Case No. 84986

In the Supreme Court of Nevada

STARR SURPLUS LINES INSURANCE CO., Petitioner, *vs.* THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, and THE HONORABLE MARK DENTON, District Judge Respondents, and JGB VEGAS RETAIL LESSEE, LLC, Real Party in Interest.	District Court Case No. A-20-816628B

On Petition for Writ of Mandamus or, in the Alternative, Prohibition

MOTION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

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Pursuant to Rule 29(a) of the Nevada Rules of Appellate Procedure, United Policyholders ("UP") hereby moves for leave to file an *amicus curiae* brief in support of Respondents and the Real Party in Interest. In support of this motion, UP respectfully submits as follows:

Effectuating the purpose of insurance and interpreting insurance contracts requires special judicial handling. United Policyholders ("UP") respectfully seeks to assist this Court in fulfilling this important role. UP is a unique non-profit, tax-exempt, charitable organization founded in 1991 that provides valuable information and assistance to the public concerning insurers' duties and policyholders' rights. UP monitors legal developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in policy sales and claim handling. Grants, donations and volunteers support the organization's work. UP does not accept funding from insurance companies.

UP assists Nevada businesses and residents through three programs: Roadmap to RecoveryTM (disaster recovery and claim help), Roadmap to Preparedness (preparedness through insurance education), and Advocacy and Action (judicial, regulatory and legislative engagements to uphold the reasonable expectations of policyholders). UP hosts a library of informational publications and videos related

to personal and commercial insurance products, coverage, and the claims process at www.uphelp.org. UP's Executive Director Amy Bach, Esq. serves as an official consumer representative for the National Association of Insurance Commissioners.

In furtherance of its mission, UP cautiously chooses cases and regularly appears as *amicus curiae* in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. UP has been advocating for policyholders' rights in the courts for decades and has submitted *amicus* briefs in more than 500 cases. For instance, UP's *amicus* brief was cited in the U.S. Supreme Court's opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999). In addition, UP seeks to fulfill the classic role of *amicus curiae* by supplementing the efforts of counsel and drawing courts' attention to law that may have escaped consideration.

UP seeks to file a brief as *amicus curiae* addressing (1) the nature of Business Income insurance; (2) the knowledge of Petitioner, Starr Surplus Lines Insurance Company ("Starr"), that its standard-form wording had been viewed, for decades, by policyholders, courts and insurance companies themselves as covering loss arising from the detrimental impact upon property of substances such as virus particles, and that such language was at least ambiguous as to whether it was triggered in such circumstances; and (3) how assertions, such as that made by the American Property Casualty Insurance Association, that paying claims for loss and damage from the

presence of SARS-CoV-2 will wreck the insurance industry, appear to be inappropriately affecting the results in such cases. These issues are at the forefront of COVID-19-related business interruption litigation in Nevada and nationwide, and this Court's treatment of these issues has the potential to affect a multitude of other claims made by policyholders in Nevada.

As set forth in the attached *amicus curiae* brief, Petitioner's legal position – that the presence of a highly-dangerous substance, such as SARS-CoV-2, on property does not result in physical loss of or damage to that property because it does not cause structural alteration of that property – is one that courts have routinely rejected. For more than sixty years, the law in the United States has been settled that structural alteration of covered property is not a necessary element of direct physical "loss" or "damage," especially when the insured property is otherwise rendered unusable for its intended purpose. What is more important for present purposes, however, is that Starr had knowledge of these decisions, and thus knew that its standard-form policy language was at least ambiguous as whether it was triggered by such circumstances. Starr had the opportunity to resolve the ambiguity that is at the heart of this case, but chose not to do so.

By bringing the full factual background surrounding these issues before the Court, UP seeks to fulfill the established role of prospective *amici curiae*, in a case of general public interest, by supplementing the efforts of counsel, and drawing the

Court's attention to law that may otherwise escape consideration. This is an appropriate role for *amicus curiae*. As commentators have often stressed, an *amicus* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).

UP and the nationwide policyholders whose interests it represents have a vital interest in this proceeding. Because of its unique perspective on insurance issues, UP's proposed *amicus curiae* brief will assist the Court in weighing considerations that are relevant to the disposition of this case.

WHEREFORE, UP respectfully moves this Court to grant it leave to file the proposed *amicus curiae* brief in support of Respondents and the Real Party in Interest, submitted herewith.

Dated: September 30, 2022

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that on this 30th day of September, 2022, the foregoing Motion of United Policyholders for Leave to File an *Amicus Curiae* Brief was e-submitted to the Clerk of the Supreme Court of the State of Nevada and services were executed to the addresses shown below in the manner indicated:

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EXHIBIT A

Case No. 84986

In the Supreme Court of Nevada

STARR SURPLUS LINES INSURANCE CO., Petitioner, *vs.* THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, and THE HONORABLE MARK DENTON, District Judge Respondents, and JGB VEGAS RETAIL LESSEE, LLC, Real Party in Interest.	District Court Case No. A-20-816628B

On Petition for Writ of Mandamus or, in the Alternative, Prohibition

BRIEF OF *AMICUS CURIAE*, UNITED POLICYHOLDERS IN SUPPORT OF RESPONDENTS AND REAL PARTY IN INTEREST

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

United Policyholders is national non-profit 501(c)(3) organization and has no parent corporation, and no publicly-held corporation owns stock in UP.

The law firms who have appeared for UP in this case or are expected to appear in this Court are Pisanelli Bice PLLC and Reed Smith LLP.

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IDENTITY OF *AMICUS CURIAE*, ITS INTERESTS IN THE CASE, AND THE SOURCE OF ITS AUTHORITY TO FILE

United Policyholders ("UP") is a national non-profit organization whose mission is to serve as an effective voice and a source of information and guidance for insurance consumers, insurance regulators and courts around the country. Here, UP seeks to assist the Court on an issue of immense public importance – coverage for COVID-19 business income ("BI") losses – by identifying arguments and authorities that may otherwise escape the Court's attention.

UP has filed for leave to file this *amicus* brief.

SUMMARY OF ARGUMENT

In this *amicus* brief, UP first makes two points based upon its particularized understanding of the insurance industry's intent for its standard-form BI wording. First, contrary to the statements of the American Property Casualty Insurance Association ("APCIA"), the core purpose of BI insurance is to insure losses from events which affect a policyholder's *operations*, whether those events damage any property owned by the policyholder or not. Second, there is overwhelming evidence from multiple sources demonstrating that, for more than sixty years, the insurance industry knew that courts had found property to have suffered direct physical "loss" or "damage" from events which rendered that property unsafe of unfit for use, triggering BI coverage, *yet the insurance industry did not alter the standard-form BI trigger*.

UP makes a third point: since March 2020, in non-COVID-19 cases, courts have continued correctly to apply the BI trigger; *i.e.*, finding BI coverage triggered by events rendering property unfit for its intended use, without requiring physical "alteration" of that property. This indicates that courts ruling against policyholders in COVID-19 cases are rewriting the BI trigger, in those cases only, to protect the insurance industry from its business decision not to narrow that trigger.

ARGUMENT

I. THE ENTIRE PURPOSE OF BI INSURANCE IS TO COVER A POLICYHOLDER'S OPERATIONS.

APCIA asserts "[t]he insured's 'operations are not what is insured – the building and the personal property in or on the building are.'"[1] This fundamentally misrepresents the purpose of BI insurance, which plainly insures a policyholder's operations. That is why renters and lessors buy BI insurance. That is why ABM Industries, the provider of janitorial services at the World Trade Center ("WTC"), owning only mops and other cleaning equipment there, was entitled to BI coverage for its inability to conduct *operations* when the WTC was destroyed.[2] ABM's policy did not insure the building, and the destruction of ABM's personal property did not

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[1] Brief of *Amicus Curiae* American Property Casualty Insurance Association in Support of Petitioner and in Support of Granting the Petition, Defendant-Appellee Westfield Insurance Company and in Support of Affirmance, at 4 (*citing Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, 499 F. Supp. 3d 288, 296 (S.D. Miss. 2020)).

[2] *Zurich Am. Ins. Co. v. ABM Indus., Inc.*, 397 F.3d 158, 166 (2d Cir. 2005).

cause the loss, but ABM received coverage for its inability to conduct operations. BI coverage is not contingent upon a policyholder making a claim for damage to its "property."[3] This is why policyholders whose operations are affected by conditions that resolve themselves through natural action, without any need to repair or replace property (such as inundation with smoke or ammonia), are entitled to BI coverage.[4]

II. FOR SIXTY YEARS, THE INSURANCE INDUSTRY HAS KNOWN THAT "DIRECT PHYSICAL LOSS OR DAMAGE" DOES NOT REQUIRE STRUCTURAL ALTERATION TO PROPERTY.

In the U.S., insurance companies sell property insurance policies that, as here, use standard-form language. This allows: (1) policyholders to compare prices and claims service of sellers without having to consider the impact of different policy wordings; and (2) insurance companies to pool loss data, and to streamline regulatory approval of policy language. In relation to the latter, insurance industry drafting organizations like the Insurance Services Office ("ISO") monitor losses under, and court decisions construing, standard-form language. If they believe the

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[3] *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, No. 603009/2002, 2005 WL 600021, at *3 (N.Y. Supr. Mar. 16, 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.").

[4] *See, e.g., Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, No. 2:12-cv-04418, 2014 WL 6675934, at *5-6 (D.N.J. Nov. 25, 2014) (heightened ammonia levels); *Oregon 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), *vacated by joint stipulation*, 2017 WL 1034203 (Mar. 6, 2017) (smoke from wildfires).

language needs narrowing, they submit proposed changes to state regulators to secure approval for their member companies to sell the narrowed coverage. Two points are critical for the issues before this Court: (1) the only parties that "negotiate" changes to standard-form wordings are drafting organizations like ISO and state regulators, and thus (2) what ISO says reflects its members' knowledge of, and intent for, the standard-form language.[5] Below, UP focuses on the insurance industry's understanding of and intent for "direct physical loss or damage."

A. The Insurance Industry Knew, for Decades, That Courts Were Construing "Loss" and "Damage" Broadly To Cover Loss from Events Rendering Property Unsafe or Unfit for Intended Use.

Since 1957, courts found that unusual circumstances rendering property unsafe or unfit for intended use caused direct physical "loss" or "damage" to that property.[6] These cases construing standard-form wording were well known in the

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[5] This Court has previously acknowledged that insurance policy drafting history is relevant to consider in determining the meaning and reach of insurance policy provisions. *Century Sur. Co. v. Casino West Inc.*, 130 Nev. 395, 400 (2014).

[6] In chronological order: *Am. All. Ins. Co. v. Keleket X-Ray*, 248 F.2d 920, 923-25 (6th Cir. 1957) (radioactivity making building unsafe); *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 655 (Ct. App. 1962) (home useless after landslide perched it on cliff); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968) (gasoline vapors making 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) (risk of building 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) (methamphetamine fumes); *Trutanich*, 858 P.2d at 1335 (methamphetamine odor); *Azalea Ltd. v. Am. States Ins. Co.*, 656 So. 2d 600,

property insurance arena – anyone reading one of them would quickly learn of the rest[7] – and the insurance industry did monitor them.

Specifically, ISO has admitted that, on behalf of its members, it closely reviews court decisions to determine whether to change the industry's standard-form wording. Of particular relevance here, ISO wrote to regulators that courts were applying its pollution exclusion "narrowly," prompting it to draft and seek approval for a virus exclusion:

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602 (Fla. Dist. Ct. App. 1995) (damage to bacteria colony necessary for sewage-treatment plant); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, No. 9400837, 1996 WL 1250616, at *2 (Mass. Super. Ct. Mar. 15, 1996) (oil fumes); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (asbestos); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 16-17 (W. Va. 1998) (home rendered dangerous by falling rocks); *Matzner v. Seaco Ins. Co.*, 1998 WL 566658, at *3-4 (Mass. Super. Ct. Aug. 12, 1998) (carbon monoxide); *Bd. of Educ. v. Int'l Ins. Co.*, 720 N.E.2d 622, 625-26 (Ill. App. Ct. 1999) (asbestos); *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 93 Cal. Rptr. 2d 364, 376-77 (Ct. App. 2000) (intermingling of a quarter pound of wood shavings in 80,000 pounds of almonds without structural change); *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 826 (Minn. 2000) (asbestos); *Port Authority of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (asbestos fibers); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *8-9 (D. Or. June 18, 2002) (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) (asbestos and lead); *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).

[7] For instance, one of the first such decisions, *First Presbyterian Church*, was subsequently cited by *Lillard-Roberts*, 2002 WL 31495830, at *8-9, *Matzner*, 1998 WL 566658, at *4; *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. Ct. App. 1993); and *Hetrick*, 1992 WL 524309, at *3.

> 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.[8]

Note ISO also admitted that a virus could cause "property damage," which of course follows, as otherwise there would be no need for the exclusion. In short, the insurance industry, through its own review and that of ISO, knew that courts had construed "loss" and "damage" broadly and had not required physical alteration of property.

B. The Insurance Industry Knew that Its Members Made Payments for Lost BI from the Loss or Damage to Property Caused by SARS-CoV-1.

The insurance industry also knew that its members paid BI claims arising from loss or damage caused by the original novel coronavirus SARS-CoV-1 in 2002-2004. Indeed, this was reported beyond the insurance industry trade press, in publications like the WASHINGTON POST:

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[8] ISO Circular, July 6, 2006, Commercial Property LI-CF-2006-175 at 1 (Ex. 1 hereto) (emphasis added).

> 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.[9]

As shown immediately below, the insurance industry's knowledge that its members had paid BI claims arising from a virus prompted it to draft a virus exclusion.

C. As a Result of Its Close Review of the Common Law, and the Claims Paid for Losses from SARS-CoV-1, ISO Drafted a Virus Exclusion.

From 2002 through 2006, courts continued to find "loss" or "damage" from caused by events which did not structurally alter property.[10] This, along with

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[9] Todd C. Frankel, "Insurers knew the damage a viral pandemic could wreak on businesses. So, they excluded coverage," Washington Post (April 2, 2020) (Ex. 2 hereto).

[10] In chronological order: *Schlamm*, 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.*, No. 05-cv-02293, 2007 WL 1772063, at *1 (D. Colo. June 18, 2007) (listeria contamination; insurer voluntarily paid); *Cook v. Allstate Ins. Co.*, No. 48D02-0611-PL-01156, 2007 Ind. Super. LEXIS 32, at *9-10 (Nov. 30, 2007) (brown recluse spider infestation).

payments in relation to SARS-CoV-1, motivated ISO to draft a virus exclusion.[11] On July 6, 2006, ISO submitted a Circular announcing "the submission of form filings to address exclusion of loss due to disease-causing agents such as viruses and bacteria."[12] ISO recognized that policyholders could reasonably claim coverage for these losses under existing policies, including a BI claim for loss during the period of decontamination (*i.e.*, the Period of Restoration):

> 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*.[13]

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11 Lucca de Paoli, *et al.*, "Insurance Unlikely to Cushion Coronavirus Losses – But There Are Exceptions," Insurance Journal (Mar. 4, 2020) (Ex. 3 hereto).

12 ISO Circular, at 1.

13 *Id.* at 9-10 (emphasis added).

The insurance industry not only knew – it *admitted* it knew, to regulators – that, without a virus exclusion, its standard-form language could be read to cover a BI loss arising from the presence of a virus in a building for at least the period needed for decontamination.

The operative phrase of the ISO's virus exclusion was "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."[14] Noted commentators have concluded the insurance industry knew that its language, without a virus exclusion, was capable of being read to coverage loss or damage from viruses:

> Prior to the SARS tragedy of the early Twenty-first Century, insurance policies did not contain virus exclusions, although many did have bacteria, fungus, or mold exclusions. And there is, of course, the pollution exclusion that we think has no application to infection-related loss but that insurers continue to occasionally push as a defense to coverage. Insurers effectively accepted that their policies of the pre-SARS era did not exclude – at least not with sufficient clarity – viral infection losses and responded by drafting a rather comprehensive virus exclusion.[15]

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[14] Erik S. Knutsen & Jeffrey Stempel, Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic, 27 CONN. INS. L.J. 185, 270-71 (2020) ("Knutsen & Stempel").

[15] *Id.* at 270.

D. Insurance Companies Confirmed the Majority Rule.

Subsequent to ISO's drafting of the virus exclusion, courts across the country continued to rule for policyholders in circumstances like those here, without requiring structural alteration of property.[16]

Again, this was no secret. Indeed, insurance companies, when it suited their interest, relied upon the very cases cited herein which were common knowledge. For instance, Factory Mutual Insurance Company admitted that "physical loss or damage" to property exists when the presence of a physical substance renders property unfit for its intended use, despite it causing **no** structural alteration to property.[17]

At issue in *FM v. Federal* was mold infestation in a "clean room" at a drug manufacturing plant.[18] Mold (and its spores), like SARS-CoV-2 virions, can exist on

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[16] In chronological order: *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (unpleasant odor in home); *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) (toxic gases); *In re Chinese Manufactured Drywall Prods. Liab. Litig.*, 759 F. Supp. 2d 822, 831-32 (E.D. La. 2010) (fumes); *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 v. N. Sec. Ins. Co.*, 115 A.3d 799, 805-06 (N.H. 2015) (pervasive odor of cat urine); *Or. Shakespeare*, 2016 WL 3267247, at *5-6 (loss from smoke from wildfires).

[17] FM's Mot. *in Limine* No. 5 re Physical Loss or Damage, filed Nov. 19, 2019 as ECF#127 in *Factory Mut. Ins. Co. v. Fed. Ins. Co.*, No. 1:17-cv-00760-GJF-LF (D.N.M.) (Ex. 4 hereto).

[18] *Id.* at 3.

the surface of property and in the air. FM argued the mold infestation constituted "physical loss or damage" under a property insurance policy because the mold "destroyed the aseptic environment and rendered [the clean room] unfit for its intended use."[19] FM asserted case law "broadly interprets the term 'physical loss or damage' in property insurance policies."[20] Citing several cases cited above – namely *First Presbyterian Church*, *Gregory Packaging*, *Port Authority*, *BloomSouth*, and *TRAVCO* – FM noted that "[n]umerous courts have concluded that loss of functionality or reliability under similar circumstances constitutes physical loss or damage."[21] FM reiterated that what was key was whether property could be used as it was used prior to the impacting event, and, essentially, that the Period of Restoration lasted until customers viewed the policyholder's location as again suitable for normal operations: "Without the customers' approval of the restored aseptic conditions following the mold infestation, [the] facility remained unusable."[22] Moreover, FM wrote that, *at the very least*, it had put forward a reasonable interpretation of the undefined phrase "physical loss or damage" and even if Federal could propose a reasonable reading, this merely rendered the clause ambiguous.[23]

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19 *Id.*
20 *Id.*
21 *Id.* at 3-4 (emphasis added).
22 *Id.* at 4-5 (emphasis added).
23 *See id.* at 3 n.1.

Three months before this pandemic, FM concisely demonstrated what the insurance industry had known for 60 years: its standard BI wording, which ISO did not change, was triggered by events rendering property unfit for its intended use *without the necessity of physical alteration*.

III. COURTS RULING AGAINST POLICYHOLDERS APPEAR MOTIVATED BY A FEAR THAT CONFIRMING COVERAGE WOULD BANKRUPT THE INSURANCE INDUSTRY.

A number of post-March 2020 cases have found, consistent with the cases cited above, that events rendering property unfit for its intended use trigger BI coverage even without structural alteration.[24] This indicates that something other than application of the common law as it existed in March 2020 is motivating courts ruling on insurance coverage for loss or damage from SARS-CoV-2: concern about the solvency of the insurance industry. Decisions accepting arguments (identical to APCIA's argument here) essentially concede as much:

> As amicus curiae brief filed on behalf of [APCIA] reminds us that insurers calculate and pool the risks of covered damage to property. To suddenly add nonphysical losses caused by a pandemic would give policyholders more than they bargained for and dramatically affect the

[24] *See Crisco v. Foremost Ins. Co.*, 505 F. Supp. 3d 993, 999 (N.D. Cal. 2020) (finding coverage for loss of use of mobile homes which were not altered but were unusable because of loss of sewage, electricity, water, gas service); *James W. Fowler Co. v. QBE Ins. Corp.*, 474 F. Supp. 3d 1149, 1153-54 (D. Or. 2020) (finding coverage triggered by inability to access underground machine which was otherwise undamaged); *Nat'l Ink & Stitch, LLC v. State Auto Prop. & Cas. Ins. Co.*, 435 F. Supp. 3d 679, 686 (D. Md. 2020) (finding coverage triggered by loss of ability to use computer system); *EMOI Servs., LLC v. Owners Ins. Co.*, 2021 Ohio App. LEXIS 3849, at *2-3, *22, *24 (Nov. 5, 2021) (same).

> insurers' financial obligations. Indeed, the National Association of Insurance Commissioners has explained that business interruption policies were not designed or priced to cover losses from a pandemic, Nationwide losses from COVID-19 have been estimated at between $255 billion and $431 billion *per month*.[25]

The insurance industry has known for decades that its direct physical "loss" or "damage" BI trigger was being construed by courts to cover BI loss from conditions rendering property unfit for use regardless of whether it suffered structural alteration. The insurance industry specifically knew of the BI risk posed by viruses, for which ISO developed a specific exclusion, but it did not change the standard-form BI trigger to require "structural alteration." This Court should not be party to the nationwide effort to except this one, known exposure from the uniform, majority line of cases, by rewriting standard wording to protect an industry which chose not to change it.

Beyond this, as noted by commentators, the insurance industry does not need any protection from the courts:

> We are not dismissive of the potential magnitude of COVID claims but remain concerned that the insurance industry has been a bit cavalier in suggesting such large losses and generally wailing gloom and doom in the event of coverage. It may be a good public relations strategy that

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[25] *Musso & Frank Grill Co. v. Mitsui Sumitomo Ins. USA Inc.*, 77 Cal. App. 5th 753, 761 n.2 (2022); *see also Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398, 407 (6th Cir. 2021) ("Fair pricing of insurance turns on correctly accounting for the likelihood of the occurrence of each defined peril and the cost of covering it. Efforts to push coverage beyond its terms creates a mismatch, an insurance product that covers something no paid for and, worse, runs the risk of leaving insufficient funds to pay for perils that insureds did pay for.").

will gain sympathy from the courts but strikes us as overblown. And, as discussed later in the article, there is something concerning about attempts to convince courts and policymakers that insurers are too vulnerable to be saddled with COVID losses when the alternative is saddling much more vulnerable small businesses with these losses.[26]

CONCLUSION

This Court should deny Starr's Petition.

Dated: September 30, 2022

/s/ Debra L. Spinelli

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[26] Knutsen & Stempel, 27 CONN. INS. L.J. at 223 n.73.

NRAP 32(A)(9) CERTIFICATE OF COMPLIANCE

I hereby certify that this *Amicus Curiae* Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman typeface. I further certify that this Brief complies with the type-volume limitation under NRAP 29(e) as it contains 2,411 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: September 30, 2022

/s/ Debra L. Spinelli
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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that on this 30th day of September, 2022, the foregoing Brief of *Amicus Curiae* United Policyholders American was e-submitted to the Clerk of the Supreme Court of the State of Nevada and services were executed to the addresses shown below in the manner indicated:

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EXHIBIT 1

ISO 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-OVBEF
- State-specific version of Forms Filing CF-2006-OVBEF (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.

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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.

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- 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. Paragraphs C and D serve to avoid overlap with other exclusions, and Paragraph E emphasizes that other policy exclusions may still apply.

Copyright Explanation

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", 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.

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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

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 supersedes 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.

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EXHIBIT 2

The Washington Post
Democracy Dies in Darkness

BUSINESS

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 at 1:25 p.m. EDT

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 3

INSURANCE JOURNAL (/)

Featured Stories

Misrepresentation by Insured Is Complicated: FL Court (https://www.insurancejournal.com/news/southeast/2022/09/14/684912.htm)

Insurer Misplays $500K Beer Pong Liquor Liability Claim (https://www.insurancejournal.com/news/east/2022/09/01/683318.htm)

Insurance Unlikely to Cushion Coronavirus Losses – But There Are Exceptions

By Lucca de Paoli (https://www.insurancejournal.com/author/lucca-de-paoli/), Katherine Chiglinsky (https://www.insurancejournal.com/author/katherine-chiglinsky/) and Benjamin Rob

Skip to content

Article (https://www.insurancejournal.com/news/international/2020/03/04/560126.htm) | 0 Comments (https://www.insurancejournal.com/news/internati

Don't look for much relief from insurers to cushion losses from canceled events, travel disruptions and potential medical claims from the deadly C

The world's largest insurers have learned lessons from previous health crises, including the 2003 SARS outbreak. Over the years, they've tighten 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 Mo

Claims from the SARS outbreak ended up spurring some property-casualty insurers to revisit policy language, particularly with "loss of attraction"

"SARS comes along and the insurers ended up paying some large losses," Norris said. "Since then, there's been a pullback from insurers for prov

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 busines

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,

"Prudential generates almost half its operating profit in Asia and health and protection products are a significant part of its offering," Kevin Ryan, a

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

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 (https://www.insurancejou

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

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 effe

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

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 b

Allianz, Europe's largest insurer, says the biggest potential risk would be from any bankruptcies in Europe spurred by the virus's spread. Credit in

Skip to Content

“The issue that may affect us is if you have massive bankruptcies in small- and medium-size companies, because we have the world market lead

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, b

“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

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 t

Munich Re has exposure of more than 500 million euros ($556 million) to contingency losses, should all events covered for pandemic be cancele

For now, Munich Re’s “risk overall is pretty limited” because few clients include pandemic risks in their reinsurance coverage, Chief Financial Offic

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

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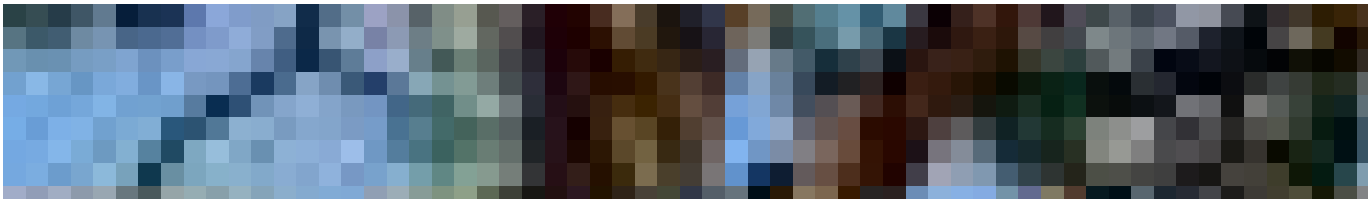

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EXHIBIT 4

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,

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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*
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