**IN THE SUPREME COURT OF OHIO**

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| **NEURO-COMMUNICATION SERVICES, INC.,** | ) | **Supreme Court Case No. 2021-0130** |
| **Plaintiffs/Respondents,** | ) | **On Review of Certified Questions from the United States District Court for the Northern District of Ohio, Eastern Division** |
| **v.** | ) | |
| **THE CINCINNATI INSURANCE COMPANY; THE CINCINNATI CASUALTY COMPANY; and THE CINCINNATI INDEMNITY COMPANY,** | ) | **Case No. 4:20-cv-1275** |
| **Defendants/Petitioners.** | ) | |

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# BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF RESPONDENT AND ANSWERING THE CERTIFIED QUESTION IN THE AFFIRMATIVE

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## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Other Authorities**

## STATEMENT OF INTEREST OF THE AMICUS CURIAE

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 Ohio 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 communicates with the Director of the Ohio Department of Insurance, Judith French, on a regular basis during meetings of the National Association of Insurance Commissioners, where UP's Executive Director Amy Bach, Esq. serves as an official consumer representative.

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 has submitted *amicus* briefs in many cases before this Court.[1] UP seeks to fulfill the classic role of *amicus curiae* by supplementing the efforts of counsel and drawing the Court's attention to law that may have escaped 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.[2]

## SUMMARY OF ARGUMENT

UP submits this *amicus curiae* brief in support of Plaintiffs/Respondents, Neuro-Communication Services, Inc. ("Neuro-Communication"). UP has a special interest in this litigation and can offer a unique perspective to the Court as it considers the issues raised by this case.

The uncontrolled spread of SARS-CoV-2 throughout Ohio, like a wildfire, constitutes a natural disaster that insurance should cover. Businesses that were habitable and safe for their ordinary and intended use one day now have become unsafe for their ordinary and intended use due to the infiltration of SARS-CoV-2 and the resulting COVID-19 disease. The inability to use property because it has become unsafe due to a physical condition outside the policyholder's

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[1] *See, e.g.*, *Garrett Well LLC v. Frick-Gallagher Mfg. Co.*, No. 2021-0249 (Ohio Supreme Court); *Neuro-Communication Servs., Inc. v. Cincinnati Ins. Co.*, No. 2021-0130 (Ohio Supreme Court); *Acuity v. Masters Pharmaceuticals, Inc.*, No. 2020-1134 (Ohio Supreme Court); *Motorists Mut. Ins. Co. v. Ironics, Inc. & Owens-Brockway Glass Container, Inc.*, No. 2020-0306 (Ohio Supreme Court); *World Harvest Church v. Grange Mut. Cas. Co.*, 148 Ohio St. 3d 11, 2016-Ohio-2913, 68 N.E.3d 738; *Lincoln Elec. Co. v. Travelers Cas. & Sur. Co.*, No. 2013-1088 (Ohio Supreme Court); *Pennsylvania Gen. Ins. Co. v. Park-Ohio Indus., Inc.*, 126 Ohio St. 3d 98, 930 N.E.2d 800; *Pilkington N. Am. v. Travelers Cas. & Sur. Co.*, 112 Ohio St. 3d 482, 861 N.E.2d 121; *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St. 3d 512, 769 N.E.2d 835. A listing of all cases in which UP has filed *amicus* briefs is at https://uphelp.org/amicus-briefs/.

[2] R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570–71 (1986) (*quoting* Bruce J. Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).

control is the exact type of "physical loss" of "physical damage" to property the "all-risk" insurance policy here was purchased and sold to address.

It is undeniable that the policyholder here, Neuro-Communications, sustained losses because of the pandemic. In an effort to avert illness and injury to citizens and to slow or prevent community spread of SARS-CoV-2 virions – which themselves are tangible, physical things – Civil Authorities in Ohio issued a number of orders limiting the ability of Neuro-Communications to use its property. These orders verify what is apparent to all: the presence of SARS-CoV-2 on or around Neuro-Communications' premises rendered the premises unsafe and unfit for their intended use. As a result, Neuro-Communications alleges it sustained significant losses.

Nevertheless, Cincinnati Insurance Company, Inc. denied Neuro-Communications' claim. In the course of litigating this denial, the trial judge drafted a Certified Question to this Court, which this Court stated that it would answer:

> Does the general presence in the community, or on surfaces at a premises, of the novel coronavirus known as SARS-CoV-2, constitute direct physical loss or damage to property; or does the presence on a premises of a person infected with COVID-19 constitute direct physical loss or damage to property at that premises?[3]

UP makes submissions on four points to aid this Court in resolving this Certified Question.

First, UP traces the how courts have treated the terms "physical loss" and "physical damage" from the 1950s to the inception of the COVID-19 pandemic; namely, courts found that infusion of property with disease-causing agents – radon gas, asbestos, ammonia, smoke, bacteria, carbon monoxide, oil fumes, *etc.* – causes direct "physical loss" or "physical damage." Policyholders and insurance companies knew this, as did the entities that draft standard-form insurance policy language, which, after the insurance industry made payouts for loss from the

[3] 04/14/2021 Case Announcements, 2021-Ohio-1202, at 5.

first novel coronavirus, SARS-CoV-1, drafted a Virus or Bacteria exclusion to address loss or damage from two types of disease-causing agents. This knowledge, spanning decades, and the ease with which the insurance industry could have drafted language to address loss from the presence of a virus – amply demonstrated by the twenty-plus clauses which the Insurance Industry Parties[4] drafted and request this Court to deem to be included in the language originally chosen by Cincinnati – should be considered by this Court in answering the Certified Question.

Second, UP puts into context the Insurance Industry Parties' arguments that this Court should not find that the presence of SARS-CoV-2 can cause physical loss or damage to property because, those Parties say, that would mean that all property everywhere suffers loss or damage because of the omnipresence of SARS-CoV-2 virions. The same, however, can be said for other disease-causing agents; each of us, for instance, breathes in hundreds of thousands of asbestos fibers each day. But in the absence of injury as a result, there is no insurance claim. In other words, what is relevant is the concentration of the disease-causing agents at a particular time and place. UP submits that where concentrations of ammonia, asbestos, radon or SARS-CoV-2 are high enough to be a risk to health, it cannot seriously be contested that property has suffered loss or damage.

Third, UP makes a comment on the nature of the arguments of the Insurance Industry Parties, which is to declare victory on this issue by pointing to results in federal court cases. UP points out that most of those cases, in turn, rely upon an insurance industry treatise, COUCH ON INSURANCE, which presents a comment on the case law in this area which, UP shows, was based on a single case addressing contamination with asbestos. While grossly misleading in itself, what is more misleading is that the Insurance Industry Parties do not even acknowledge that

[4] This Brief will refer to collectively to Cincinnati (the Defendants/Petitioners in this appeal) and the various insurance industry *amici curiae* as the "Insurance Industry Parties."

COUCH ON INSURANCE also sets forth the cases addressed in UP's first point, finding that the presence of disease-causing agents in amounts sufficient to risk injury causes physical loss or damage to property.

Last, UP submits that the Court should not be swayed by the Insurance Industry Parties' claims that paying claims for loss and damage from the presence of SARS-CoV-2 will wreck the insurance industry. That is not a proper point of argument in a policy interpretation case. The Court has no authority to speculate about which party will be worse off if it loses, or what constitutes good economic policy. Nor does Ohio law recognize an exception to the rule that a party is bound by the terms of the contracts it freely enters into merely because the party now regrets the terms of those contracts. If insurers are in "dire straits" after paying covered COVID-19 losses, then they can ask insurance regulators for relief. The Court cannot – and should not – rewrite the policy to accommodate an insurers' regret that it agreed to insure too many risks.

Regardless, any warnings of impending doom are entirely unfounded. Financially, insurers did very well during the pandemic. Not only have they reported massive profits, but also they raised rates on consumers in every quarter of 2020, and have continued to do so in 2021. Virtually all of them have reinsurance. They can weather losses that most entities – such as Neuro-Communications and other policyholders – cannot bear. The Court's only role in this case is to ask whether Neuro-Communications' interpretation of the policy is reasonable. If so, then it must answer the Certified Question in the affirmative.

## STATEMENT OF FACTS

UP accepts and adopts the Statement of Facts in the Merit Brief of Plaintiffs/Respondents Neuro-Communication Services, Inc.

## ARGUMENT

### I. THE INSURANCE INDUSTRY HAS KNOWN FOR SIXTY YEARS THAT COURTS WERE RULING THAT ITS STANDARD-FORM LANGUAGE COVERED LOSSES LIKE THOSE AT ISSUE HERE.

#### A. Contrary to the Arguments of the Insurance Industry Parties, the Entire Purpose of Business Income Insurance Is To Cover a Policyholder's Operations.

The Insurance Industry Parties make extended arguments on the history and "core purpose" of property insurance.[5] Cincinnati asserts "the core purpose of a commercial property insurance policy is to insure buildings and personal property against physical harm, such as from fire."[6] The American Property Casualty Insurance Association asserts "[t]he insured's 'operations are not what is insured – the building and the personal property in or on the building are.'"[7]

These points fundamentally misrepresent the nature and purpose of first-party property insurance policies providing coverage for Business Income loss. Insurance is a matter of contract, not generalized contracts, and whether insurance provide coverage depends on what the insurance policies say, not what the Insurance Industry argues. As will be shown below, such policies absolutely insure a policyholder's operations. That is why renters and lessors buy Business Income insurance. That is why ABM Industries, the provider of janitorial services at the World Trade Center, which owned only mops and cleaning equipment destroyed there, was

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5 *See* Brief of Amicus Curiae Nationwide Mutual Insurance Company in Support of Defendants/Petitioners the Cincinnati Insurance Company, the Cincinnati Casualty Company and the Cincinnati Indemnity Company ("Nationwide Br.") at 4-5.

6 Merits Brief of the Defendant/Petitioners the Cincinnati Insurance Company, the Cincinnati Casualty Company and the Cincinnati Indemnity Company ("Cincinnati Merit Br.") at 11.

7 Brief of *Amici Curiae* American Property Casualty Insurance Association and National Association of Mutual Insurance Companies in Support of Petitioners ("American Property Casualty Insurance Association Br."), at 8 (*citing Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, 499 F. Supp. 3d 288, 296 (S.D. Miss. 2020)).

entitled to Business Income coverage for the loss of the property (the World Trade Center) at which it conducted **operations**.[8] Indeed, a company teaching unarmed self-defense courses in a warehouse it leases would have a Business Income claim if the warehouse became infused with radon, because it could not conduct operations there, despite the fact that it could not make any claim for any real or personal property.

For instance, in *Schlamm Stone & Dolan, LLP v. Seneca Insurance Co.*, No. 603009/2002, 2005 WL 600021 (N.Y. Supr. Mar. 16, 2005), the policyholder operated a law firm near the WTC. After the September 11, 2001 attacks, the policyholder alleged that dust and debris in its premises affected its operations for the balance of the month of September.[9] In the coverage case, the court rejected the insurance company's argument that the policyholder "should be denied business interruption coverage because [the policyholder] failed to file a claim for actual damage to its property":

> 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.[10]

Modern first-party property insurance policies insure a policyholder's operations, and this is why policyholders whose operations are affected by conditions that occur through natural action –

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8 *Zurich American Ins. Co. v. ABM Indus., Inc.*, 397 F.3d 158, 166 (2d Cir. 2005) (finding the janitorial firm was entitled to Business Income for loss from the destruction of the World Trade Center where it performed "operations").

9 *Id.* at *1.

10 *Id.* at *3.

such as smoke from forest fires or dust from the collapse of a nearby building – without any need to repair or replace property nonetheless are entitled to coverage for Business Income claims.[11]

### B. For More than Sixty Years, Policyholders, Courts, Insurance Policy Drafting Organizations and Insurance Companies Themselves Stated That Standard-Form Property Insurance Policies Covered Loss from Events Rendering Property Unfit for Its Intended Use.

UP submits that what is more important that the Insurance Industry Parties' misleading musings as to the "core purpose" of property insurance is the actual history of how the language at issue has been construed. As shown below, policyholders, courts, insurance companies, and insurance industry drafting organizations have – for decades – concluded that the terms "physical loss" or "physical damage" included situations in which events rendered property unfit or unsafe for its intended use, regardless of whether such property had suffered physical "alteration." At a minimum, Cincinnati knew that its standard-form policy language was at least ambiguous as to whether it applied in such situations. This is amply demonstrated by the following.

#### 1. From 1957 through 2000, Courts Repeatedly Concluded that Policyholders Were Correct in Asserting that Events Rendering Property Unfit or Unsafe for Intended Use Caused Physical Loss or Damage.

For years, there have been issues as to whether unusual events – *i.e.*, events other than a fire, collapse or tornado – cause direct physical loss or damage to property. The parties will no doubt discuss these cases at length, and UP will not duplicate that discussion, but what is important for present purposes is that there were cases finding standard-form property insurance

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[11] *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) (concluding that "property can sustain physical loss or damage without experiencing structural alteration," that "the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated," and therefore that the ammonia discharge caused direct physical loss or damage to the plant); *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).

policies to have been triggered in such circumstances in the 1950s,[12] the 1960s,[13] the 1970s,[14] the 1980s,[15] and the 1990s.[16] As shown below, it was near the tail end of this forty-year period in

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[12] *American Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957) (finding that the policyholder, which manufactured instruments used in measuring radioactivity, had suffered property damage from a release of radon dust and gas which made the building unsafe to work in, and made it impossible to calibrate the instruments prior to sale because of the background radiation).

[13] *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 655 (Cal. App. 1962) (finding that policyholder's home, which became perched on the edge of a cliff after a sudden landslide deprived it of lateral support and stability, was damaged because it became unsafe to live in and thus useless); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968) (en banc) (finding a "direct physical loss" where a church complied with the fire department's order to close because gasoline vapors made "use of the building dangerous").

[14] *Cyclops Corp. v. Home Ins. Co.*, 352 F. Supp. 931, 937 (W.D. Pa. 1973) (finding policyholder entitled to coverage for loss of Business Income where vibration of motor, without apparent damage, caused it to be shut down).

[15] *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986) (finding policyholder could claim Business Income coverage where risk of collapse necessitated abandonment of grocery store).

[16] In chronological order: *Hetrick v. Valley Mut. Ins Co.*, 15 Pa. D. & C. 4th 271, 1992 WL 524309, at *3 (Pa. Comm. Pl. May 28, 1992) (finding that there would be coverage for loss of use of a house if an outside oil spill made the house uninhabitable); *Largent v. State Farm Fire & Cas. Co.*, 842 P.2d 445, 446 (Or. App. 1992) (noting insurance company conceded methamphetamine fumes could cause "accidental direct physical loss"); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. App. 1993) (finding costs of methamphetamine odor covered as direct physical loss or damage); *Azalea, Ltd. v. American States Ins. Co.*, 656 So. 2d 600, 602 (Fla. Dist. Ct. App. 1995) (finding damage to sewage treatment plant from chemicals that destroyed a bacteria colony necessary for the plant to operate amounted to "direct damage to the structure"); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, No. 9400837, 1996 WL 1250616, at *2 (Mass. Super. Mar. 15, 1996) (finding oil fumes present in house after discovery of oil leak constituted physical damage to the house); *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, 17 (W. Va. 1998) (concluding that a home rendered dangerously unlivable by the presence of falling rocks had suffered a "direct physical loss to the property"); *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 78 Cal. App. 4th 847, 865 (2000) (intermingling of a quarter pound of wood shavings in 80,000 pounds of almonds caused physical loss or damage to the almonds even though the almonds were structurally unchanged); *Matzner v. Seaco Ins. Co.*, 9 Mass. L. Rptr. 41, 1998 WL 566658, at *4 (Mass. Super. Aug. 12, 1998) (concluding that the phrase "direct physical loss or damage" was ambiguous and could mean either "only tangible damage to the structure of insured property" or "more than tangible damage to the structure of insured property," and that "carbon monoxide contamination constitutes 'direct physical loss of or damage to' property"); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. 98-434-HU, 1999 WL

which the section in COUCH ON INSURANCE – upon which the Insurance Industry Parties rely, although they omit reference to the section discussing cases like those in the above footnotes – was written.

### 2. In the Early 2000s, the Insurance Industry Made Payments in Relation to Claims of Loss from SARS-CoV-1.

In the early 2000s, there were a number of other decisions finding that unusual circumstances nonetheless caused direct physical loss or damage to property.[17]

Consistent with this, and the previous cases decided in the period 1957-2000, the insurance industry paid a number of claims for loss caused by the original novel coronavirus, SARS-CoV-1, which led to a pandemic in 2002-2004. As noted in an article in the Washington Post titled "Insurers knew the damage a viral pandemic could wreak on businesses. So they excluded coverage":

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619100, at *7-8 (D. Or. Aug. 4, 1999) (finding that policyholder could bear its burden to demonstrate that clothes impregnated with mold or mildew suffered "direct physical loss or damage" if it established "at trial a class of garments which has increased microbial counts and that will, as a result, develop either an odor or mold or mildew"); *Board of Educ. v. International Ins. Co.*, 720 N.E.2d 622, 625-26 (Ill. App. 1999) (*citing* liability insurance coverage cases finding that incorporation of asbestos into buildings caused "property damage," defined under liability policies to be "physical injury to or destruction of tangible property," and finding that policyholder had established that the asbestos fiber contamination constituted Property Damage).

[17] In chronological order: *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 825-26 (Minn. 2000) ("A principal function of any living space [is] to provide a safe environment for the occupants" and "[i]f rental property is contaminated by asbestos fibers and presents a health hazard to the tenants, its function is seriously impaired"); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *8-*9 (D. Or. June 18, 2002) (concluding that mold damage to house could constitute "distinct and demonstrable" damage and that inability to inhabit a building may constitute "direct, physical loss"); *Cooper v. Travelers Indem. Co. of Ill.*, No. 01-cv-2400, 2002 WL 32775680, at *1 (N.D. Cal. Nov. 4, 2002) (coliform bacteria and E.coli); *Graff v. Allstate Ins. Co.*, 54 P.3d 1266, 1269 (Wash. Ct. App. 2002) (methamphetamine vapors); *Yale Univ. v. CIGNA Ins. Co.*, 224 F. Supp. 2d 402, 413 (D. Conn. 2002) (finding while the presence of asbestos and lead in buildings did not constitute "physical loss of or damage to property," contamination by such materials could, citing "the substantial body of case law" "in which a variety of contaminating conditions have been held to constitute 'physical loss or damage to property'").

> 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.[18]

Accordingly, by the mid-2000s, not only did the insurance industry, including Cincinnati, know that courts had found that standard-form property insurance forms covered claims from the infusion of property with substances rendering its intended use dangerous, the insurance industry specifically knew that its members had paid claims alleging loss or damage from the presence of a novel coronavirus.

### 3. Insurance Industry Drafting Organizations Paid Close Attention to the Development of Case Law in this Area.

The trend in cases discussed above from 1957 onward continued in the mid-2000s after the industry paid claims from SARS-CoV-1.[19] The insurance industry, through its ratings

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[18] Todd C. Frankel, "Insurers knew the damage a viral pandemic could wreak on businesses. So they excluded coverage," Washington Post (April 2, 2020) (attached hereto as Exhibit **1**).

[19] In chronological order: *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 824, 826–27, 824–26 (3d Cir. 2005) (E. coli); *De Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 722-23 (Tex. App. Mar. 31, 2005) (finding mold damage constituted "physical loss to property"); *Schlamm*, 2005 WL at *4 (finding that "the presence of noxious particles, both in the air and on surfaces of the plaintiff's premises, would constitute property damage under the terms of the policy"); *Cook v. Allstate Ins. Co.*, No. 48D02-0611-PL-01156, 2007 Ind. Super. LEXIS 32, at * slip op. at 9-10 (Ind. Super. Ct. Madison County Nov. 30, 2007) (finding that infestation of house with Brown Recluse Spiders constituted "sudden and accidental direct physical loss" to the house: "Case law demonstrates that a physical condition that renders property unsuitable for its intended use constitutes a 'direct physical loss' even where some utility remains and, in the case of a building, structural integrity remains"); *Brand Mgt., Inc. v. Maryland Cas. Co.*, No. 05-cv-02293, 2007 WL 1772063, at *2 (D. Colo. June 18, 2007) (noting, where a sushi manufacturer which closed for 15 days to disinfect its premises after discovery of listeria

organizations, its claims handlers, its coverage counsel, and its employees reading trade journals, was well aware of the decisions.

To the extent there is any doubt of this, the Insurance Services Office ("ISO") and the American Association of Insurance Services ("AAIS") have admitted that it was part of their responsibility to their member companies (including Cincinnati) to monitor the common law on standard-form property insurance policies, and that such review prompted them to draft changes to the standard forms to eliminate ambiguities:

> 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.[20]

It was no secret in the insurance industry that courts had found unusual events that do not visibly alter property – like SARS-CoV-1 – nonetheless cause physical loss or physical damage to that property; indeed, anyone reading one of these cases recounted above would soon learn of the rest.[21]

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contamination, the insurance company voluntarily paid the Business Income claim during that period); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co.*, No. 05-1315, 2007 WL 464715, at *8 (D. Or. Feb. 7, 2007) (finding, where the policyholder's heat treater for medical implants was contaminated by lead when a lead hammer was mistakenly left in it, this was "physical loss or damage": "There is no question that the physical transformation of the furnace which rendered it useless for processing medical devices, the use for which it was specially certified, reduced both the value of the furnace and [the policyholder's] ability to derive business income from the furnace. This reduction of value was caused by an incident that is fairly characterized as 'direct physical damage'").

[20] ISO Circular dated July 6, 2014 ("ISO Circular"), at 7 of 13.

[21] For instance, one of the first such decisions, *First Presbyterian Church* (gasoline vapors) was subsequently cited by a host of other similar decisions. *Lillard-Roberts*, 2002 WL 31495830, at *8-9 (mold); *Matzner*, 1998 WL 566658, at *4 (carbon monoxide); *Trutanich*, 858 P.2d at 1335 (methamphetamine fumes); *Hetrick*, 1992 WL 524309, at *3 (oil fumes).

### 4. As a Result of Their Close Review of the Common Law, and the Insurance Industry's Payments for Loss from SARS-CoV-1, ISO and AAIS Drafted the Virus or Bacteria Exclusion.

The trend in the common law, and insurance company payments in relation to SARS-CoV-1, motivated the insurance-industry drafting organizations, on behalf of its members, to draft the Exclusion for Loss Due to Virus or Bacteria in 2006.[22] On July 6, 2006, ISO submitted an ISO Circular announcing "the submission of form filings to address exclusion of loss due to disease-causing agents such as viruses and bacteria."[23] In relevant part, the ISO Circular states that property policies had not historically been a source of cover for loss from "disease-causing agents,"[24] which, as shown above, was not true. ISO further stated that it aimed to prevent efforts to "expan[d]" coverage under standard-form wordings, contrary to policy intent; *i.e.*, to remove what it recognized was at least an ambiguity:

> 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.**

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22 Lucca de Paoli, *et al.*, "Insurance Unlikely to Cushion Coronavirus Losses – But There Are Exceptions," Insurance Journal (Mar. 4, 2020) (attached hereto as Exhibit **2**).

23 ISO Circular, at 2 of 13 (attached hereto as Exhibit **3**).

24 *Id.* at 7 of 13.

> In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.[25]

In the same time period, AAIS's Filing Memorandum sent to state regulators likewise stated, incorrectly, that property policies had not been a source of recovery for loss or damage caused by disease-causing agents. As relevant here, however, AAIS stated that the new exclusion was intended to "clarify policy intent"; *i.e.*, to remove ambiguity:

**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.[26]

ISO's and AAIS's statements to regulators are legally and factually the equivalent of statements by Cincinnati to its policyholder, and should be considered admissions of Cincinnati. The process by which insurance industry drafting organizations draft and seek approval to sell standard-form insurance policy language is set forth in detail in *Morton International, Inc. v. General Accident Insurance Co.*, 629 A.2d 831 (N.J. 1993). First, the insurance industry will

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[25] *Id.* (emphasis added).

[26] Property Lines - PA 10/06, Copyright, American Association of Insurance Services, Inc., 2006, filed in reference to CL 0700 10 06 (emphasis added), attached hereto as Exhibit **4**.

identify a change it wishes to make to standard forms, such as an exposure it wishes to exclude.[27] The insurance industry drafting organizations will draft the change.[28] The insurance industry drafting organizations will then seek regulatory approval, typically by submitting the same change and the same explanatory memorandum to each of the state regulators and meeting with individual regulators as necessary.[29] The insurance industry drafting organizations will then negotiate with the insurance regulators with regard to the changes they seek to make and whether those changes will require adjustment of rates.[30] Once approval is obtained, the standard form is sold throughout the United States, with no ability of individual policyholders to negotiate changes.[31] As *Morton* explained in relation to the insurance industry's efforts, through the Insurance Rating Board ("IRB") (a predecessor of ISO) to add a pollution exclusion to the standard-form comprehensive general liability ("CGL") policy:

> In considering the IRB's explanatory memorandum concerning the effect of the pollution-exclusion clause which the record suggests was the only explanation offered to New Jersey insurance officials-we accord special significance to the process by which that clause gained approval in New Jersey and other states. Realistically, once the clause gained regulatory approval, it was uniformly adopted as an endorsement to the standard form CGL policies that were issued to innumerable commercial enterprises and governmental agencies for more than a decade. The abundant case law called to our attention by counsel for all parties may be regarded merely as an illustrative sample of the virtually universal inclusion of the standard clause, or one of its derivatives, in CGL policies issued throughout the United States. **Of course, after regulatory approval the specific provisions of the pollution-exclusion clause ordinarily were not negotiable by purchasers of CGL policies.** As some commentators observe, the typical commercial insured rarely sees the policy form until after the premium has been paid. Ballard and Manus, supra, 75 Cornell L.Rev. at 621; W. David Slawson, Mass Contracts: Lawful Fraud in California, 48 S.Cal.L.Rev. 1, 12 (1974).

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27 *Id.* at 849-50.

28 *Id.* at 850.

29 *Id.* at 851.

30 *Id.* at 851-52.

31 *Id.* at 851.

> **Accordingly, to the extent that the pollution-exclusion clause ever was subjected to arms-length evaluation by interests adverse to the insurance industry, that evaluation occurred only when the clause was submitted to and reviewed by state regulatory authorities**.[32]

It is UP's understanding that Cincinnati was and is a member of ISO. As a result, ISO's statements to the effect that it understood that its policy language – absent the Virus or Bacteria Exclusion – was at least ambiguous as to whether it applied to loss caused by the presence of a virus is the equivalent of an admission by Cincinnati of this ambiguity to Neuro-Communications.

Note, however, that what the insurance industry drafting organizations did not do is seek to define "physical loss" or "physical damage" to include any one of the twenty plus definitions offered by the Insurance Industry Parties in this case (collected in Section I.C below).

#### 5. From 2007 through 2018, Courts Repeatedly Concluded that Policyholders Were Correct in Asserting that Events Rendering Property Unfit or Unsafe for Intended Use Caused Physical Loss or Damage.

After the insurance industry drafted the Virus or Bacteria Exclusion, courts continued to rule for policyholders in circumstances like those here.[33]

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[32] *Id.* at 852-53 (emphasis added).

[33] In chronological order: *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 968 A.2d 724, 734 (N.J. Super. App. Div. 2009) ("In the context of this case, the electrical grid was 'physically damaged' because, due to a physical incident or series of incidents, the grid and its component generators and transmission lines were physically incapable of performing their essential function of providing electricity."); *Manpower Inc. v. Insurance Co. of the State of Pa.*, No. 08C0085, 2009 WL 3738099, at *1 (E.D. Wis. Nov. 3, 2009) (finding "direct physical loss … or damage to" a building adjacent to a building which collapsed despite the fact that the collapse did not cause any noticeable damage to the policyholder's occupied space); *Travco Ins. Co. v. Ward*, No. 2:10cv14, 2010 WL 2222255, at *8-9 (E.D. Va. June 3, 2010) (finding that house built with Chinese drywall which emitted toxic gases, causing the policyholder to move out, had suffered direct physical loss, despite the fact that it was "physically intact, functional and ha[d] no visible damage," noting the majority of cases nationwide find that "physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces"); *In re Chinese Mfr'd Drywall Prods. Liab. Litig.*, 759 F.

### 6. Insurance Companies Confirmed the Majority Rule that Events Rendering Property Unfit for Its Intended Use Cause Physical Loss or Damage.

Beyond this, prior to the run of claims by policyholders as a result of loss from COVID-19 and SARS-CoV-2, insurance companies had confirmed the status of the law discussed above. For instance, three months before the pandemic, Factory Mutual Insurance Company – perhaps the most sophisticated property insurance company in the United States – 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.[34]

At issue in *Factory Mutual Insurance Co. v. Federal Insurance Co.* was a mold infestation in a "clean room" at a drug manufacturing plant.[35] Mold (and its spores), like SARS-CoV-2 virions, can exist on the surface of property and in the air. FM argued the mold infestation constituted "physical loss or damage" under a property insurance policy sold by Federal Insurance Company because the mold "destroyed the aseptic environment and rendered

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Supp. 2d 822, 831 (E.D. La. 2010) (finding that there "exists a covered physical loss" where "potentially injurious material" is "activated, for example by releases gases or fibers," and "that the presence of Chinese-manufactured drywall in a home constitutes a physical loss" because it "renders the [policyholders'] homes useless and/or uninhabitable"); *Association of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1068 (D. Haw. Apr. 9, 2013) (applying Hawai'i law) (finding that intrusion of arsenic into roof caused "direct physical loss or damage" to the roof); *Gregory Packaging*, 2014 WL 6675934, at *5-6 (concluding that "property can sustain physical loss or damage without experiencing structural alteration," that "the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated," and therefore that the ammonia discharge caused direct physical loss or damage to the plant); *Mellin v. Northern Sec. Ins. Co.*, 115 A.3d 799, 806 (N.H. 2015) (holding that pervasive odor of cat urine was "physical loss" to condominium); *Oregon Shakespeare Festival*, 2016 WL 3267247, at *5-6 (smoke from wildfires).

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

[35] *Id.* at 3.

[the clean room] unfit for its intended use."[36] FM asserted case law "broadly interprets the term 'physical loss or damage' in property insurance policies."[37] Citing several of the cases cited above, FM represented to the court that loss of use is physical loss or damage:

> **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 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).[38]

FM reiterated that what was key was whether property could be used as it was used prior to the occurrence, and, essentially, that the Period of Restoration was the period which lasted until customers viewed the policyholder's location as safe:

> The period of time as well as costs required to bring [the policyholder's] facility to the **level of cleanliness** following the mold infestation required by [the policyholder's] customers is **also** physical loss or damage covered by the Federal policy. The facility was damaged by stringent requirements of [the policyholder'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. . . . Without the customers' approval of the restored aseptic conditions following the mold infestation, [the] facility remained unusable.[39]

Moreover, FM conceded that, **at worst**, it had put forward a reasonable interpretation of the undefined phrase "physical loss or damage" – akin to the undefined terms "physical loss" and

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36 *Id.*

37 *Id.*

38 *Id.* at 3-4 (emphasis added).

39 *Id.* at 4-5 (emphasis added).

"physical damage" here – and even if Federal could propose a reasonable reading, this merely rendered the subject policy ambiguous.[40]

### 7. The Failure of the Insurance Industry To Draft Specific Language To Achieve the End They Seek Here – Such as the Twenty Formulation of the Insurance Industry Parties in their Briefs to this Court – Must Have Consequence.

Decisions addressing claims for loss or damage from SARS-CoV-2 and COVID-19 have noted that courts, in wrestling with the issue since 1957, had essentially begged the insurance industry to make their language more specific. For instance, in *Cherokee Nation v. Lexington Insurance Co.*, No. CV-20-150, 2021 WL 506271 (Okl. Dist. Jan. 28, 2021), the policyholder, in response to the COVID-19 pandemic, temporarily closed its business operations to implement mitigation protocols and modifications, such as acrylic barriers and sanitation stations, staggering seating and gaming machines, and replacing air filters, to allow its businesses to operate safely.[41] The policyholder sought coverage for its losses of income under a policy triggered by "all risk of direct physical loss or damage," which "important phrase" was not defined.[42] The insurance companies argued that "direct physical loss or damage" was a "phrase-of-art" which means "distinct, demonstrable, physical alteration to the property."[43] The court first noted that the interpretation of this phrase "could have been preempted if [the insurance companies] would have simply defined the phrase within the [insurance] Policy," noting that "[c]arriers have utilized the phrase *direct physical loss* for over fifty (50) years and courts have begged carriers to define the phrase to avoid the precise issue before the Court now."[44] Later in

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40 *See id.* at 3 n.1.

41 *Id.* at *1-2.

42 *Id.* at *3.

43 *Id.*

44 *Id.*

the opinion, the court noted "[i]t is also notable that since at least 1968, several courts have rejected [the insurance companies'] interpretation and instructed carriers to clearly limit *direct physical loss or damage* within their policies for it to have the meaning [the insurance companies] advance here," but the insurance companies "failed to do so."[45]

"Despite these pleas and the known confusion surrounding the phrase 'direct physical loss,' Defendant Insurers made no attempt to clarify or define that phrase within the [insurance] policy to avoid the [policyholder's] that losses such as the closure of a business in response to the Pandemic would be covered – at least, not until it was too late."[46] Specifically, the insurance companies added a Communicable Disease exclusion, which the court construed against them:

> The day after the [policyholders] filed this same action under this same policy, Defendant Insurers added a new Communicable Disease exclusion to the [insurance] Policy that preempted coverage due to the fear or threat of viruses. This action on the part of the Defendant Insurers can mean one of two things. Either the exclusion was added to provide clarity for [the insurance companies'] interpretation—i.e., that Pandemic-related closures like the one at issue here are not covered—which underscores the confusion surrounding the existing policy language and the conclusion that the [insurance policy] is ambiguous. Or the exclusion was added because the [policyholders'] interpretation is correct—i.e., that Pandemic-related closures like the one at issue here are covered—and Defendant Insurers needed to create a truly new exclusion in order to avoid liability for such claims. In either event—even assuming the Defendant Insurer[s'] interpretation of the existing language is reasonable—Oklahoma law would require the Court to adopt the [policyholders'] interpretation.[47]

**8. Since the SARS-CoV-2 Pandemic, Insurance Companies Have Drafted Additional Exclusions To Address Loss from the Infusion of Property with Virus.**

As shown above in the discussion of *Cherokee*, since the inception of the COVID-19 pandemic, insurance companies have drafted a number of exclusions to bar coverage for loss

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45 *Id.* at *7 n.16.

46 *Id.* at *3.

47 *Id.* at *4.

arising from infusion of property with a virus or other communicable disease, such as the following:

> COMMUNICABLE DISEASE EXCLUSION
>
> This policy, subject to all applicable terms, conditions and exclusions, covers losses attributable to direct physical loss or physical damage occurring during the period of insurance. Consequently and notwithstanding any other provision of this policy to the contrary, this policy does not insure any loss, damage, claim, cost, expense or other sum, directly or indirectly arising out of, attributable to, or occurring concurrently or in any sequence with a Communicable Disease or the fear or threat (whether actual or perceived) of a Communicable Disease.[48]

In fact, one estimate from the National Association of Insurance Commissioners is that 83% of 80% of property policies in effect when the pandemic struck incorporated the ISO exclusion.[49] Yet, despite their knowledge of the risk of pandemic, some insurance companies did not exclude it, and their failure to use clear and distinct language to address the issue must be held against them.

> When carriers fail to use clear and distinct language to exclude a cause of loss known in the market, they "act at their own peril." *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.* [] 505 F.2d 989, 1001 (2d Cir. 1974). As with the definition of *direct physical loss*, the [insurance companies] could have included language that would have clarified any ambiguity regarding pandemic coverage, but they chose not to do so. Indeed, [the insurance companies'] choice to add the "Communicable Disease Exclusion" (discussed above) underscores the conclusion that the policy at issue does not clearly and distinctly exclude pandemics.[50]

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48 2021 WL 506271, at *6.

49 *See* *https://content.naic.org/sites/default/files/naic-covid-19-report-update3-eoy-2020.pdf*, at 23.

50 *Id.*

### C. In Evaluating the "Core Purpose" and the "History" of Standard-Form Policy Language, the Key Point Is That the Insurance Industry Has Known, for Sixty Years, That Its Language Could Be Held To Cover Loss or Damage from Viruses, But Did Not Change the Language; Rather, It Only Drafted a Virus Exclusion.

Cincinnati argues that the absence of definitions for "physical loss" and "physical damage" does not make the terms ambiguous, then pivots to say "the absence of a contractual definition for every word in the operative phase is not pertinent."[51] These points are not the same. UP would not necessarily disagree with the former proposition, but strongly disagrees with the latter in circumstances like those presented in this appeal.

Cincinnati, and the rest of the insurance industry, knew that "physical loss" and "physical damage" were being construed to cover loss or damage from bacteria, smoke, ammonia, asbestos, radon, *etc.*, and from the first novel coronavirus, SARS-CoV-1. It is extremely "pertinent" that the insurance industry – if it truly disagreed with these decisions – did not change the standard-form terms wording by redrafting it or defining the terms, just as it is "pertinent" that the insurance industry drafted the Virus or Bacteria exclusion.

It certainly would have been easy enough for the insurance industry to define its standard terms to add the words of limitation the Insurance Industry Parties insist this Court must deem those standard-form terms to include. By UP's conservative count, the Insurance Industry Parties have offered more than a score definitions of the terms "physical loss" and "physical damage," which UP lists in rough, alphabetical order:

"actual, *physical* alteration or change to property."[52]

"actual, tangible alteration of property."[53]

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51 Cincinnati Merit Br. at 13.

52 Cincinnati Merit Br. at 32.

53 Merit Brief of Amici Curiae, State Auto Mutual Insurance Company, in Support of

"actual, tangible physical alteration or structural damage."[54]

"distinct, demonstrable, physical alteration."[55]

"material or perceptible destruction, harm, or ruin to covered property."[56]

"material or perceptible harm to property."[57]

"material or perceptible harm or alteration to the covered property."[58]

"material, perceptible harm or structural change to property."[59]

"material, perceptible and structural harm."[60]

"perceptible, tested or documented change to any conditions."[61]

"perceptible, and structural changes to property."[62]

"perceptible, verifiable and physical alteration of conditions."[63]

"physical alteration to property."[64]

"physical alteration or structural damage."[65]

"physically, tangibly alter property."[66]

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Petitioners, the Cincinnati Insurance Company, the Cincinnati Casualty Company, and the Cincinnati Indemnity Company ("State Auto Merit Br."), at 19.

54 Cincinnati Merit Br. at 17.

55 State Auto Merit Br. at 15; Nationwide Br. at 3.

56 State Auto Merit Br. at 9.

57 *Id.* at 3.

58 *Id.*

59 *Id.* at 5.

60 *Id.* at 6. State Auto Merit Br. at 3.

61 State Auto Merit Br. at 11.

62 *Id.* at 13.

63 *Id.* at 17.

64 Cincinnati Merit Br. at 2.

65 *Id.* at 18.

66 *Id.* at 3.

"physical, tangible loss or damage."[67]

"structurally altered."[68]

"structural, tangible or perceptible harm to covered property."[69]

"tangible, perceptible alteration or physical change of the property."[70]

"tangible, physical alteration to property."[71]

"tangible, physical alteration to the property or structural damage to it."[72]

UP submits this mass of differing definitions shows three things. First, the insurance industry could have easily inserted any one of these definitions in its standard-form wording. Second, the Insurance Industry Parties believe "loss" and "damage" are sufficiently nebulous and plastic to mean any of these twenty phrases. Two *amici* appear to understand that their peers are essentially conceding the terms are inherently ambiguous; these parties argue the terms have only one meaning that they repeat over and over again.[73] Third, and perhaps most critically, Cincinnati understands that for it to prevail, the phrases "physical loss" and "physical damage" must be "**read to require** physical alteration to property."[74] In other words, Cincinnati understands that, for it to prevail, this Court must read a broad promise of coverage to include words of limitation that Cincinnati and the Insurance Industry have no problem drafting in post-claim insurance coverage litigation but chose not to draft prior to sale.

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67 *Id.* at 25.

68 *Id.* at 14.

69 State Auto Merit Br. at 3.

70 *Id.* at 6.

71 Cincinnati Merit Br. at 12; American Property Casualty Insurance Association Br. at 16.

72 Cincinnati Merit Br. at 2.

73 Nationwide and the Ohio Insurance Institute only use "distinct, demonstrable, physical alteration" of property (the Couch definition).

74 *Id.* at 2 (emphasis added)

UP submits that if the Insurance Industry Parries can persuade this Court to deem "physical loss" or "physical damage" to include one or more of these twenty formulations, the phrase is at least pliable enough to encompass the inability to use property, the standard that courts across the country have adopted since 1957.

## II. It is True That, Like Asbestos or Carbon Monoxide, Viruses are in General Circulation in the Air We All Breathe, But What is Important Under Property Insurance is The Concentration of Those Contaminants at Particular Times and Places.

Cincinnati argues that SARS-CoV-2 "has been generally present in Ohio for over a year," but "the virus does not physically, tangibly alter property," but rather only "hurts people."[75] "The mere presence of a virus in the community generally, at a premises or on surfaces does not satisfy that requirement."[76] If "the mere presence of a virus in the community becomes direct physical loss or damage to property, then all property, everywhere and at all times, has been physically lost or damaged because viruses, abound, everywhere and at all times."[77]

While this point has surface appeal, the same can be said for many if not most of the disease-causing substances which courts have, historically, found can cause physical loss or damage. Asbestos is everywhere:

> All of us have more than a million sharp mineral fibres in our lungs by the time we die. In our cities there are around 11 mineral fibres in every litre of air and we each inhale around 300,000 fibres a day.[78]

Likewise, ammonia is everywhere, smoke is everywhere, radiation is everywhere, bacteria is everywhere, brown recluse spiders, if not everywhere, are commonplace. What is relevant for present purposes is not the ubiquity of a disease-causing substance, but its concentration, or

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75 *Id.* at 3.

76 *Id.*

77 *Id.* at 3-4.

78 https://www.theguardian.com/science/2002/jan/17/physicalsciences.technology

suspected concentration, at a particular time and place. Courts find physical loss or damage when health-harming substances are present on property in amounts that render it dangerous to use that property.

For instance, State Auto mentions the novovirus.[79] Can it seriously be contested that a cruise ship infused with novovirus to the extent that the majority of crew and passengers had become infected had not suffered physical loss or damage from the presence of that novovirus?

The question is whether the presence or suspected presence of SARS-CoV-2 virions at a particular time and place was so dangerous that it caused the loss of use of property. Here, in specific relation to the locations of Neuro-Communications, Civil Authorities certainly thought that the presence or suspected presence of SARS-CoV-2 rendered those locations too dangerous to use. Historically, courts have recognized that that existing loss or damage to property damage is often confirmed by orders of civil authorities.[80] UP submits that is what happened here.

## III. THE BRIEFS OF THE INSURANCE INDUSTRY PARTIES WELL DEMONSTRATE THE INSURANCE INDUSTRY STRATEGY – CITE THE SAME QUESTIONABLE SOURCES OVER AND OVER AND DECLARE VICTORY.

The briefs of the Insurance Industry Parties reflect the core strategy of the insurance industry to claims of loss from SARS-CoV-2: repeat and repeat statements that they are winning without looking too closely at the actual arguments. UP submits that the references to COUCH ON INSURANCE § 148:46 is a perfect example of this strategy in action.

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79 State Auto Merit Br. at 20.

80 *Manpower Inc. v. Insurance Co. of the State of Pa.*, No. 08C0085, 2009 WL 3738099, at *4 (E.D. Wis. Nov. 3, 2009) ("Because coverage was available under the ordinary business interruption provisions of the policy, and the order of the [civil authority] merely confirmed that the collapse rendered the entire building unstable, the $500,000 sublimit on civil authorities coverage does not apply.").

As far as UP can determine, at some point in the late 1990s, the treatise COUCH ON INSURANCE included a new section, § 148:46, titled "Generally; 'Physical' loss or damage." (The first case to cite this section was *Columbiaknit*, in 1999.) This section of COUCH ON INSURANCE has been a feature of a majority of the cases ruling against policyholders on the issue of whether orders of Civil Authority or the presence of SARS-CoV-2 at or on property cause "loss" or "damage" to property. Those courts, and Cincinnati, Nationwide and Ohio Insurance Institute, cite the fourth paragraph – and only the fourth paragraph – of that section,[81] which reads:

> The requirement that the loss be "physical," given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.[82]

For its conclusion in this paragraph, the current version of COUCH cites five cases relative to the issue in this case,[83] only one of which was decided when this section was originally drafted: *Benjamin Franklin.*

In the next (and fifth) paragraph, however, the author states – perhaps tellingly, in the passive voice – the quite obvious point from the cases cited in Section I.B above that "[t]he opposite result has been reached":

> The opposite result has been reached, allowing coverage based on physical damage despite the lack of physical alteration of the property, on the theory that

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81 Cincinnati Merit Br. at 14; Nationwide Br. at 5-6; Ohio Insurance Institute Br. at 7.

82 10A COUCH ON INSURANCE § 148:46.

83 *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002); *Universal Image Prods., Inc.* v. *Federal Ins. Co.*, 475 Fed. App'x 569, 573 (6th Cir. 2012); *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, No. 13 Civ. 2177(PAE), 2014 WL 1642906 (S.D.N.Y. Apr. 24, 2014); *Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass'n*, 793 F. Supp. 259, 263 (D. Or. 1990); *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 115 Cal. Rptr. 3d 27, 38 (Cal. App. 2010).

> the uninhabitability of the property was due to the fact that gasoline vapors from adjacent property had infiltrated and saturated the insured building, and the theory that the threatened physical damage to the insured building from a covered peril essentially triggers the insured's obligation to mitigate the impending loss by undertaking some hardship and expense to safeguard the insured premises.[84]

In support of this conclusion in this paragraph, COUCH, inexplicably, cites only two[85] of the ten or so cases that found in favor of coverage at the time the section was drafted. As shown in Sections I.B.5, this disparity has only grown over time, and the third edition of COUCH continues to cite, disingenuously, only two of the three dozen cases finding coverage.[86]

While UP believes this treatment by COUCH misrepresents state of the law, both in the mid-1990s and as of March 2020, what is important for this Court's consideration is that COUCH – the very insurance industry source that Cincinnati relied upon below and no doubt will rely upon in this Court – recognizes a split in authority; *i.e.*, that it is at least ambiguous as to whether "physical loss or damage" can be caused by events rendering property unfit for its intended use, without "physical alteration" of that property. The Insurance Industry Parties in no way address this split which, as one of their member recognizes, means that the relevant terms at issue in this case are at least ambiguous.

## IV. THE COURT SHOULD NOT BE SWAYED BY SELF-SERVING WARNINGS ABOUT RUINING THE INSURANCE INDUSTRY—INSURERS MAKE THESE CLAIMS AFTER *EVERY* DISASTER, AND THEY ARE ALWAYS OVERSTATED.

This pandemic has imposed hardship and losses for a wide range of business concerns—some have gone out of business already, and others likely will before the pandemic is over. The

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84 10A COUCH ON INSURANCE § 148:46.

85 *First Presbyterian Church* and *Hampton Foods.*

86 10A COUCH ON INSURANCE § 148:46.

Insurance Industry Amici argue at length that a decision finding that "physical loss or damage" includes loss of use would bankrupt the insurance industry.[87]

This is no basis to decide coverage: insurance policies should not be interpreted with the thumb on the scale to the benefit of either insurer or policyholder because of the impact the result would have to party's industry. Rather, insurance contracts should be interpreted according to long-standing precedent and rules of construction, and in accordance with public policy favoring the spread and transfer of risk through the purchase of insurance.

Indeed, this is a threadbare cry. Too often, when they have faced a significant new loss, or when laws change that may lead to a proverbial avalanche of claims, insurance companies have sounded a false alarm of industry-wide insolvency. Typically, this is paired with a claim that their property insurance policies "never meant to cover that." That predicted collapse, however, has never arrived. Going back thirty years, insurers attempted to color the coverage discussion by asserting that the liability from claims launched by the passage and enforcement of the then-new strict liability environmental statute, CERCLA would bankrupt them.[88] Yet, insurers survived despite the fact that many courts found coverage for claims in CGL policies. The same can be said for the dire predictions about the losses insurers faced from asbestos claims, the aftermath of Hurricane Katrina, the World Trade Center attacks on 9/11, and SARS. Despite catastrophic events that affected millions of people, businesses, and properties, the insurance industry survived. It would be unwise and unjust to allow concerns about the number

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87 Brief of *Amicus Curiae* Ohio Insurance Institute in Support of Petitioners and Answering the Certified Question in the Negative ("Ohio Insurance Institute Br."), at 8-12; American Property Casualty Insurance Association Br. at 9-13.

88 In testimony given before Congress in 1990, insurance industry representatives sounded the alarms, claiming that the cost of cleaning up even part of the pollution issues will be five times their total "surplus" and could be ruinous. *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), pp. 18-29 and 75-76.

of claims and amount of losses facing the industry to guide the interpretation of the terms of the policy before the Court. Rather, the appropriate thing to do is to follow the rules of construction and let precedent and sound legal reasoning guide us where they may. As the California Supreme Court put it nearly 25 years ago when insurers (represented by some of the same counsel who appeared on behalf of the Insurance Industry in the present case) made the same arguments that the Insurance Industry is making here:

> We shall assume for argument's sake that Aerojet has enjoyed great good luck over against the insurers. But the pertinent policies provide what they provide. Aerojet and the insurers were generally free to contract as they pleased. . . . They evidently did so. They thereby established what was "fair" and "just" inter se. We may not rewrite what they themselves wrote. . . . We must certainly resist the temptation to do so here simply in order to adjust for chance — for the benefits it has bestowed on one party without merit and for the burdens it has laid on others without desert. . . . As a general matter at least, we do not add to, take away from, or otherwise modify a contract for "public policy considerations."

*Aerojet Gen. Corp. v. Transport Indem. Co.*, 17 Cal. 4th 38, 75-76 (1997).

In fact, to the knowledge of UP, no insurance company has entered insolvency due to the pandemic. Few other industries have been so fortunate.

Indeed, insurers have done *very* well during the pandemic. The precipitous drop in claims (and claim payments) in the last year have led to enormous windfalls for insurers. 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.[89] Chubb Ltd. reported net income of $1.19 billion in Q3 2020 – up 9.4%, or $100 million, from the year before.[90] CNA Insurance similarly reported a $106 million increase in net income in the same

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89 R. 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

90 C. Wilkinson, *Chubb reports gains in Q3 profit, net premium written*, Business Insurance (Oct. 8, 2020), available at https://www.businessinsurance.com/article/20201028/NEWS06/912337411?template=printart

period.[91] Berkley Insurance reported a massive 161% increase in Q4 2020.[92] Rather than pay the COVID-19 claims their policies cover, the insurers have been hoarding this surplus.

Not only that, but virtually all insurers *increased* rates on consumers in 2020, across all lines of business. The Arthur J. Gallagher Co., a large broker in Chicago, reported that 89% of its clients saw a rate increase for their property insurance – the "highest number recorded since the early 2000s."[93] From April through June 2020, property insurance rates spiked 22%, despite the insurers' refusal to pay COVID-19 claims and despite the historically low rate of insurance claims in general.[94] Insurers ratcheted up prices again between July and September, with a total increase of 24% for commercial property coverage.[95] From October to December 2020, property insurance premiums increased – again – by 20%.[96] Finally, in late 2020, insurers told consumers to expect increases of 15% to 25% for property insurance in 2021 – again, despite their refusal to pay any COVID-19 claims.[97]

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91 A. Childers, *CNA Reports Higher Net Income Despite Cat Losses*, Business Insurance (Nov. 2, 2020), available at https://www.businessinsurance.com/article/20201102/NEWS06/912337508?template=printart

92 J. Greenwald, *Berkley Reports 161% Jump in Profits*, Business Insurance (Jan. 26, 2021), available at https://www.businessinsurance.com/article/20210126/NEWS06/912339367/Berkley-reports-161-jump-in-profits

93 M. Lerner, *Most Policyholders See Rate Hikes Across Multiple Lines*, Business Insurance (Oct. 26, 2020).

94 M. Lerner, *U.S. Commercial Property Pricing up 22% in Q2*, Business Insurance (Aug. 10, 2020), https://www.businessinsurance.com/article/20201102/NEWS06/912337508?template=printart

95 C. Wilkinson, *Insurance Prices Increased Sharply in Third Quarter*, Business Insurance (Nov. 5, 2020), available at https://www.businessinsurance.com/article/20201005/NEWS06/912337014?template=printart

96 M. 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-

97 J. Greenwald, *Continued Rate Increases Expected: Willis*, Business Insurance (Nov. 19, 2020), available at

In all likelihood, the industry will be fine if it must pay COVID-19 claims. It enjoyed substantial windfalls in 2020 while the rest of the economy suffered. Clearly, it is hedging future exposure with drastic premium increases.

Ultimately, if some insurance company eventually lacks the resources to pay claims and liquidates, then the insurance industry funds state insurance guaranty associations to help pay the covered claims owed by insolvent insurance companies. Likewise, elected legislatures have the province to help industries that are failing due to catastrophic losses. With the pandemic, both federal and state legislatures have taken steps, and are considering additional steps, to relieve industries pummeled with losses from COVID-19. It is those bodies that are tasked with making policy choices in that regard, and that is where those decisions should rightfully remain.

## CONCLUSION

Respectfully submitted,

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Dated: July 30, 2021

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EXHIBIT 1

The Washington Post
*Democracy Dies in Darkness*

# 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

  119

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 2

INSURANCE JOURNAL

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’
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EXHIBIT 3

# 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.

## PERSON(S) TO CONTACT

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- the content of this circular, please contact:

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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 4

# 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 5

**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.

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