UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Nostalgic Partners LLC d/b/a Staten Island Yankees, Albuquerque Baseball Club LLC d/b/a Albuquerque Isotopes, Diamond Stadium Group LLC, Golden State Concessions & Catering Inc., Greenville Drive LLC, Lake Elsinore Storm LP, Long Ball Inc. d/b/a Spokane Indian Baseball Club, Northwest Baseball Ventures I LLC d/b/a Tri-City Dust Devils Baseball, Rancho Baseball LLC, Storm Events LLC, Storm Thredz LLC, 7th Inning Stretch LP d/b/a Delmarva Shorebirds,	:	No: 20-cv-03346-ABB
Plaintiffs,	:	
v.	:	
Philadelphia Indemnity Insurance Co.,	:	
Defendant.	:	

MOTION OF UNITED POLICYHOLDERS AND NATIONAL INDEPENDENT VENUE ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

United Policyholders ("UP") and National Independent Venue Association ("NIVA") (collectively referred to as "Amici Parties") moves the Court for an order permitting them to file an amicus curiae brief. The brief, a copy of which is attached, provides the Court additional context in relation to the nationwide, identical regulatory submissions made in 2006 by the Insurance Service Office, Inc. ("ISO") and the American Association of Insurance Services ("AAIS") to obtain approval for their member companies to sell insurance policies containing the Virus or Bacteria exclusion. The Amici Parties' brief also provides additional information relative to the how courts nationwide have, under standard-form language, found physical loss of

or damage to property affected by temporary conditions which are dangerous to human health prior to dissipating naturally – like COVID-19.

The Amici Parties have consulted with counsel for each party, and while Plaintiff's Counsel consents to the filing of this pleading, Counsel for Defendant do not.

I. INTEREST OF PROPOSED *AMICUS CURIAE*

a. United Policyholders ("UP")

The application of insurance contracts requires special judicial handling. Commerce, government and society benefit when losses are indemnified through insurance purchased by individuals and businesses. The insurance system is woven into the fabric of our economy through mandatory purchase requirements, prudent personal and business risk management and the pricing of goods and services. Each state regulates insurance contracts and transactions through its own set of laws and regulations, yet most insurers operate in multiple states. Most insurers serve three different masters when carrying out their important purpose, and the resulting conflicts that arise often compel judicial balancing, such as the instant case. Insurers must meet their own revenue objectives *and* the reasonable expectations of policyholders, *and* the demands of their investors and shareholders. Judicial oversight is essential to maintain the purpose and value of insurance purchases by individuals and businesses in this complex system.

Insurance policies are adhesive in nature and their language is increasingly less standardized.[1] That means insurers are using far more creativity in drafting policy terms and conditions and exclusions and limitations than in the past. This has made it much harder for state insurance regulators to review those terms and limitations and determine whether they will

[1] https://www.uphelp.org/library/resource/reevaluating-standardized-insurance-policies, by Professor Daniel Schwarcz, University of Minnesota Law School, Published in University of Chicago Law Review, Vol. 77, 2011, Minnesota Legal Studies Research Paper No. 10-65

effectuate or deprive the purchaser of the protection they intend to purchase. Compounding that challenge to state insurance regulators is that data mining, artificial intelligence and computerized risk modeling have made it literally impossible to give every new policy form the scrutiny it deserves.

Effectuating indemnification in case of loss despite these factors remains a fundamental economic and social objective that courts can advance. United Policyholders ("UP") respectfully seeks to assist this Court in fulfilling these important roles.

United Policyholders is a highly respected national non-profit 501(c)(3) organization. Founded in 1991, for nearly 30 years UP has operated as a dedicated advocate and information resource for individual and commercial insurance consumers throughout the entire United States. UP assists purchasers of insurance when seeking a policy or pursuing a claim for loss. For example, UP is routinely called upon to help individual policyholders in the wake of large-scale national disasters such as floods and windstorms in the Midwest, wildfires in Arizona, California, Colorado, New Mexico, Oregon and Washington, and hurricanes in the Gulf States and across the Eastern Seaboard. In 2020 UP has been engaged in the critical effort to assist business owners around the country whose operations have been impacted by COVID-19 and public safety orders. UP is conducting educational workshops for businesses and trade associations and maintaining an online help library at uphelp.org/COVID.

In addition to hosting disaster-relief workshops and clinics around the country and helping individual policyholders resolve coverage questions and claim disputes, UP routinely engages in nation-wide policy work to assist and educate the public, governmental agencies, and the courts on policyholders' insurance rights. Grants, donations, and volunteers support UP's work, which is divided into three program areas: Roadmap to Recovery™ (disaster recovery and

claim help), Roadmap to Preparedness (insurance and financial literacy and disaster preparedness), and Advocacy and Action (advancing pro-consumer laws and public policy).

Public officials, state insurance regulators, academics, and journalists throughout the U.S. routinely seek UP's input on insurance and legal matters. UP serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and in turn, the U.S. Treasury Department. UP's Executive Director has been an official consumer representative to the National Association of Insurance Commissioners since 2009. In that role, UP assists regulators in monitoring policy language and claim practices through presentations and collaboration and the development of model laws and regulations.

UP gave three separate NAIC presentations in 2020 on the topic of coverage and claims for Business Interruption related to COVID-19 and public safety orders.[2] The gist of UP's presentations was that there is evidence that insurers were not fully candid with regulators about the significance of virus and pandemic-related limitations and exclusions they added to their policies.[3] Although insurers had paid business interruption losses from hotel reservation cancellations due to SARS, when they added limitations and exclusions after that event, some told regulators they had *never* paid virus-related losses and that therefore there would be no rate

[2] NAIC Special Session on COVID-19 Lessons Learned, https://content.naic.org/sites/default/files/national_meeting/speakerbios_covid-19_lessons_learned_summer_nm_2020_0.pdf
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[3] https://www.propertycasualty360.com/2020/04/07/here-we-go-again-virus-exclusion-for-covid-19-and-insurers/?slreturn=20200927114442

decrease associated with the policy language change. Because there was no rate decrease and no clear notice that virus and pandemic related losses could be excluded, commercial policyholders were not aware of insurers' efforts to drastically reduce business interruption loss protection until 2020. Because policyholders (including plaintiff in this case) had no notice of a potentially very substantial hole in their insurance, they had no opportunity to cure the gap, hence the need for special judicial handling and careful scrutiny of this case.

Since 1991 UP has filed amicus curiae briefs in federal and state appellate courts across 42 states and in over 450 cases. Amicus briefs filed by UP have been expressly cited in the opinions of state supreme courts as well as the U.S. Supreme Court. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 105 A.3d 1181, 1185-6 (Pa. 2014).

By submitting a brief in this matter, UP seeks to fulfill the classic role of amicus curiae in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration. This is an appropriate role for amicus curiae. As commentators have often stressed, an amicus is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (*quoting* Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).

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A complete listing of all cases in which UP has appeared as amicus curiae can be found in our online Amicus Project library at www.uphelp.org.

Given its decades of experience, UP is uniquely suited to provide context to the application of standard-form property insurance wording to the issues in this case, including some additional context surrounding statements by ISO and AAIS to regulators which they made to secure regulatory approval for their member companies to sell policies with the Virus or Bacteria exclusion, as well as what individual insurance companies told regulators about that exclusion thereafter. Beyond this, UP seeks to ensure this Court has before it the factual context of certain case authorities relevant to issues raised by the parties. In short, UP seeks to ensure this Court has that full context before it when addressing the arguments in the Motion to Dismiss and the Response.

b. National Independent Venue Association ("NIVA")

The National Independent Venue Association ("NIVA") is a trade association formed in 2020 just prior to the pandemic, with about 2,900 charter members in all 50 states. NIVA's members are independent performing-arts venues, both for- and non-profit, employing thousands of people, and are part of the cultural backbone of their communities. Representative

Pennsylvania members include World Café Live in Philadelphia, Rex theatre and Mr. Smalls Theatre in Pittsburgh, and Basement Transmissions in Erie. Outside of Pennsylvania, well-known members include the 9:30 Club in Washington, D.C.; Chicago Independent Venue League in Chicago, Illinois; Pabst Theater Group in Milwaukee, Wisconsin; the Red River Cultural District in Austin, Texas; and Exit/In in Nashville, Tennessee.

The pandemic and related civil authority orders have devastated performing arts and cultural organizations, including those of NIVA's members who rely on in-person performances for revenue. Like the restaurant industry, the performing arts sector has been almost completely shut down by the pandemic. Locally, NIVA members have cancelled or delayed hundreds of performances, incurring substantial business income losses and putting their businesses in jeopardy. More information is available at https://www.nivassoc.org/.

II. ARGUMENT

As this Court has found,[4] amicus curiae status is generally granted when: (1) the petitioner has a "special interest" in the particular case; (2) the petitioner's interest is not represented competently or at all in the case; (3) the proffered information is timely and useful; and (4) the petitioner is not partial to a particular outcome in the case. Sciotto v. Marple Newtown Sch. Dist., 70 F. Supp. 2d 553, 555 (E.D. Pa. 1999).

Amici Parties meet these factors. First, they have a "special interest" in ensuring that the rights of nonparty policyholders, with regard to standard-form policy language sold on a take-it-or-leave it basis, are protected. As this Court has no doubt seen from the various out-of-state decisions cited in the parties' papers, any decision by this Court will have effects beyond this

[4] See Liberty Res., Inc. v. Philadelphia Hous. Auth., 395 F. Supp. 2d 206, 209–10 (E.D. Pa. 2005) (Brody, J.).

district and beyond Pennsylvania. Second, Amici Parties' interest is not adequately represented by either Plaintiffs, who have focused on information different from that gathered in Amici Parties' brief, or Philadelphia Insurance, which lodges arguments seeking to have the insurance industry's standard-form language construed narrowly. Neither party mentioned the recent decision of the Pennsylvania Supreme Court making factual findings on the ubiquitous presence of COVID-19 and the property damage it causes throughout this state. Third, Amici Parties offer information that is both timely and useful concerning the rights of nonparty policyholders who are affected by this litigation in that they purchased insurance policies containing the standard-form language at issue here. Fourth, while Amici Parties are, on behalf of policyholders in Pennsylvania and nationwide, interested in a result finding coverage, Amici Parties have no pecuniary interest in the outcome of this case, and "[t]here is no rule ... that amici must be totally disinterested." Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982); see also Neonatology Assocs., P.A. v. C.I.R., 293 F.3d 128, 132 (3d Cir. 2002) (rejecting argument that *amicus* must be impartial person).

Courts have found the participation of an amicus especially proper where the amicus will ensure "complete and plenary presentation of difficult issues so that the court may reach a proper decision," see Alliance of Auto. Mfrs. v. Gwadowsky, 297 F. Supp. 2d 305, 307 (D. Me. 2003) (quoting Alexander v. Hall, 64 F.R.D. 152, 155 (D.S.C. 1974)), or where an issue of general public interest is at stake, see Russell v. Bd. of Plumbing Examiners, 74 F. Supp. 2d 349, 351 (S.D.N.Y. 1999) (noting the primary role of amicus is "to assist the Court in reaching the right decision in a case affected with the interest of the general public"). Here, permitting the Amici Parties to provide additional context through an amicus brief will ensure that this Court has

before it all relevant information so that it can reach the proper decision in a case that will affect the public in this district, in Pennsylvania, and nationwide.

Amici Parties have a keen interest in preserving the integrity of the process by which insurance companies obtain regulatory approval for the standard insurance policy forms they sell, because policyholders, nationwide, rely upon regulators to protect their interests by making informed decisions on what language the regulators will permit insurance companies to use in their forms and how much they can charge for those forms. Regulators are the only party with any opportunity to negotiate the content of standard forms and the rates which insurance companies can charge for those forms; policyholders are offered the approved forms on a take-it-or-leave-it basis. Amici Parties seek to preserve the integrity of the regulatory and insurance-buying processes by ensuring this Court has full contextual information on the statements ISO and AAIS made to regulators in successfully gaining their approval to sell policies with the standard-form Virus or Bacteria Exclusion.

Further, as Amici Parties come to this case with decades of nationwide experience in monitoring and participating in cases addressing coverage for loss and damage associated with unusual events – like smoke from fires and now COVID-19 – Amici Parties can provide perspectives on the case law that is relevant to evaluating the issues between the parties and before this Court.

III. CONCLUSION

Amici Parties and the nationwide policyholders whose interests it represents have a vital interest in this proceeding due to the importance of the issue of whether insurance companies can enforce the Virus or Bacteria exclusion as argued by Philadelphia Insurance or whether insurance companies will be bound by what their agents represented, nationwide to insurance regulators in 2006 to secure approval of that exclusion. Further, Amici Parties have a vital

interest in ensuring that nationwide policyholders are afforded the full extent of coverage their standard-form policies provide, as established by decades of precedent. Because of its unique perspective on insurance issues, Amici Parties' proposed amicus curiae brief will assist the Court in weighing considerations that are relevant to the disposition of the Motion to Dismiss.

For the foregoing reasons, Amici Parties respectfully request that the Court to permit it to file the attached amicus curiae brief.

Dated: November 10, 2020

Respectfully submitted,

/s/ John N. Ellison

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2020, a copy of the Motion of United Policyholders and National Independent Venue Association for Leave to File a Brief as Amicus Curiae was served via this Honorable Court's CM/ECF System upon the following counsel of record:

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Plaintiffs,	:	
v.	:	
Philadelphia Indemnity Insurance Co.,	:	
Defendant.	:	

[PROPOSED] ORDER

For the reasons stated in the motion filed by United Policyholders and National Independent Venue Association, the Motion of United Policyholders and National Independent Venue Association for Leave to File a Brief as Amicus Curiae is GRANTED.

Dated: November _____, 2020

_____
Hon. Anita Blumstein Brody
United Stated District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Nostalgic Partners LLC d/b/a Staten Island Yankees, Albuquerque Baseball Club LLC d/b/a Albuquerque Isotopes, Diamond Stadium Group LLC, Golden State Concessions & Catering Inc., Greenville Drive LLC, Lake Elsinore Storm LP, Long Ball Inc. d/b/a Spokane Indian Baseball Club, Northwest Baseball Ventures I LLC d/b/a Tri-City Dust Devils Baseball, Rancho Baseball LLC, Storm Events LLC, Storm Thredz LLC, 7th Inning Stretch LP d/b/a Delmarva Shorebirds,	:	No: 20-cv-03346-ABB
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[PROPOSED] BRIEF OF <u>AMICUS CURIAE</u> UNITED POLICYHOLDERS AND NATIONAL INDEPENDENT VENUE ASSOCIATION

Date: November 10, 2020

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INTRODUCTION

Amicus Curiae United Policyholders and National Independent Venue Association (collectively referred to as "Amici Parties") file this brief to give this Court further context in relation to two issues raised by the Memorandum of Law in Support of Defendant's Motion To Dismiss Plaintiffs' Amended Complaint Pursuant to Rule 12(b)(6) ("Defendant's Motion To Dismiss") and Plaintiffs' Response to Defendant's Motion To Dismiss ("Plaintiffs' Response").

The first issue involves the application of a Virus or Bacteria Exclusion which was drafted by insurance industry drafting organizations, the Insurance Service Office, Inc. ("ISO") and the American Association of Insurance Services ("AAIS"). ISO and AAIS sought and obtained regulatory approval for their member insurance companies to sell insurance policies containing this exclusion. The parties' briefs address whether, when of ISO and AAIS averred to regulators that property insurance policies had not historically been a source of cover for "disease-causing agents," this amounted to a misrepresentation that estops the industry from enforcing the Virus or Bacteria exclusion. Amici Parties offer the Court further context on this issue in two ways. First, the Amici Parties show that ISO and AAIS have admitted the obvious point that, as insurance industry drafting organizations, it is their job to monitor developments in the common law, and therefore that they clearly knew at the time of their representations to regulators that: (i) there were 18 decisions finding that contamination with disease-causing agents amounts to physical loss of or damage to property, (ii) and there were no contrary decisions. Second, the Amici Parties provide additional regulatory history showing that member insurance companies well understood that ISO and AAIS deceived regulators in the course of securing approval for the Virus or Bacteria Exclusion.

The second issue relates to the case law concluding that events similar to contamination with COVID-19 cause physical loss of or damage to property, upon which Amici Parties

highlight three points that may arise in the course of this Court's deliberations. First, Amici Parties note that the Pennsylvania Supreme Court recently recognized that COVID-19, because of its characteristics, has caused widespread damage to property in Pennsylvania, because it renders such property unfit and unsafe for its intended use. Second, Amici Parties discuss the authority holding that temporary conditions that abate naturally – such as infusion with ammonia fumes, smoke, and dust – nonetheless cause physical loss of or damage to property. This is true regardless of whether the policyholder makes a claim for the property damage and regardless of the fact that there is no repair or replacement of property. The third point is that courts have found that a condition which makes property dangerous for human use – as the Pennsylvania Supreme Court found with regard to the ubiquitous presence of COVID-19 – can constitute physical loss of or damage to property. The Amici Parties submit that all three of these points are relevant to the determination of whether COVID-19 contamination causes physical loss of or damage to property.

STATEMENT OF INTEREST OF AMICUS CURIAE

I. UNITED POLICYHOLDERS ("UP")

The application of insurance contracts requires special judicial handling. Commerce, government and society benefit when losses are indemnified through insurance purchased by individuals and businesses. The insurance system is woven into the fabric of our economy through mandatory purchase requirements, prudent personal and business risk management and the pricing of goods and services. Each state regulates insurance contracts and transactions through its own set of laws and regulations, yet most insurers operate in multiple states. Most insurers serve three different masters when carrying out their important purpose, and the resulting conflicts that arise often compel judicial balancing, such as the instant case. Insurers must meet their own revenue objectives *and* the reasonable expectations of policyholders, *and*

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Insurance policies are adhesive in nature and their language is increasingly less standardized.[5] That means insurers are using far more creativity in drafting policy terms and conditions and exclusions and limitations than in the past. This has made it much harder for state insurance regulators to review those terms and limitations and determine whether they will effectuate or deprive the purchaser of the protection they intend to purchase. Compounding that challenge to state insurance regulators is that data mining, artificial intelligence and computerized risk modeling have made it literally impossible to give every new policy form the scrutiny it deserves.

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presentations was that there is evidence that insurers were not fully candid with regulators about the significance of virus and pandemic-related limitations and exclusions they added to their policies.[7] Although insurers had paid business interruption losses from hotel reservation cancellations due to SARS, when they added limitations and exclusions after that event, some told regulators they had *never* paid virus-related losses and that therefore there would be no rate decrease associated with the policy language change. Because there was no rate decrease and no clear notice that virus and pandemic related losses could be excluded, commercial policyholders were not aware of insurers' efforts to drastically reduce business interruption loss protection until 2020. Because policyholders (including plaintiff in this case) had no notice of a potentially very substantial hole in their insurance, they had no opportunity to cure the gap, hence the need for special judicial handling and careful scrutiny of this case.

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ARGUMENT

I. THE FACTUAL CONTEXT SURROUNDING THE STATEMENTS MADE BY ISO AND AAIS TO INSURANCE REGULATORS DEMONSTRATES THAT THEY FALSELY STATED PROPERTY INSURANCE HAD NOT BEEN A SOURCE OF RECOVERY FOR CONTAMINATION WITH DISEASE-CAUSING AGENTS.

A. Given That They Admitted That It Was Their Responsibility To Monitor the Common Law, ISO and AAIS Knew at the Time They Made Representations to Regulators in 2006 That Nearly Twenty Cases Had Found Contamination with Disease-Causing Agents Causes "Physical Loss or Damage," and That There Were No Contrary Cases.

In discussing whether ISO and AAIS misrepresented the state of the common law – and, thus, the extent of coverage provided by standard property policies – to regulators by stating that "property policies have not been a source of recovery for losses involving contamination by disease-causing agents," the parties' briefs address the state of case law in 2007.[8] Amici Parties will not repeat their arguments, but makes only three limited points to provide this Court additional factual context.

[8] See Plaintiffs' Response, at 12 n.5, 30; Defendants' Motion to Dismiss, at 20.

One, ISO and AAIS admitted – in the very regulatory submissions relevant to this case – that it was part of their responsibility to their member companies to monitor the common law on standard-form property insurance policies, and that this prompted them to draft changes to the standard forms:

> 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.[9]

Two, ISO and AAIS, given their remit to monitor the common law, would have known that there were nineteen cases finding that the presence of "disease-causing agents" causes "physical loss of or damage to property," and that there were no contrary cases. (These nineteen cases consist of the eighteen cited at 12 n.5 in Plaintiffs' Response and the case mistakenly cited by Philadelphia Insurance, Port Authority of New York & New Jersey v. Affiliated FM Insurance Co., 311 F.3d 226 (3d Cir. 2002), which is discussed below). ISO and AAIS would have known this, in part, because the cases largely cite each other in support, and reading one would have led them to the balance.[10]

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[9] New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria, dated July 6, 2006 (filed in relation to the proposed Endorsement CP 01 40 07 06 - Exclusion Of Loss Due To Virus Or Bacteria), at 7 of 13 (attached hereto as Exhibit **A**) ("ISO Circular").

[10] For instance, Western Fire Insurance Co. v. First Presbyterian Church, 437 P.2d 52 (Colo. 1968) (gasoline vapors) was subsequently cited by a host of other similar decisions. Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts, No. CV-01-1362-ST, 2002 WL 31495830, at *8-9 (D. Or. June 18, 2002) (mold); Matzner v. Seaco Ins. Co., No. 96-0498-B, 1998 WL 566658 (Mass. Super. Aug. 26, 1998) (carbon monoxide); Farmers Ins. Co. v. Trutanich, 858 P.2d 1332, 1335 (Ore. App. 1993) (methamphetamine fumes); Hetrick v. Valley Mut. Ins. Co., 15 Pa. D. & C.4th 271, 1992 WL 524309, at *3 (Cum. Co. Pa. Comm. Pl. May 28, 1992) (oil).

Three, the only case prior to 2007 cited by Philadelphia Insurance for the proposition that contamination with a disease-causing agent did not constitute physical loss of or damage to property actually stands for the contrary proposition. In Port Authority of New York & New Jersey v. Affiliated FM Insurance Co., 311 F.3d 226 (3d Cir. 2002), the policyholder sought property insurance coverage under policies for expenses incurred in abating asbestos-containing materials in many of its properties, alleging these structures suffered "physical damage" as a result of the "presence of asbestos," "threat of release and reintrainment of asbestos fibers," and the "actual release and reintrainment of asbestos fibers."[11] In support of its claims, the policyholder alleged the presence of "friable" asbestos – or asbestos susceptible to becoming airborne – but the evidence failed to disclose any instances in which asbestos in air samples exceeded EPA standards or other applicable regulations.[12] Further, all of the policyholder's buildings continued in normal use.[13] In other words, all the asbestos in the policyholders' buildings was encapsulated and not friable.

In the coverage action, the lower court "held that unless asbestos in a building was of such quantity and condition as to make the structure unusable, the expense of correcting the situation was not within the scope of a first party insurance policy covering 'physical loss or damage.'"[14] More specifically, the court "reasoned that 'physical loss or damage' could be found only if an imminent threat of asbestos release existed, or actual release of asbestos resulted in contamination of the property so as to nearly eliminate or destroy its function, or render it

[11] Port Authority of New York & New Jersey, 311 F.3d at 230.

[12] Id.

[13] Id.

[14] Id.

uninhabitable."[15] Further, the court found that "a significant portion of the [policyholder's] claimed losses arise from the presence of asbestos, unaccompanied by even the suggestion of actual release or imminent threat of release of asbestos fibers," and that, "[o]f the plaintiffs' locations where proof of release was shown … the continued and uninterrupted use of the buildings without any indication of elevated airborne asbestos level, coupled with the plaintiffs' own assurances of public safety, 'belie the existence of contamination to the extent required to constitute physical loss or damage.'"[16]

On appeal, the court concluded that the lower court did not err in concluding that the mere presence of asbestos in the buildings did not cause them "physical loss or damage":

> In ordinary parlance and widely accepted definition, physical damage to property means "a distinct, demonstrable, and physical alteration" of its structure. 10 Couch on Insurance § 148:46 (3d ed.1998). Fire, water, smoke and impact from another object are typical examples of physical damage from an outside source that may demonstrably alter the components of a building and trigger coverage. Physical damage to a building as an entity by sources unnoticeable to the naked eye must meet a higher threshold….
>
> In the case before us, the policies cover "physical loss," as well as damage. When the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner. However, if asbestos is present in components of a structure, but is not in such form or quantity as to make the building unusable, the owner has not suffered a loss. The structure continues to function--it has not lost its utility. The fact that the owner may choose to seal the asbestos or replace it with some other substance as part of routine maintenance does not bring the expense within first-party coverage….
>
> We agree with the District Court's articulation of the proper standard for "physical loss or damage" to a structure caused by asbestos contamination. The requirement that the contamination reach such a level in order to come within coverage limitation establishes a reasonable and realistic standard for identifying physical loss or damage. The effect of asbestos fibers in such quantity is comparable to that of fire, water or smoke on a structure's use and function. A less demanding standard would require compensation for repairs caused by the

[15] Id.

[16] Id.

> inevitable deterioration of materials used in the construction of the building. This outcome would not comport with the intent of a first-party 'all risks' insurance policy, but would transform it into a maintenance contract.[17]

Accordingly, friable asbestos, like smoke, causes physical loss of or damage to property, while the mere presence of encapsulated asbestos does not. Analogously, COVID-19 virus present in test tubes in a building does not cause physical loss of or damage, while COVID-19 on surfaces and in the air does cause physical loss of or damage.

B. Contrary to the Insurance Industry's Statements, Other Regulatory Filings Prove the Standard-Form Policy Language Covers Contamination of Property with Viruses.

Other insurers' regulatory filings on the same standard-form exclusion further demonstrate ISO and AAIS committed misrepresentations in 2006 in the process of securing regulatory approval throughout the United States. As an initial matter, Amici Parties note that, as described in Morton International, Inc. v. General Accident Insurance Co., 629 A.2d 831, 851 (N.J. 1993), when insurance industry drafting organizations seek regulatory approval, they do so by submitting the same change and the same explanatory memorandum to each of the state regulators.[18] Because the drafting organizations seek approval for a standard-form on behalf of all of their member companies for sale throughout the United States, statements by those drafting organizations to any regulator as to the content of the standard form bind all of the member companies everywhere. This is why the Morton court looked to what drafting organizations said on behalf of their members in New Jersey, Georgia, West Virginia, Kansas, Puerto Rico, etc.[19]

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[17] Id. at 235-36.

[18] Morton International, Inc., 629 A.2d at 851.

[19] Morton International, Inc., 629 A.2d at 851-54.

As shown below, one member company demonstrated to the New York Insurance Commissioner what ISO and AAIS had said to all insurance commissioners was false.

Specifically, in 2009, Greater New York Mutual Insurance Company, Insurance Company of Greater New York, INSCO, and Strathmore Insurance Company (GNYM), as individual insurers, sought approval in New York to make the ISO Virus or Bacteria exclusion "optional" rather than "mandatory," so that they could sell policies to certain classes of policyholders without that exclusion.[20] These GNYM filings directly contradict the statements of ISO and AAIS and demonstrate insurers were quite aware that their standard-form property insurance policies covered loss or damage from viruses and other disease-causing agents.

The New York state insurance regulator objected to GNYM's proposal for an optional virus or bacteria exclusion because it could lead to rate discrimination. The issue arose because ISO and AAIS had not accounted for any rate reduction with their new exclusion, given their false assertion that the exclusion would not reduce coverage. In response to New York's objection, GNYM proposed "loss characteristics" it might use when determining if the exclusion should be applied.[21] These characteristics included whether there had been a "historical report of an event which may or may not have resulted in loss involving sickness (including death) arising out of an insured's clients' (and/or any other person to whom the insured's clients' have contact) exposure to disease or infection while on the insured's premises or due to contact with the insured's operations, employees; or products," or losses arising "from the action or order of a civil authority to close the insured's operation in order to limit public exposure to such

[20] GNYM Explanatory Memorandum – Response to Objection 1 Dated 4-30-2010, at 1 ¶ 4 (May 4, 2010) ("GNYM May 2010 Memo") (attached hereto as Exhibit **B**).

[21] GNYM Explanatory Memorandum – Response to NYSID Objection Dated 6/16/10, at 3-4 (August 2, 2010) ("GNYM Aug. 2010 Memo") (attached hereto as Exhibit **C**).

contagion, sickness and death," among other things, such as whether a prior event is traced to an insured restaurant's "improper food handling practices, storage or sanitation infractions or improperly cooked ground beef."[22]

In 2010, GNYM provided a further "Explanatory Memorandum" expressly describing the coverage that exists for "pandemic" diseases like COVID-19 in the absence of an exclusion for virus or bacteria. GNYM anticipated potential losses "to fall largely in Business Personal Property ('stock') and Business Interruption/Time Element coverage segments," and "some isolated risks."[23] GNYM even provided examples of communicable diseases that spread in restaurants and hotels that may create covered property insurance losses. GNYM acknowledged that a "pandemic" loss from "contagious disease" could involve a wide variety of vectors that lead to physical loss or damage to insured property and cause insured business interruptions.[24] Those could include disease "transmitted to third parties via ingestion or some other direct contact to an insured's products," or by a "Typhoid Mary," or "spread through a HVAC system in any selected Apartment or Condo Building," or even through impact on a business's supply chains, including "vendors of supplies."[25] All of these statements contradict the 2006 assertions by ISO and AAIS that standard-form property policies are not intended to respond and do not respond to losses involving dangers of communicable disease.

Not only did GNYM point out how claims like those involving COVID-19 could be covered by policies without viral exclusions, they admitted their policyholders reasonably expect this coverage and would never willingly part with it: "[W]e do not anticipate that any of our

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[22] Id. at 3 ¶ 6 to 4 ¶¶ 1-5.

[23] GNYM May 2010 Memo, at 1 ¶ 3.

[24] Id. at 1 ¶ 4.

[25] Id. at 1 ¶¶ 4-5.

insured's [sic] will voluntarily request this exclusion; some (habitational risks) because it would never enter their minds as a problem for which they would voluntarily reduce coverage; others (restaurants) because they feel that such an event is well within the realm of possible fortuitous occurrences and should be covered should such an event arise."[26] Yet, in 2006, ISO and AAIS forced this change on all of their policyholders and used misrepresentations to make it happen.

In fact, in a remarkable supplemental explanation proposing a method for rating and charging this new "coverage," GNYM pointed out that this coverage for virus contamination it proposed was essentially "created" by omitting an exclusion the rest of the industry had stated was not a restriction.[27] This reveals the truth that the rest of the industry tried to suppress, namely that COVID-19 type losses would have been covered if the new exclusions had not been approved by regulators.

In a still later Explanatory Memorandum Response to NYSID Objection Dated 6/16/10, the GNYM insurers confirmed that the purpose of the ISO exclusion was to eliminate coverage for virus and bacteria contamination that policyholders and courts would have otherwise expected to exist. In short, the ISO explanation was misleading: "The ISO action was taken specifically for the purpose of eliminating the potential for the courts to expand the definition of property damage to include this exposure."[28] As shown above, courts had already taken that step, so the industry's effort was duplicitous. GNYM further explained that selective application of the exclusion could not be "discriminatory" because the New York regulator had been successfully fooled by ISO's misstatements, and "apparently agreed with ISO's position and did

[26] Id. at 1 ¶ 7.

[27] Id. at 1 ¶ 9.

[28] GNYM Aug. 2010 Memo, at 1 ¶ 3.

not require a 'give back' on any Loss Cost or indicated there should be any associated rate differential due to the application of the exclusion."[29]

Amici Parties submit that GNYM was simply disclosing what was known throughout the insurance industry: the 2007 statements of ISO and AAIS that property policies did not respond to contamination by disease-causing agents were false.

II. HISTORICALLY, COURTS HAVE FOUND THE STANDARD-FORM POLICY LANGUAGE AT ISSUE IS TRIGGERED BY TEMPORARY CONDITIONS THAT ARE HAZARDOUS TO HUMAN HEALTH.

Philadelphia Insurance argues that Plaintiffs have not alleged "direct physical loss or damage" because they fail to allege "demonstrable, physical alteration," and Plaintiffs address this argument through discussion of recent case law on this issue in relation to COVID-19 (Plaintiffs' Response, at 7-11) and earlier case law on this issue in relation to other disease-causing agents (Plaintiffs' Response, at 11-14). Amici Parties will not discuss these points, but instead offers three points to provide the Court with additional context.

A. The Pennsylvania Supreme Court Has Already Concluded that COVID-19 Is a Physical Substance that Can Cause Property Damage on a Wide Scale, as with Other Natural Disasters.

First, Amici Parties direct this Courts attention to two points in Friends of Danny Devito v. Wolf, 227 A.2d 872 (Pa. 2020). In Devito, at issue was whether the Governor of Pennsylvania was empowered by the Emergency Code – applying to a "natural disaster" such as a tornado, flood, fire, or "other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life" – to order their businesses to close, on the ground "that the COVID-19 pandemic is not a natural disaster as defined by the Emergency Code."[30] The Court

[29] Id., at 1 ¶ 4, 3 ¶ 2.

[30] Friends of Danny Devito v. Wolf, 227 A.2d at 888.

concluded that "the COVID-19 pandemic qualifies as a 'natural disaster' under the Emergency Code" because it was a disaster involving "substantial damage to property, hardship, suffering or possible loss of life":

> [T]he specific disasters in the definition of "natural disaster" themselves lack commonality, as while some are weather related (e.g., hurricane, tornado, storm), several others are not (tidal wave, earthquake, fire, explosion). To the contrary, the only commonality among the disparate types of specific disasters referenced is that they all involve "substantial damage to property, hardship, suffering or possible loss of life." In this respect, the COVID-19 pandemic is of the "same general nature or class as those specifically enumerated," and thus is included, rather than excluded, as a type of "natural disaster."[31]

Next, the Court rejected the argument that "this provision only authorizes the Governor to act in a 'disaster area,' and there have been no disasters in the areas in which their businesses are located":

> We find no merit in this argument. First, Respondents correctly note that COVID-19 cases have been reported in the counties in which Petitioners' businesses are located (Allegheny, Northampton and Warren Counties). Respondents' Brief at 24. In fact, COVID-19 cases have now been reported in all counties in the Commonwealth. Department of Health, "COVID-19 Data for Pennsylvania," https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx (last accessed 4/8/2020). More fundamentally, Petitioners' argument ignores the nature of this virus and the manner in which it is transmitted. The virus spreads primarily through person-to-person contact, has an incubation period of up to fourteen days, one in four carriers of the virus are asymptomatic, and the virus can live on surfaces for up to four days. Thus, any location (including Petitioners' businesses) where two or more people can congregate is within the disaster area.[32]

Accordingly, the Pennsylvania Supreme Court has concluded that COVID-19 is a "natural disaster," causing "substantial damage to property, hardship, suffering or possible loss of life" because of its ability to spread unchecked from location to location, which is a function of its long incubation period and ability to "live" on surfaces for long periods. As shown below, under

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[31] Friends of Danny Devito v. Wolf, 227 A.2d at 888-89.

[32] Friends of Danny Devito v. Wolf, 227 A.2d at 889-90.

long-established case law, these findings of the Pennsylvania Supreme Court lead to the conclusion that COVID-19 renders property unfit for its intended purpose; i.e., COVID-19 causes physical loss of or damage to property.

B. Courts Have Concluded That Temporary Conditions That Dissipate Naturally Nonetheless Can Cause Physical Loss of Damage to Property.

Second, courts have concluded that even a temporary condition impacting a property's safety or function can cause "physical loss or damage." These cases are important to the issues before this Court for two reasons, namely that they show: (1) it is not necessary for a policyholder to make a claim for property damage to find that the policyholder has suffered physical loss of or damage to property; and (2) it is not necessary for the property to require repair or replacement; rather, lost Businesss Income is owed in the period when property cannot safely be used.

For instance, in Oregon Shakespeare Festival Association v. Great American Insurance Co., No. 1:15-cv-01932-CL, 2016 WL 3267247 (D. Or. June 7, 2016), the policyholder cancelled several performances at its outdoor theatre because of dangerous levels of smoke and ash caused by numerous nearby fires. The policyholder made a claim for lost Business Income which was denied on a number of grounds, but primarily because the loss was not caused by "physical loss or damage to the theatre."[33] In the coverage case, the policyholder argued that "the wildfire smoke caused injury or harm to the interior of the theatre, which includes the air within the theatre."[34] The court first rejected the insurance company's argument that "air is not 'property'": "The policy itself does not give any indication that the air within a covered building cannot suffer contamination or infiltration such that 'physical loss of or damage to property'

[33] Oregon Shakespeare Festival Association, No. 1:15-cv-01932-CL, 2016 WL 3267247 at *5.
[34] Id.

exists."[35] Next the court rejected the insurance company's argument that "the loss or damage must be *physical*" finding it did "not give a sufficient explanation for which air is not physical": "Certainly, air is not mental or emotional, not is it theoretical."[36] Third, the court rejected the insurance company's argument that "in order to be 'physical,' the loss or damage must be *structural* to the building itself," finding the insurance company "does not provide any evidence from within the policy to show that the plain meaning of the term 'physical' includes such a limitation."[37] Fourth, the insurance company argued that the smoke from the fires did not require any "structural" "repairs" to the theatre, and thus there was no Period of Restoration."[38] The court rejected this, finding that dissipation of the smoke took several days, and that it was not a plausible reading of the policy to add the word "structural."[39]

Similarly, in Schlamm Stone & Dolan, LLP v. Seneca Insurance Co., No. 603009/2002, 2005 WL 600021 (N.Y. Supr. Mar. 16, 2005), the policyholder alleged that dust, soot and smoke in its law firm after the attacks of September 11, 2011 affected its operations for the balance of the month of September. The court first 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

[35] Id.

[36] Id.

[37] Id.

[38] Id. at *5-6.

[39] Id. at *6.

> instance, the transaction costs for recovering the claim may be higher than the value of the claim itself.[40]

The court found that "the central question before the court on this portion of plaintiff's claims is whether 'property damage' as used in the Policy includes noxious particles in an insured premises," and held that such particles constituted property damage under the policy:

> Under the Policy, particles that have settled in the carpets and on other surfaces in [the policyholder's] offices constitutes property damage. The carpets and other surfaces are property of the [policyholder], and the presence [sic] noxious particles thereon clearly impairs [the policyholder's] ability to make use of them.[41]

Next, after initially noting that the policyholder did not own the air, and thus could not suffer property damage from particles in the air, the court observed that "the distinction between particle that have settled and particles suspended in the air raises serious problems in practical application":

> Particles that have settled on surfaces could easily be stirred up and cause business interruptions not unlike that the particles suspended in the air could cause. However, unlike losses caused by particles which have never settled, the losses caused by the stirred up particles would be covered under the policy because they arise from property damage. Hence the parties would be faced with the impossible task of demonstrating what portion of the losses were caused by particles suspended in the air that never settled, and what portion were caused by particles that had been stirred up. The court is not aware of any conceivable method for establishing this distinction. However, the reading of the policy that says that particles in the air in the premises do not constitute property damage seems to require this. Therefore, this cannot be the intended reading of the policy, as it is inconceivable that the parties would have intended to set the terms of their agreement as to make it practically impossible to determine whether losses are covered. Following the rule that ambiguities in an insurance policy must be construed in favor of the insured and against the insurer, the court reads the policy to include, under the definition of property damage, particles both on surfaces and in the air in the insured premises.[42]

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[40] Schlamm Stone & Dolan, LLP, No. 603009/2002, 2005 WL 600021, at *3.

[41] Id. at *4.

[42] Id. at *5.

Accordingly, the court concluded 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."[43]

Gregory Packaging, Inc. v. Travelers Property Casualty Co., No. 2:12-cv-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014), finding temporary infusion with ammonia amounted to physical loss of or damage to property, is discussed by Plaintiffs.[44]

Amici Parties submit to this Court that these cases are very important to consider in evaluating the Motion to Dismiss. One, as in cases involving contamination with COVID-19, the "physical loss of or damage to property" in these cases was temporary and resolved itself with limited or no human action. Two, as in cases involving contamination with COVID-19, policyholders can recover for lost Business Income whether or not they make a claim for property damage. Three, as in the case with COVID-19, the period when Business Income coverage is owed is, of necessity, not pegged at the period needed to repair or replace property, but at the time needed for the harmful condition to dissipate.

C. Contamination with Substances Potentially Harmful To Health Constitutes Physical Loss of or Damage To Property.

Amici Parties' last point addresses Philadelphia Insurance's apparent argument that the cause of the loss at issue in this case was fear of personal injury and not damage to bricks and mortar.[45]

Courts have found physical loss or damage to property which was simply too unsafe to inhabit. For instance, in Hughes v. Potomac Insurance Co., 18 Cal. Rptr. 650 (Cal. App. 1962),

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[43] Id.

[44] Plaintiffs' Response, at 13.

[45] Defendants' Motion To Dismiss, at 2.

the court found that policyholder's home, which became perched on the edge of a cliff after a sudden landslide caused a large chunk of the ground surrounding their property to fall into a creek, depriving the home of lateral support and stability, was damaged because it became unsafe to live in and thus useless to the owners:

> To accept [the insurance company's] interpretation of its policy would be to conclude that a building which has been overturned or which has been place in such position as to overhang a steep cliff has not been "damaged" so long as its paint remains intact and its walls still adhere to one another. Despite the fact that a "dwelling building" might be rendered completely useless to its owners, [the insurance company] would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner. **[The policyholders] correctly point out that a "dwelling" or "dwelling building" connotes a place fit for occupancy, a safe place in which to dwell or live.** It goes without question that [the policyholders'] "dwelling building" suffered real and severe damage when the soil beneath it slid away and left it overhanging a 30-foot cliff. Until such damage was repaired and the land beneath the building stabilized, the structure could scarcely be considered a "dwelling building" in the sense that rational persons would be content to reside there. We conclude that [the insurance company's] policy should and can be interpreted in such a manner as to cover the damage to [the policyholders'] "dwelling building" as a result of the landslide.[46]

Similarly, in Murray v. State Farm Fire & Casualty Co., 509 S.E.2d 1 (W. Va. 1998), the policyholder sought coverage for the complete loss of its home after continued occupancy in it was rendered dangerous by the presence of falling rocks under a policy providing coverage for "direct physical loss to the property." The court rejected the insurance companies' argument that, while their policies were obligated to cover actual physical damage from falling rocks, they did not "cover any losses occasioned by the potential damage that could be caused by future rockfalls":

[46] Hughes, 18 Cal. Rptr. at 655 (emphasis added); see also 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).

> The policies in question provide coverage against "sudden and accidental loss" and "accidental direct physical loss" to property. "'Direct physical loss' provisions require only that a covered property be injured, not destroyed. **Direct physical loss also may exist in the absence of structural damage to the insured property.**" Sentinel Management Co. v. New Hampshire Ins. Co., 563 N.W.2d 296, 300 (Minn. App. 1997) (citations omitted).
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> The properties insured by [the insurance companies] in this case were homes, buildings normally thought of as a safe place in which to dwell or live. It seems undisputed from the record that on February 22, 1994 all three of the plaintiffs' homes became unsafe for habitation, and therefore suffered real damage when it became clear that rocks and boulders could come crashing down at any time. The record suggests that until the highwall on [the policyholder's] property is stabilized, the plaintiffs' houses could scarcely be considered "homes" in the sense that rational persons would consent to reside there.
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> We therefore hold that an insurance policy provision providing coverage for a "sudden and accidental" loss or an "accidental direct physical loss" to insured property requires only that the property be damaged, not destroyed. **Losses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property.**[47]

Note that Philadelphia Insurance, without page citation, argues that in Murray "it was undisputed that the insured had suffered actual physical damage resulting from fallen boulders that had damaged the insured property."[48] This is wrong. Three homes were at issue, two which suffered minor damage from falling rocks and one which had suffered none.[49]

In Manpower Inc. v. Insurance Co. of the State of Pennsylvania, No. 08C0085, 2009 WL 3738099 (E.D. Wis. Nov. 3, 2009), the policyholder owned two adjacent buildings, but occupied only one of them. The building it did not occupy partially collapsed; but this collapse did not cause any noticeable damage to the policyholder's occupied space.[50] In the coverage action, the

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[47] Murray, 509 S.E.2d at 17 (emphasis added).

[48] Defendants' Motion To Dismiss, at 13.

[49] Murray, 509 S.E.2d at 5.

[50] Manpower Inc., No. 08C0085, 2009 WL 3738099 at *1.

court first rejected the insurance company's argument that "because the collapse damaged only the area of the building around the courtyard and parking structure and not [the policyholder's] leased office space, it did not cause 'direct physical loss… or damage to' [the policyholder's] 'interest' in the building":

> [The insurance company's] argument assumes that [the policyholder's] interest in the building was limited to that portion reserved for its exclusive use. But [the policyholder] could not use its offices unless other parts of the building functioned properly. Such parts include the entrances and exits, hallways, elevators, staircases, hearing and cooling systems, electricity, water, fire and security systems, and most importantly, the building's foundation and support structure. That [the policyholder] did not enjoy the exclusive use of the above features does not mean that a business interruption caused by damage to them was not covered. The policy covered business interruption resulting from damage to [the policyholder's] interest in property it owned, used or intended to use. (Policy §9.A.) A tenant "uses" the support structure of a building as much as it uses its own office space. Indeed, without the support structure, [the policyholder] could not have operated in its leased space. A tenant also uses other common aspects of an office building, such as electricity, water, and heating and cooling systems, although perhaps to a lesser extent than the support structure. Thus, if a covered peril damaged any of these features of the building, and the damage caused [the policyholder] to sustain a business interruption loss, the policy would cover such loss up to $15 million, and resort to the civil authorities extension would be unnecessary.[51]

The court rejected any argument that a building which is unstable is not physically damaged:

> [The insurance company] suggests that instability is insufficient to trigger coverage and that the foundation in the area of [the policyholder's] offices would have had to collapse or sustain visible damage before [the policyholder] could claim business interruption losses as a result of damage to the building's support structure. However, the location of damage to the foundation does not matter, so long as the damage renders the entire structure unstable. A tenant cannot use its office space even if such space is not close to the damaged beam. In such a case, the tenant will have sustained damage to its property interest in the building, and that damage will not have been caused by a subsequent evacuation order.[52]

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[51] Id. at *3.

[52] Id. at *4 n. 7.

Accordingly, events, like the presence or suspected presence of COVID-19, which ,as found by the Pennsylvania Supreme Court, make it too dangerous to use property as it was intended to be used, cause physical loss or damage to that property.

CONCLUSION

On behalf of policyholders in Pennsylvania and nationwide, we trust this Court will find the above points of context helpful in resolving the issues raised in Defendant's Motion To Dismiss and the Policyholders' Response.

Dated: November 10, 2020

Respectfully submitted,

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EXHIBIT A

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

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

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

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

Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

About This Filing

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

New Form

We are introducing:

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

Related Filing(s)

Rules Filing CF-2006- OVBER

Introduction

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

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

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

Current Concerns

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

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

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

Features Of New Amendatory Endorsement

The amendatory endorsement presented in this filing states that there is **no coverage for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease**. The exclusion (which is set forth in Paragraph B of the endorsement) applies to property damage, time element and all other coverages; introductory Paragraph A prominently makes that point. Paragraphs C and D serve to avoid overlap with other exclusions, and Paragraph E emphasizes that other policy exclusions may still apply.

Copyright Explanation

Important Note

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

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

A. The exclusion set forth in Paragraph **B.** applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

However, this exclusion does not apply to loss or damage caused by or resulting from "fungus", wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.

C. With respect to any loss or damage subject to the exclusion in Paragraph **B.**, such exclusion supersedes any exclusion relating to "pollutants".

D. The following provisions in this Coverage Part or Policy are hereby amended to remove reference to bacteria:

1. Exclusion of "Fungus", Wet Rot, Dry Rot And Bacteria; and

2. Additional Coverage - Limited Coverage for "Fungus", Wet Rot, Dry Rot And Bacteria, including any endorsement increasing the scope or amount of coverage.

E. The terms of the exclusion in Paragraph **B.**, or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.

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Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

About This Filing

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

New Form

We are introducing:

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

Related Filing(s)

Rules Filing CF-2006-OVBER

Introduction

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

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

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

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

Current Concerns

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

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

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

Features Of New Amendatory Endorsement

The amendatory endorsement presented in this filing states that there is **no coverage for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease**. The exclusion (which is set forth in Paragraph B of the endorsement) applies to property damage, time element and all other coverages; introductory Paragraph A prominently makes that point. Paragraph C serves to avoid overlap with another exclusion, and Paragraph D emphasizes that other policy exclusions may still apply.

Copyright Explanation

Important Note

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

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

A. The exclusion set forth in Paragraph **B.** applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

However, this exclusion does not apply to loss or damage caused by or resulting from fungus. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.

C. With respect to any loss or damage subject to the exclusion in Paragraph **B.**, such exclusion supersedes any exclusion relating to "pollutants".

D. The terms of the exclusion in Paragraph **B.**, or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.

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EXHIBIT B

EXPLANATORY MEMORANDUM – RESPONSE TO OBJECTION 1 DATED 4-30-2010

The chief object of this filing is to submit a Company Exception to ISO State Exception Rule A.6.

Currently, this ISO rule imposes a Mandatory application of a Virus and Bacteria Exclusion CP 01 78 to the coverage afforded by the ISO Commercial Property Coverage Form. The ISO initial filing of this endorsement indicated that the exclusion was appropriate due to "pandemic" exposure to loss which was not anticipated in the standard coverage forms or in development of the loss costs for Commercial Property. Therefore, we assume that this Exclusion is deleting coverage across the entire NY Commercial Fire and Allied book written by the ISO member companies that utilize the ISO product, unless modified by such a Company exception.

Because the application of this Exclusion is to Commercial Property, we anticipate losses to fall largely in Business Personal Property ("stock") and Business Interruption/Time Element coverage segments. We also anticipate that it will not affect large segments of GNY's current book, but rather solely to some isolated risks.

The GNY Insurance Companies wishes to make this endorsement CP 01 78 Optional on individual risks rather than Mandatory on a panacea basis. Because the GNY Insurance Companies is largely a niche market of habitational business, we feel that our exposure to this type of loss ("pandemic") is minimal, since such contagious disease is largely is transmitted to third parties via ingestion or some other direct contact to an insured's products. While it is possible that some type of disease (airborne Legionnaires Disease, for example) could spread through a HVAC system in any selected Apartment or Condo Building, it is highly unlikely that it would spread throughout a vast proportion of the apartments and condominiums across NYC that we insure.

While GNY does write some business in the restaurant classifications and we acknowledge that some exposure is inherent in such classifications due to the "Typhoid Mary" or contagious disease hazard (as some saw in the Hepatitis B exposure via a green onion vector some years ago), we feel such exposure is minimal since we do not write large concentrations of these risks in the same locales who could potentially use the same vendors of supplies. We do not write "chain" restaurants utilizing the same suppliers.

For all of the above reasons, we believe application of this Exclusion is appropriate on occasion, only to certain individual risks which sell or distribute products to the public. Additionally, GNY's underwriting management feels that such an endorsement would be considered imposed on a restaurant account only if the risk presented with claim history indicative of recent incident and loss control with little remediation.

Therefore, to answer your specific questions, we do not anticipate that any of our insured's will voluntarily request this exclusion; some (habitational risks) because it would never enter their minds as a problem for which they would voluntarily reduce coverage; others (restaurants) because they feel that such an event is well within the realm of possible fortuitous occurrences and should be covered should such an event arise.

We anticipate that the Company will impose this exclusion on such individual risks that present with recent loss history of this type of claim and loss control that would give us concerns of an on-going nature (cavalier attitude of management regarding implementation of hand washing procedures by food handling staff); i.e., we would impose attachment of this Exclusion in accordance with prudent supportable underwriting analysis of risk (since the variables involved could be of substantial scope). We do not anticipate imposing this exclusion on any specific classification (though restaurants are probably the most likely to experience such events) or across large segments of our book of business, since we do not feel the exposure to loss is very high in any segment of our existing Commercial Property book (though we acknowledge the possibility for Apartments, Condominiums and Office/Retail Buildings to experience such an event).

Because of the broad scope of the potential events which may occur, we feel that it is largely impossible to create a rule which takes in every aspect of exposure to communicable disease. Is it possible to simply indicate something in your proposed revision of our rule to state "This Exclusion will be applied on a case-by-case basis to risks which present with recent loss history which in the underwriters judgment indicates a potential higher than average exposure to loss"?

As indicated, our main object of this filing is to remove the carte blanch application of this Exclusion and not deny coverage to the majority portion of our book.

EXHIBIT C

EXPLANATORY MEMORANDUM

RESPONSE TO NYSID OBJECTION DATED 6/16/10

RE: Company amendment to ISO Additional Rule A.6. EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

We are filing to amend the above-captioned ISO Rule A.6. as it applies to the attachment of ISO endorsement CP 01 78 and as further explained in our response to your objection dated 4-30-10. The current filed and approved ISO rule applies this exclusion to all CP policies. We desire to amend this rule to apply it only on a Company discretionary basis.

Our revised rule would allow this endorsement to be applied only to such accounts that are otherwise acceptable, but are rendered unacceptable due to disclosed loss history which presents incidence of exposure to this type of contamination or infectious disease hazard.

It is not an unusual practice for carriers to utilize the flexibilities of the ISO product to exclude certain exposures that present an unacceptable exposure to loss, especially a type of loss which is unanticipated in the exposures assumed in the historical definition of the terms of the coverage forms. The ISO action was taken specifically for the purpose of eliminating the ***potential*** for the courts to expand the definition of property damage to include this exposure.

As indicated in our previous response to your earlier objection, we wish to remove ISO's panacea application of this exclusion to all Commercial Property policies, so that it applies only to a select few risks which have shown known exposure to loss. We feel that application of this exclusion to such accounts is **not** Unfairly Discriminatory, since the majority of our accounts have never presented with this type of a loss. If an account did present with such a loss, then it would only be prudent to assume that the statistical probability of their experiencing another loss is of higher potential (given the nature of such bacterial and viral contamination) in comparison to the balance of our book which has little or no exposure and consequently little or no probability, regardless of classification, but as application to operations.

Unfair Discrimination

In your objection 1 dated 6-17-10, you indicated that you object to the application of the ISO Exclusion to individual risks, as follows:

> *We note your proposal to apply the Virus and Bacteria Exclusion on an optional basis because the company feels that the risk is minimal. If the company chooses to impose this exclusion on individual risks, this could be considered unfairly discriminatory.*
>
> *Where an endorsement is optional and has the effect of either broadening or limiting coverage, there should be a rate effect associated with it. To do otherwise may result in a rate that could be unfairly discriminatory to some insureds.*

Our response is that we believe you are interpreting the definition of Unfair Discrimination without reference to the **basis** of our selection process and without regard to the **basis** for determining a Discriminatory Practice as defined by the Insurance Code of the State of New York.

A practice is deemed ***Unfair*** Discrimination under the NY Insurance Code only if the **basis** for the practice is one which is defined as any of the following:

1. Under §2606: Race, Color, Creed, National Origin, Or Disability;
2. Under §2607: Sex or Marital Status;
3. Under §2608: Mental Disability.

See Attachments. We have not included any references under § 4424, since this section of the Code applies to Health Insurance Underwriting as applicable to Individuals only.

EXPLANATORY MEMORANDUM
RESPONSE TO NYSID OBJECTION DATED 6/16/10


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Therefore, we find no evidence in the Insurance Code of New York which would support your objection that the application of this Exclusion is Unfairly Discriminatory. The Commercial Property Checklist cites §2606, §2607 and §2608 and the application of an exclusion on the basis of disclosed Loss History does not come under the basis of any of these sections that define Discrimination.

The application of this exclusion to an account showing corresponding loss history for this exposure is no more Unfairly Discriminatory than removing coverage for certain types of Property in the Open under the Additional Property Not Covered endorsement (for which there has been no filed loss cost credit) for certain Named Perils.

Therefore, we request that you submit to us the citation from the NY Insurance Code which supports your allegation that the analysis of Loss History is deemed a Discriminatory practice.

Unfair Discrimination and Rate Differential:

The voluntary market assumes an underwriting selection process; however, that selection process is tempered by imposition of regulations which prohibit ***Unfair*** application of rate differentials (one would assume to any group or class of risks of similar characteristics based on the prohibited characteristics noted in the statutes §2606, §2607 and §2608).

We have not done so. Therefore, we conclude that if a single Commercial Property risk has already exhibited a higher potential for loss, as shown in a disclosed loss history, that such an exposure would necessarily be appropriate to be excluded in order to maintain the integrity of a rate which does not include in its promulgation an element representing such loss.

The standard industry definition of *Unfair Discrimination* is reflected in Professor C. Arthur Williams, Jr. succinct definition as it applies to unfairly discriminatory insurance rates as follows:

> "An insurance rate structure will be considered to be unfairly discriminatory:
> if allowing for practical limitations, there are premium differences that do not correspond to expected losses and average expenses or if there are expected average cost differences that are not reflected in premium differences"
>
> This excerpt is taken from *Insurance, Government, and Social Policy*, The S.S. Huebner Foundation for Insurance Education, C. Arthur Williams, Jr., Chapter 11, Price Discrimination in Property and Liability Insurance, 209-242.

We have not submitted for review any factor or rating basis on which the application of the Exclusion would render this filing to be supporting a Unfairly Discriminatory rate, since ISO has stated their position in their Circular (noted below) as not being anticipated in the promulgation of their Loss Costs and we have based our imposition of the Exclusion on disclosed historical losses.

Since the basis of our application of the Exclusion is based on Losses, the definition above would **not** deem the practices Unfairly Discriminatory.

No Unfair Discrimination in Rate Differential Based on ISO Historical Data and Reference Material

In ISO Reference Filing CF-2006-OVBEF (Forms) and CF-2006-OVBER (Rules) the NYSID approved the use of CP 01 78 and allowed attachment of this form to all CP policies. These filings were announced to companies in Circular LI-CF-2007-027 - NEW YORK - FORMS AND RULES TO ADDRESS EXCLUSION

EXPLANATORY MEMORANDUM
RESPONSE TO NYSID OBJECTION DATED 6/16/10

OF LOSS DUE TO VIRUS OR BACTERIA AMENDED AND APPROVED; ADVISORY NOTICE TO POLICYHOLDERS FURNISHED as approved by the NYSID as filed.

In it's Explanatory Memorandum which details the cause and effect of the application of this Exclusion, ISO states:

> "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. ……
>
> 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." See attachment LI CF 2006 175 under Supporting Documentation.

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The NYSID Analysts who reviewed this filing apparently agreed with ISO's position and did not require a "give back" on any Loss Cost or indicated there should be any associated rate differential due to the application of the exclusion. Neither is there evidence that the NYSID required that criteria for the application of the noted exclusion whose effect is to limit coverage against such potential threats to expand the definition of property damage.

Since ISO assigned no rate increment for the application of the Exclusion endorsement, there is no basis for the assertion that there is Unfair Discrimination in the application of rate differential, since the coverage was never intended as an inclusion to begin with.

RATE DETERMINATION FOR EXCLUSION ENDORSEMENT:

We therefore conclude since you approved the above ISO filing that you are in agreement with us that since there is no basis included in the ISO analysis which would support any increment of a Commercial Property Loss Cost representing this exposure, that application of any credit or rate differential is not appropriate as any credit to premium on application of this Exclusion endorsement.

CRITERIA FOR APPLICATION OF EXCLUSION ENDORSEMENT TO POLICIES:

In response to your stated Objection 1 in your letter dated 6-17-10, we hereby submit revised Company Exception Page NY CP EXC 1 01/10 ed. This revision includes criteria under which the noted endorsement CP 01 78 will be applied to selected policies.

Risk Characteristics For Application of Exclusion (CP 01 78):

1. Historical report of an event which may or may not have resulted in loss involving sickness (including death) arising out of an insured's clients' (and/or any other person to whom the insured's clients' have contact) exposure to disease or infection while on the insured's premises or due to contact with the insured's operations, employees; or products.

EXPLANATORY MEMORANDUM
RESPONSE TO NYSID OBJECTION DATED 6/16/10

2. Such claim or loss must arise from the action or order of a civil authority to close the insured's operation in order to limit public exposure to such contagion, sickness and death; or

3. Such historical event or incident can arise from the action of the insured to close the insured's operation in order to limit public exposure to such contagion, sickness and death due to the insured's prudent expectation that such an event is likely to occur.

4. Account will be considered acceptable upon submission of clearance by civil authority governing type of business insured operates or through certification by duly authorized Public Health or contagious disease expert.

5. Issues described under paragraphs 1 through 3 above may be waived if proximate cause of the incident/event is traced to vendor or supplier of the insured with which the insured has severed its relationship and/or if the insured was proven not to have contributed to the incident.

6. Issues described under paragraphs 1 through 3 above may not be waived if the insured is a restaurant and the proximate cause of the incident/event is traced to improper food handling practices, storage or sanitation infractions or improperly cooked ground beef.

RISK CHARACTERISTICS DETERMINING WHEN EXCLUSION IS NOT APPLIED:

Application of the Exclusion is determined solely on the above-noted criteria ("**Risk Characteristics For Application of Exclusion")**. Coverage provided by omission of the exclusion is therefore otherwise written freely and without restriction.

Premium Determination When Exclusion is NOT Attached:

Apply the Factor in the Table below against the combined Building, Business Personal Property or Business Income including/without Extra Expense adjusted premium for the location after application of all other modification factors.

Grade	Exposure	Charge
High	Restaurants/Hotels/Grocery or Food Product Manufacturers with Products Liability exposure; No prior loss history.	Factor: .025
Medium	Buildings (lessors') with high traffic Restaurant, Grocery or Retail exposures; No Questionable Loss Control pertaining to cleaning of ventilation systems; No prior loss history.	Factor: .015
Low	All other Classifications; No prior loss history.	Flat: $25

We have attempted to collect raw countrywide data with the assistance of our reinsurers; however, they inform us that they have no experience to share.

We have no company loss history on this exposure on which to base any charge; however, have done our best to reflect both your concerns and the exposure to loss. We plan on reviewing the performance of this coverage over the next three years and will re-assess if credible experience is collected at that juncture.

We believe the above responds to your objection and respectfully request your disposition or comment.