forth in Paragraph B of the endorsement) applies to property damage, time element and all other coverages; introductory Paragraph A prominently makes that point. Paragraph C serves to avoid overlap with another exclusion, and Paragraph D emphasizes that other policy exclusions may still apply.

Copyright Explanation

The material distributed by Insurance Services Office, Inc. is copyrighted. All rights reserved. Possession of these pages does not confer the right to print, reprint, publish, copy, sell, file or use same in any manner without the written permission of the copyright owner.

Important Note

Insurance Services Office, Inc. (ISO) makes available advisory services to property/casualty insurers. ISO has no adherence requirements. ISO policy forms and explanatory materials are intended solely for the information and use of ISO's participating insurers and their representatives, and insurance regulators. Neither ISO's general explanations of policy intent nor opinions expressed by ISO's staff necessarily reflect every insurer's view or control any insurer's determination of coverage for a specific claim. ISO does not intercede in coverage disputes arising from insurance policies. If there is any conflict between a form and any other part of the attached material, the provisions of the form apply.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

- A.** The exclusion set forth in Paragraph **B.** applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
- B.** 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.
- However, this exclusion does not apply to loss or damage caused by or resulting from fungus. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.
- C.** With respect to any loss or damage subject to the exclusion in Paragraph **B.**, such exclusion supercedes any exclusion relating to "pollutants".
- D.** The terms of the exclusion in Paragraph **B.**, or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.

N

E

W

EXHIBIT 5



View this article online: <https://www.insurancejournal.com/news/international/2020/03/04/560126.htm>

Insurance Unlikely to Cushion Coronavirus Losses – But There Are Exceptions

Don't look for much relief from insurers to cushion losses from canceled events, travel disruptions and potential medical claims from the deadly Covid-19 virus that's sweeping across the globe.

The world's largest insurers have learned lessons from previous health crises, including the 2003 SARS outbreak. Over the years, they've tightened up their policies, inserting communicable-disease exclusions to prevent potential losses. That means consumers and companies will bear the brunt of the cost for disruptions related to the virus — which has infected 90,000 people and left more than 3,000 people dead.

“While there is a significant risk of disruption, coronavirus-related claims will be low,” analysts at Moody's Investors Service wrote in a note on Monday. “Business interruption claims will be limited as these policies commonly exclude outbreaks of infectious disease, and pay out only if physical damage occurs.”

Claims from the SARS outbreak ended up spurring some property-casualty insurers to revisit policy language, particularly with “loss of attraction” clauses, according to Gigi Norris, co-leader of Aon Plc's infectious disease task force.

“SARS comes along and the insurers ended up paying some large losses,” Norris said. “Since then, there's been a pullback from insurers for providing this kind of coverage.”

Below are some of the areas where insurers stand to be affected by the virus.

Health Insurance

While most of the industry nervously leafs through policies and counts its exposure, firms offering health insurance policies may get more business.

Companies such as Prudential Plc stand to benefit from the virus's spread as more people seek cover. That was certainly the case back in 2003, when Asia represented a far smaller part of its business.

“Prudential generates almost half its operating profit in Asia and health and protection products are a significant part of its offering,” Kevin Ryan, an analyst at Bloomberg Intelligence, wrote in a note. In the first nine months of 2003, when SARS struck, “Prudential reported a 17% rise in new business sales in local currency.”

Health insurers in China are also expected to get a helping hand from the government.

“We expect coronavirus-related critical illness claims to be limited because the Chinese government has undertaken to cover the cost of care and treatment for those affected,” Moody's said in a note on Monday.

Events Insurance

Events are particularly susceptible to an epidemic, and a number of large corporate fairs and conferences have been scrapped or postponed.

“Event cancellation is one area of insurance that may have losses,” analysts at [Fitch Ratings said in a note on Monday](#). “The largest event taking place is the Tokyo Olympics in July 2020. Industry experts anticipate coverage of approximately \$2 billion for this event.”

Informa Plc, which derived more than half of its 2018 revenues from events, has postponed several March and April exhibitions as a result of the virus. The London-based firm has fallen almost 23% so far in 2020, greater than the drop in the benchmark FTSE 100 index.

Mipim, the world's largest property fair, was postponed to later in the year, while the Mobile World Conference in Barcelona was canceled.

"With other companies, like logistics companies if shipments don't come through in the next few weeks, there will probably be some catch-up effect later down the line," said Michael Field, an analyst at Morningstar Inc. "With conferences and sporting events, generally, you've got tight windows and, if you miss them, that could be the end of it for a year or two."

Travel Insurance

The cost to insurers from payouts on travel insurance is likely to be minimal. Many travel policies exclude losses caused by epidemics, so unless consumers took out additional disruption cover they won't be able to claim for canceling travel plans, according to a statement on Allianz SE's travel insurance website.

Some insurers, including Allianz and AXA SA, have temporarily waived that condition for certain claims related to coronavirus.

Credit Insurance

A slowing economy and lagging consumer spending could lead to higher claims for credit insurance, and the longer the outbreak continues, the bigger the impact could be for firms like Coface SA and Allianz's Euler Hermes.

Allianz, Europe's largest insurer, says the biggest potential risk would be from any bankruptcies in Europe spurred by the virus's spread. Credit insurance protects companies when firm they do business with fail.

"The issue that may affect us is if you have massive bankruptcies in small- and medium-size companies, because we have the world market leader in credit insurance," Chief Executive Officer Oliver Baete said in an interview with Bloomberg last week, referring to Euler Hermes, which it acquired in 2018.

While Allianz's credit insurance business isn't large in Asia, the firm has still been cutting such exposure in China for the past two months, he said.

Reinsurance

Reinsurers, firms that provide insurance for insurers, would need the death toll to rise into the hundreds of thousands before they took a big hit, but the effect of a full-scale pandemic would be sizable.

"It's one of the biggest potential risks they face on a par with a 1-in-200-year hurricane or quake," said Charles Graham, an analyst at Bloomberg Intelligence.

For instance, about 15% of SCOR SE's regulatory capital is at risk in the event of a pandemic, but only in an extreme event that would see more than 10 million people die from the virus, according to company filings.

Munich Re has exposure of more than 500 million euros (\$556 million) to contingency losses, should all events covered for pandemic be canceled, said Torsten Jeworrek, chief of the firm's reinsurance unit.

For now, Munich Re's "risk overall is pretty limited" because few clients include pandemic risks in their reinsurance coverage, Chief Financial Officer Christoph Jurecka said in an interview on Bloomberg Television on Friday. The risks are "easily digestible for us as we speak; if things go south substantially then the situation might change," he said.

Financial Markets

Last month, the S&P 500 Index dropped and U.S. Treasury yields fell amid fears about the coronavirus' impact. The [upheaval in financial markets](#) is likely to have a more material impact on the industry, according to Moody's analysts.

Insurers such as MetLife Inc. and American International Group Inc. control billions of dollars in investments, pooling the money it takes in from policyholders. These funds come under pressure during bouts of market volatility.

"Significant deterioration in equity markets and widening credit spreads, along with even lower interest rates, will weigh on insurers' profitability and capitalization," analysts at Moody's said in a report. "The expected economic slowdown will also have a negative impact on insurers' business volumes."

—With assistance from Dan Reichl.

Photograph: A Chinese worker checks the temperature of a customer as he wears a protective suit and mask at a supermarket in Beijing on Feb. 11, 2020. Photographer: Kevin Frayer/Getty Images.

Related:

- [Parametric Insurance Could Offer Hotels Relief from Coronavirus Cancellations](#)
- [Handshakes, Buffets Out. Otherwise It's Insurance Conferences-as-Usual Amid Coronavirus.](#)
- [Fitch Sees Only 'Modest Impact' on U.S. P/C Insurance from Coronavirus](#)
- [Re/Insurers to Feel Coronavirus Impact From Financial Market Volatility: Moody's](#)
- [Global Insurers Face Hefty Claims If Coronavirus Forces Olympics Cancellation](#)

- [Coronavirus Raises Insurance Questions But Catastrophe-Tested Insurers Are Prepared](#)
- [Insurers Rush to Exclude Coronavirus Epidemic from Event-Cancellation Protection](#)
- [Coronavirus Leads Companies with Supply Chain Disruptions to Invoke 'Force Majeure'](#)
- [Coronavirus Led to Cancellation of Telecoms Meeting, but Insurance Cover Is Excluded](#)
- [Thai Insurer Offers First Coronavirus Insurance Policy](#)
- [Many Global Firms Face High Coronavirus Costs Due to Insurance Exclusions](#)

More from Insurance Journal

[Today's Insurance Headlines](#) | [Most Popular](#) | [International & Reinsurance News](#)

EXHIBIT 6

AMERICAN ASSOCIATION OF INSURANCE SERVICES

Commercial Properties

Virus Or Bacteria Exclusion - Filing Memorandum

AAIS has developed and is filing a *mandatory* endorsement for use with the Commercial Properties Program. This new mandatory Virus Or Bacteria Exclusion, CL 0700, is described below.

Property policies have not been, nor were they intended to be, a source of recovery for loss, cost, or expense caused by disease causing agents. With the possibility of a pandemic, there is concern that claims may result in efforts to expand coverage to create recovery for loss where no coverage was originally intended. In light of this possibility, AAIS is filing a Virus Or Bacteria Exclusion that will specifically address virus and bacteria exposures and clarify policy intent.

This endorsement clarifies that loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress is excluded. Avian Flu, SARS, rotavirus, listeria, legionella, or anthrax are examples of disease or illness causing agents addressed by this exclusion but are by no means an exhaustive list.

A copy of CL 0700 10 06 is provided for your review.

VIRUS OR BACTERIA EXCLUSION

DEFINITIONS

Definitions Amended --

When "fungus" is a defined "term", the definition of "fungus" is amended to delete reference to a bacterium.

When "fungus or related perils" is a defined "term", the definition of "fungus or related perils" is amended to delete reference to a bacterium.

PERILS EXCLUDED

The additional exclusion set forth below applies to all coverages, coverage extensions, supplemental coverages, optional coverages, and endorsements that are provided by the policy to which this endorsement is attached, including, but not limited to, those that provide coverage for property, earnings, extra expense, or interruption by civil authority.

1. The following exclusion is added under Perils Excluded, item 1.:

Virus or Bacteria --

"We" do not pay for loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress.

This exclusion applies to, but is not limited to, any loss, cost, or expense as a result of:

- a. any contamination by any virus, bacterium, or other microorganism; or
- b. any denial of access to property because of any virus, bacterium, or other microorganism.

2. **Superseded Exclusions** -- The Virus or Bacteria exclusion set forth by this endorsement supersedes the "terms" of any other exclusions referring to "pollutants" or to contamination with respect to any loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress.

OTHER CONDITIONS

Other Terms Remain in Effect --

The "terms" of this endorsement, whether or not applicable to any loss, cost, or expense, cannot be construed to provide coverage for a loss, cost, or expense that would otherwise be excluded under the policy to which this endorsement is attached.

CL 0700 10 06

EXHIBIT 7

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

FACTORY MUTUAL INSURANCE)	
COMPANY (as Assignee of ALBANY)	
MOLECULAR RESEARCH, INC. and OSO)	
BIOPHARMACEUTICALS)	
MANUFACTURING, LLC))	
)	
Plaintiff,)	CASE NO.: 1:17-cv-00760-GJF-LF
vs.)	
)	
FEDERAL INSURANCE COMPANY and)	
DOES 1-10,)	
)	
Defendants.)	

**PLAINTIFF FACTORY MUTUAL INSURANCE COMPANY’S
MOTION *IN LIMINE* NO. 5 RE PHYSICAL LOSS OR DAMAGE**

I. INTRODUCTION

Plaintiff Factory Mutual Insurance Company (“FM Global”) hereby moves this court for an order excluding any and all evidence, references to evidence, testimony and argument that the mold infestation, as well as the costs incurred to remediate and return the facility to its pre-loss condition, is not physical loss under the Federal Insurance Company policy. Plaintiff further moves the court to instruct defendant and defendant’s counsel to advise all witnesses accordingly.

Evidence and argument that mold is not physical damage have no tendency to prove or disprove disputed facts relevant to the determination of this action and are contrary to the law in this regard. Accordingly, such assertions cannot lead to proper evidentiary inferences, i.e., a deduction of *fact* logically and reasonable drawn from another established *fact*. It will consume unnecessary

time and create an extreme danger of confusing and misleading the jury about what is physical loss or damage for purposes of establishing coverage under the Federal policy.

II. ARGUMENT

A. Legal Standard.

The Court has the inherent authority to control trial proceedings, including ruling on motions *in limine*. See, e.g., *Luce v. United States*, 469 U.S. 38, 40, n.2 and 4 (1984). In addition, a motion *in limine*:

affords an opportunity to the court to rule on the admissibility of evidence in advance, and prevents encumbering the record with immaterial or prejudicial matter, as well as providing a means of ensuring that privileged material as to which discovery has been allowed by the court will not be used at trial if it is found to be inadmissible.

75 Am.Jur.2d, *Trial* § 94 (1991) (footnotes omitted).

Federal Rule of Evidence Rule 401 states that evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. *Sprint/United Mgmt. Co. v. Medelsohn*, 552 U.S. 379, 388 (2008). Rule 402 specifically prohibits irrelevant evidence. The Advisory Committee has stated that “relevance is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.” *Fed. R. Evid.* 401. In addition, the Court may exclude otherwise relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice.” *Fed. R. Evid.* 403. Further, evidence may be excluded when there is a significant danger that the jury might base its decision on emotion, or when non-party events would distract reasonable jurors from the real issues in the case. *Tennison v. Circus Circus Enterprises, Inc.*, 244 F.3d 684, 690 (9th Cir. 2001). With this in mind, “motion[s] in limine allow[] the parties to resolve evidentiary disputes before trial and avoid[] potentially prejudicial evidence being presented in front of the jury, thereby relieving the trial judge from the formidable

task of neutralizing the taint of prejudicial evidence.” *Brodit v. Cambra*, 350 F.3d 985, 1004-05 (9th Cir. 2003).

B. The Mold Infestation Is Physical Loss or Damage Under the Federal Policy.

FM Global anticipates that Federal will argue and attempt to introduce evidence that the mold infestation is not “physical loss or damage” under its policy and thus, not covered. In addition, Federal has indicated it will assert that the costs to remediate and return the facility to its pre-loss condition are not “physical loss or damage.” These arguments are contrary to the facts of this loss and the case law which broadly interprets the term “physical loss or damage” in property insurance policies.¹

It is undisputed that the mold infestation destroyed the aseptic environment and rendered Room 152 unfit for its intended use – manufacturing injectable pharmaceutical products. Numerous courts have concluded that loss of functionality or reliability under similar circumstances constitutes physical loss or damage. *See, e.g., Western Fire Insurance Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (church building sustained physical loss or damage when it was rendered uninhabitable and dangerous due to gasoline under the building); *Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America*, Civ. No. 2:12-cv-04418 2014 U.S. Dist. LEXIS 165232, 2014 WL 6675934 (D. N.J. 2014) (unsafe levels of ammonia in the air inflicted “direct physical loss of or damage to” the juice packing facility “because the ammonia physically rendered the facility unusable for a period of time.”); *Port Authority of N.Y. and N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (asbestos fibers); *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (unpleasant odor in home); *TRAVCO Ins. Co. v. Ward*, 715

¹ At best for Federal, ‘physical loss or damage,’ which is undefined, is susceptible of more than one reasonable interpretation and is therefore ambiguous and must be construed against Federal. See Memorandum and Order, docket 118, p. 9, citing *United Nuclear Corp. v. Allstate Ins. Co.*, 285 P.3d 644, 647 & 649 (N.M. 2012); *Battishill v. Farmers All. Ins. Co.*, 127 P.3d 1111, 1115 (N.M. 2006).

F.Supp.2d 699, 709 (E.D.Va. 2010), aff'd, 504 F. App'x. 251 (4th Cir. 2013) (“toxic gases” released by defective drywall).

Loss of functionality and/or reliability is especially significant where, as here, the property covered involves a product to be consumed by humans. Courts have concluded that the product is damaged where its “function and value have been seriously impaired, such that the product cannot be sold.” *Pepsico, Inc. v. Winterthur International America Insurance Co.*, 806 N.Y.S.2d 709, 744 (App. Div. 2005), citing *General Mills, Inc. v. Gold Medal Insurance Co.*, 622 N.W.2d 147 (Minn. Ct.App. 2001); *Pillsbury Co. v. Underwriters at Lloyd's, London*, 705 F Supp 1396 (D. Minn. 1989); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Terra Indus.*, 216 F Supp 2d 899 (N.D. Iowa 2002), aff'd 346 F3d 1160 (8th Cir. 2003), cert denied 541 US 939 (2004); *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 93 Cal Rptr. 2d 364 (Cal.App. 2000); *Zurich Am. Ins. Co. v. Cutrale Citrus Juices USA, Inc.*, 2002 WL 1433728, 2002 US Dist LEXIS 26829 (M.D. Fla. 2002). These courts’ rationale regarding food products applies equally, if not more so, to the injectable pharmaceuticals OSO manufactured which were exposed to mold and no longer met industry safety standard. See, *General Mills v. Gold Medal Insurance*, 622 N.W.2d at 152 (food product which no longer met FDA safety standard sustained property damage.); *Motorists Mutual Ins. Co. v. Hardinger*, 131 F.Appx. 823 (3d Cir. 2005) (E coli in water well was physical loss or damage to insured’s home.)²

The period of time as well as costs required to bring OSO’s facility to the level of cleanliness following the mold infestation required by OSO’s customers is also physical loss or damage covered by the Federal policy. The facility was damaged by stringent requirements of OSO’s customers regarding production to the same extent it was damaged from the mold infestation itself as the facility was unusable as the result of a covered loss. See, e.g., *Western Fire v. First Presbyterian*,

² The Court appears to agree that the mold infestation at the OSO facility was “physical loss or damage” as that term is used in property insurance policies such as the one issued by Federal. See Memorandum and Order, docket 118, p. 9.

437 P.2d at 55 (insured was awarded costs to remediate infiltration and contamination when gasoline rendered church unusable); *Farmers Insurance Co. v. Trutanich*, 858 P.2d 1332, 1335 (Ore.App. 1993) (costs of rectifying methamphetamine odor covered as direct physical loss or damage.)

The case of *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 256 Minn. 404, 98 N.W.2d 280 (1959 Minn.) is instructive. There, the insured manufactured food products for the army pursuant to a contract that required the manufacturing plant be smoke free. When smoke from a fire on a neighbor's property permeated the insured's plant for some period of time, the army refused to accept any of the products, rendering them worthless. The Minnesota Supreme Court rejected the insurer's argument that there was no physical loss or damage. According to the court, the food was damaged because of army regulations that set forth stringent requirements for the manufacturing environment. The court also noted that the impairment of value, not the physical damage, was the measure of damages. *Id.* 98 N.W. 2d at 293.

Here, Federal was familiar with OSO's manufacturing process and the contracts which required OSO to maintain an aseptic manufacturing standards at its facilities. Federal was also aware that a mold infestation could cause significant damage not only to the products exposed to the mold, but also because of the time and cost to clean the mold to the standards required by the manufacturing contracts. Without the customers' approval of the restored aseptic conditions following the mold infestation, OSO's facility remained unusable. Indeed, had OSO manufactured products without the customers' approval of the facility, the customers could have properly refused to accept the products and they would have been as worthless as the food products at issue in *Marshall Produce v. St. Paul*. See also, *General Mills, Inc. v. Gold Medal Insurance Co.*, 622 N.W.2d 147 (Minn. Ct.App. 2001) (The function and value of food products was impaired where the

FDA prevented the insured from selling them.); *Pepsico, Inc. v. Winterthur International America Insurance Co.*, 806 N.Y.S.2d 709, 744 (App. Div. 2005) (Insured sustained property damage where its beverages had become “unmerchantable,” i.e., the product’s function and value were seriously impaired, such that the product could not be sold.)

Accordingly, evidence or argument that the mold infestation or the time and costs to remediate the infestation are not physical loss or damage does not create a reasonable inference as to the probability or lack of probability of a fact. *Fed. R. Evid.* 401; *A.I. Credit Corp v. Legion Insurance Co.*, 265 F.3d 630, 638 (7th Cir. 2001). There being no legal basis to require FM Global to prove demonstrable structural damage or alteration to property or products, evidence or argument in this regard does not involve or establish a controverted fact and should be barred from trial. Allowing Federal to argue or elicit testimony that the loss did not create structural damage or alteration to property or products, so is not covered is inconsistent the law, prejudicial to FM Global and will only confuse the jury. See *Fed. R. Evid.* 403.

III. CONCLUSION

Based on the foregoing, FM Global respectfully requests that the Court grant this motion *in limine* to preclude questions, testimony or argument that the mold infestation and costs to remediate the infestation are not physical loss or damage under the Federal policy.

Respectfully submitted,

/s/Maureen A. Sanders
MAUREEN A. SANDERS
Email: mas@sanwestlaw.com
SANDERS & WESTBROOK, PC
102 Granite Ave. NW
Albuquerque, NM 87102
Tel.: (505) 243-2243

Joyce C. Wang (California Bar No. 121139)
Email: jwang@ccplaw.com
Colin C. Munro (California Bar No. 195520)
Email: cmunro@ccplaw.com
CARLSON CALLADINE & PETERSON LLP
353 Sacramento Street, 16th Floor
San Francisco, CA 94111
Tel: (415) 391-3911
Fax: (415) 391-3898

Attorneys for Plaintiff
FACTORY MUTUAL INSURANCE COMPANY
(individually, and as Assignee of ALBANY
MOLECULAR RESEARCH, INC. and OSO
BIOPHARMACEUTICALS MANUFACTURING,
LLC)

CERTIFICATE OF SERVICE

This is to certify that on November 19, 2019, a true and correct copy of the foregoing was delivered to all counsel of record in accordance with the Federal Rules of Civil Procedure and the Local Rules of this Court.

/s/Maureen A. Sanders

Maureen A. Sanders
Email: mas@sanwestlaw.com
SANDERS & WESTBROOK, PC