No. 21-3068

IN THE

United States Court of Appeals for the Sixth Circuit

SANTO'S ITALIAN CAFÉ LLC d/b/a SANTOSUOSSOS PIZZA PASTA VINO,

Plaintiff–Appellant,

v.

ACUITY INSURANCE COMPANY,

Defendant–Appellee

On Appeal from the United States District Court for the Northern District of Ohio The Honorable Pamela A. Barker No. 1:20-cv-01192

BRIEF FOR UNITED POLICYHOLDERS AS *AMICUS CURIAE* IN SUPPORT OF SANTO'S AND REVERSAL

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INTRODUCTION

Santo's, like many businesses, cannot generate meaningful revenue unless its customers are physically present on its restaurant property. In response to the Covid-19 pandemic, state officials issued orders that rendered Santo's property useless, because hosting customers there was too dangerous.

Santo's insured against this hazard. Marketed as "business-interruption insurance," Acuity sold a policy promising to replace Santo's business income if it suffered "physical loss of or damage to" its property. But Acuity denied Santo's claim, asserting that it had to show "tangible damage" to its property in order to prevail. This has been the groundless claim of the insurance industry in hundreds of cases since March 2020.

Beginning in the 1960s, courts warned insurers that "physical loss of or damage to," and its variants, cover loss-of-use claims. *See, e.g.*, *Hughes* v. *Potomac Ins. Co.*, 18 Cal. Rptr. 650 (Cal. Ct. App. 1962). In case after case, appellate courts rejected a "tangible damage" requirement, holding this language provides coverage where risks make property too dangerous for its intended use. Courts also "begged carriers to define the phrase to avoid the precise issue before the Court now"—

pandemic-induced closures. *E.g.*, *Cherokee Nation* v. *Lexington Ins. Co.*, 2021 WL 506271, *3 (Cherokee Cnty., Okla., Jan. 14, 2021).

Those pleas fell on deaf ears. Insurers are still using the same broad language. They are still insisting that it does not mean what it says—they add text here, delete text there, and claim that this is not what insurance is "for." Those arguments are unpersuasive. Insurers had decades of fair warning that "physical loss" includes "loss of use" and is not limited to "tangible damage." Acuity chose not to heed those warnings. Instead, Acuity continued selling broad coverage that applied regardless of any "tangible alteration." The courts lack power to alter that choice, and it was error for the district court to do so here. Acuity, like everyone, ought to be held to the words it used—not the words it now wishes it had used.

The judgment should be **VACATED**, and the case **REMANDED** for further proceedings.

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INTEREST OF *AMICUS CURIAE*[1]

United Policyholders ("UP") is a non-profit organization whose mission is to serve as an effective voice and a source of information and guidance for insurance consumers around the country. UP is funded by donations and grants. It does not sell insurance or accept money from insurance companies.

Unlike insurers, individual policyholders are not repeat players on insurance-coverage issues. UP works to provide an intellectual counterweight to the claims of the insurance industry, in order to help facilitate the evenhanded development of the law. During the pandemic, UP's commitment to advocating for policyholders' rights to coverage for their devastating Covid-19 losses is more vital than ever. Here, UP seeks to assist the Court on an issue of immense public importance—coverage for Covid-19 losses—by identifying arguments and authority that has escaped the lower courts' attention to date.

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[1] The parties have consented to the filing of this brief. No party or their counsel has authored this brief in whole or in part, nor has any party or its counsel contributed money intended to fund preparing or submitting this brief. No person—other than UP, its members, and its counsel—has contributed money intended to fund the preparation and submission of this brief.

STATEMENT OF THE CASE

Acuity's policy promises the following:

> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your operations during the period of restoration. The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a [risks of Direct Physical Loss unless the loss is Excluded in Property Exclusions].[2]

[R. 7-7, PID 130-31 (emphasis added).] The terms "direct physical loss of or damage to" and "Direct Physical Loss" are not defined. [R. 23, PID 439.] The policy "do[es] not include any definitions of the words 'direct,' 'physical,' 'loss,' or 'damage.'" [*Id.*] The policy also contains a standard-form "Virus or Bacteria" exclusion, stating:

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area. . . .
>
> **i. Virus Or Bacteria**
>
> (1) Any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness or disease.

[R. 7-7, PID 139-40.]

[2] The bracketed language substitutes "Covered Cause of Loss" with the definition for that term. [R. 7-7, PID 127.]

ARGUMENT

This case presents a basic lesson in textualism. Acuity promised to insure business income if Santo's suffered "physical loss of or damage to" its property. [R. 7-7, PID 130-31.] The disjunctive "or" shows that there are two bases for coverage: "physical loss of" the property or "physical damage to" the property. When a deadly pandemic prevents someone from physically using the property as it was intended, ordinary people would describe that as a "physical loss of" the property.

Unhappy with the policy's ordinary meaning, Acuity argues that the policy requires "tangible alteration" to trigger coverage. Acuity is wrong. The policy nowhere uses that (or any other) more specific term to displace the broad, ordinary meaning of "physical loss." Despite this, the district court accommodated Acuity's request to narrow coverage to "tangible alteration." The Court needs to correct this error.

The basic rule of textualism is that words are given their natural meaning, not a narrow or contrived one. A. SCALIA & B. GARNER, READING LAW §62, at 355-58 (2012) (explaining that courts "have only to say what the very words mean"). This is crucial for insurance cases. Insurers write all of the forms and, as a result, terms are strictly construed against

them, not in their favor. The text must control, even if the insurer can contrive a narrow reading of broad language. Courts are not authorized to construe language in the insurer's favor based on a conviction that the insurer could not have meant what it said. *See id.*

What Acuity said in its policy of insurance is clear: It insured "physical loss of" Santo's property and not just "tangible damage to" that property.

I. Decades of case law warned insurers that this language is broad and not limited to tangible harms.

A few years ago, this Court noted that "direct physical loss" is exceptionally broad. *K.V.G. Props., Inc.* v. *Westfield Ins. Co.*, 900 F.3d 818, 820-21 (6th Cir. 2018). In the Court's words, "one would struggle to think of damage not covered by this language." *Id.* That case involved an illicit marijuana farm, but the comment was prescient.

Before the pandemic, precedent from sixteen jurisdictions addressed insurers' "tangible damage" argument. In all but one, appellate courts ruled against the industry. Despite this consensus, insurers insist that the weight of authority tilts their way. They do so by

citing a swath of unpublished or trial-level decisions (both pre- and post-pandemic).

Virtually all of those cases did not face, or have not yet faced, appellate scrutiny. It is not accurate to equate the rulings of trial courts with the judgments of state and federal appellate courts. And the bulk of published appellate law cuts against Acuity.

A. The overwhelming weight of published authority gives "physical loss" its broad, ordinary meaning.

Insurance coverage is a matter of state law. *Telxon Corp.* v. *Fed. Ins. Co.*, 309 F.3d 386, 391 (6th Cir. 2002). Before the pandemic, five states' high courts[3] and seven other states' intermediate appellate courts[4]

[3] *W. Fire Ins. Co.* v. *First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (gasoline fumes); *Sentinel Mgmt. Co.* v. *Aetna Cas. & Sur. Co.*, 615 N.W.2d 819 (Minn. 2000) (asbestos); *Mellin* v. *N. Sec. Ins. Co.*, 115 A.3d 799 (N.H. 2015) (urine odor); *Dundee Mut. Ins. Co.* v. *Marifjeren*, 587 N.W.2d 191 (N.D. 1998) (power outage); *Murray* v. *State Farm Fire & Cas. Co.*, 509 S.E.2d 1 (W. Va. 1998) (threat of rockfall).

[4] *Hughes* v. *Potomac Ins. Co.*, 18 Cal. Rptr. 650 (Cal. Ct. App. 1962) (erosion of land beneath a house); *Azalea, Ltd.* v. *Am. States Ins. Co.*, 656 So. 2d 600 (Fla. Ct. App. 1995) (death of bacteria colony in treatment plant); *Bd. of Educ.* v. *Int'l Ins. Co.*, 720 N.E.2d 622, 625-26 (Ill. Ct. App. 1999) (presence of asbestos); *Widder* v. *La. Citizens Prop. Ins. Corp.*, 82 So. 3d 294 (La. Ct. App. 2011) (lead contamination); *Wakefern Food Corp.* v. *Liberty Mut. Fire Ins. Co.*, 968 A.2d 724 (N.J. App. Div. 2009) (power outage); *Farmers Ins. Co.* v. *Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993)

held in binding decisions that "physical loss" and its variants included risks that rendered property unsafe or unusable, even without visible, tangible, or structural damage. Federal appellate courts reached the same conclusion applying the law of four other states—including this one, under Ohio law.[5]

New York is the only state that generally sides with the insurers on this issue. *E.g.*, *Roundabout Theatre Co.* v. *Cont'l Cas. Co.*, 302 A.D.2d 1 (N.Y. App. Div. 2002). But not all of the time. *Pepsico, Inc.* v. *Winterthur Int'l Am. Ins. Co.*, 24 A.D.3d 743, 744 (N.Y. App. Div. 2005). Ohio law provides coverage unless the policy is limited to "physical injury." *Alliance*, 248 F.2d at 925 (radium contamination triggered business-income coverage); *Mastellone* v. *Lightning Rod Mut. Ins. Co.*, 884 N.E.2d

(meth fumes); *Graff* v. *Allstate Ins. Co.*, 54 P.3d 1266 (Wash. Ct. App. 2002) (meth residue).

[5] *Essex Ins. Co.* v. *BloomSouth Flooring Corp.*, 562 F.3d 399 (1st Cir. 2009) (Massachusetts law) (carpet chemical odors); *Hampton Foods, Inc.* v. *Aetna Cas. & Sur. Co.*, 787 F.2d 349 (8th Cir. 1986) (Missouri law) (risk of collapse); *Alliance Ins. Co.* v. *Keleket X-Ray Corp.*, 248 F.2d 920 (6th Cir. 1957) (Ohio law) (radium contamination); *Intermetal Mexicana, S.A.* v. *Ins. Co. of N. Am.*, 866 F.2d 71 (3d Cir. 1989) (Pennsylvania law) (dispossession of property).

1130, 1143 (Ohio Ct. App. 2008) (construing "physical injury" as requiring structural damage).[6]

If Acuity wants to keep score, then it is 15-1 in favor of Santo's. The law in some jurisdictions is nuanced. But it is false to claim that most states require "tangible alteration" to trigger the broader term "physical loss" in a business-interruption policy.

There is no reason to believe that the Ohio Supreme Court would follow the one state where the insurers' position has generally prevailed, rather than the fifteen states that have generally rejected it. The sheer weight of authority makes it impossible to discuss each case in detail. But the key decisions illustrate why Acuity's position has persuaded few appellate judges.

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[6] There is variation in some other states. *Compare Hughes*, 18 Cal. Rptr. at 655 (rapid erosion rendering house uninhabitable caused "physical loss" to the house) *with MRI Healthcare of Glendale, Inc.* v. *State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766 (2010) (no "physical loss" when MRI machine would not "ramp up" due to inherent defect); *compare also General Mills, Inc.* v. *Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (FDA ban on selling contaminated oats caused "physical loss") *with Source Food Techs., Inc.* v. *U.S. Fidelity & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006) (Minnesota law) (USDA ban on importing contaminated beef did not cause "physical loss").

Start with *Hughes* and *Murray*. Both policies promised to pay for "direct physical loss to the property." *Murray*, 509 S.E.2d at 16; *Hughes*, 18 Cal. Rptr. at 655. In *Hughes*, erosion swept away the building's support, causing cosmetic damage but making it unsafe to inhabit. 18 Cal. Rptr., at 655. In *Murray*, unstable rocks above a house prompted an evacuation order from the government. 509 S.E.2d at 16-17.

The insurers denied coverage in both cases. Like here, they contended that their policies "only insured the physical damage to the dwelling." 509 S.E.2d at 16-17. Both courts disagreed:

> To accept [the insurer's] interpretation of its policy would be to conclude that a building which has been overturned or which has been placed in such a 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 insurer] 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 a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner.

Id. (quotations omitted, emphasis added).

Both courts stressed that the property was not safe—giving weight to perhaps the most important characteristic of physical property. *Id.*

Hughes reasoned that "[i]t goes without question that [the homeowners]' 'dwelling building' suffered real and severe damage when the soil beneath it slid away and left it overhanging a 30-foot cliff." 18 Cal. Rptr. at 655. *Murray* echoed this, pointing out that the houses beneath the cliff "could scarcely be considered 'homes' in the sense that rational persons would be content to reside there." 509 S.E.2d at 17. That was a "physical loss."

Other cases include *First Presbyterian*, where the Colorado Supreme Court held that loss of use can be a "physical loss." 437 P.2d at 55. There, "the accumulation of gasoline around and under the church building . . . ma[de] further use of the building highly dangerous" and caused a "direct physical loss." *Id.* And in *Wakefern*, the court rejected "the narrowly-parsed definition of 'physical damage' which the insurer urges us to adopt" and held that "loss of function" sufficed. 968 A.2d at 735-38.

This discussion could go on for pages, but UP will stop here. The Court should review the many other pre-Covid cases that found coverage. *See, e.g.*, *Motorists Mut. Ins. Co.* v. *Hardinger*, 131 F. App'x 823, 827 (3d Cir. 2005) (e-coli contamination); *General Mills*, 622 N.W.2d at 152 (FDA

rule that harmless oats were nonetheless "adulterated"); *Manpower Inc.* v. *Ins. Co. of Pa.*, 2009 WL 3738099 (E.D. Wis., Nov. 3, 2003) (police order forbidding access to unstable building); *TRAVCO* v. *Ward*, 2010 WL 2222255 (E.D. Va., June 3, 2010) (toxic gas); *Or. Shakespeare Festival Ass'n* v. *Great Am. Ins. Co.*, 2016 U.S. Dist. LEXIS 74450 (D. Or., June 7, 2016) (wildfire smoke), *vac'd as a condition of settlement*.

Having failed to "defin[e] direct physical loss or damage as they (and others before them) have argued it should be interpreted," Acuity must honor its broad promise of coverage. *Cherokee Nation* v. *Lexington Ins. Co.*, 2021 WL 506271, *4 (Cherokee Cnty., Okla., Jan. 14, 2021). The Court of Appeals is not in the business of rescuing insurance companies who regret their choice to sell broadly worded insurance policies.

B. *Couch on Insurance* cannot bear the weight the insurers put on it.

The district court relied heavily on a single treatise section that purports to summarize the law. 10A STEVEN PLITT, ET AL., COUCH ON INSURANCE §148:46 (3d ed., 2020 update). That section of Couch distorts the state of things. It cites only *First Presbyterian* and *Hampton Foods* as pro-policyholder cases. *Id.* It then cites five cases as supporting the

insurers' restrictive view: two from New York, the *MRI* case from California, an Oregon federal district court opinion (abrogated three years later in *Trutanich*, *supra*), and this Court's unpublished decision in *Universal Image*. *Id.*

This is a markedly incomplete survey. Yet insurers cite it as authoritative. The Court should be skeptical of such assertions. Indeed, even Couch's attempt to reconcile the split supports Santo's. It posits that the key factor in the "physical loss" analysis is whether a fortuitous, external force changed the condition of the property. *Id.* That test is met here: the pandemic was fortuitous, and it made Santo's property unsafe.

Another telling indictment of this section is that a district court in Oregon rejected it—despite Couch's assertion that Oregon follows the "majority," pro-insurer rule. *James W. Fowler Co.* v. *QBE Ins. Corp.*, 474 F. Supp. 3d 1149, 1155-59 (D. Or. 2020) (Oregon law). The insurer argued that Couch supported its tangible-damage argument, but the court disagreed. Instead, as instructed by Oregon law, the court held that "physical loss" occurs when the property, "while intact and undamaged, is rendered useless to [the policyholder]." *Id.* at 1158. That is the majority rule.

II. The better-reasoned Covid-19 cases follow the pre-pandemic consensus.

The insurers' refusal to pay Covid-19 claims generated a flood of litigation. Acuity claims that most trial-level decisions favor insurers. But those orders contain serious errors, egregious departures from the text, or both. Given existing law, appellate benches may well invert that count. In any event, a growing number of trial courts are staying faithful to the text of the policies and the actual, pre-pandemic consensus. This Court should adopt their reasoning.

A recent ruling by Judge Chang in the Covid-19 MDL litigation is representative.[7] *In re Soc'y Ins. Co. Covid-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2964, 2021 U.S. Dist. LEXIS 32351 (N.D. Ill., Feb. 22,

[7] There are many other Covid-19 decisions that the Court should review, including one by Judge Polster. *Henderson Rd. Rest. Sys.* v. *Zurich Am. Ins. Co.*, 2021 U.S. Dist. LEXIS 9521 (N.D. Ohio, Jan. 19, 2021); *see also Ungarean* v. *CNA Ins.*, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2 (Mar. 22, 2021); *Derek Scott Williams PLLC* v. *Cincinnati Ins. Co.*, 2021 U.S. Dist. LEXIS 37096 (N.D. Ill., Feb. 28, 2021); *NECO, Inc.* v. *Owners Ins. Co.*, 2021 U.S. Dist. LEXIS 28761 (W.D. Mo., Feb. 16, 2021); *Choctaw Nation of Okla.* v. *Lexington Ins. Co.*, 2021 WL 714032 (Bryan Cty., Okla., Feb. 15, 2021); *Cherokee Nation*, 2021 WL 506271, *3-7; *Elegant Massage, LLC* v. *State Farm Mut. Auto. Ins. Co.*, 2020 WL 7249624 (E.D. Va., Dec. 9, 2020); *Studio 417* v. *Cincinnati Ins. Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020).

2021). *Society* analyzed the policy text in detail and concluded that coverage existed for Covid-19 losses. *Id.*, *15-16.

Judge Chang started, as one should, with the text. "[T]he operative text is 'direct physical loss of or damage to covered property." *Id.*, *37. He swiftly desiccated the "tangible alteration" requirement:

> The disjunctive "or" in that phrase means that "physical loss" must cover something different from "physical damage." It is axiomatic that courts interpret contracts so as to give effect to all of their provisions. That interpretive principle refutes [the insurer]'s first argument: that the coronavirus could not constitute "direct physical loss of or damage to" the covered property because the virus "does not cause a tangible change to the physical characteristics of property."

Id. (cleaned up). This is not surprising; it's what the word "or" means. SCALIA & GARNER §12, at 116-17; *Sec. Ins. Co.* v. *Kevin Tucker & Assocs.*, 64 F.3d 1001, 1007 (6th Cir. 1995). So too in Ohio: "A policy's use of the disjunctive 'or' indicates that the two phrases were not intended to have the same meaning." *Ohio Gov't Risk Mgmt. Plan* v. *Harrison*, 874 N.E.2d 1155, 1161 (Ohio 2007).

Society observed that the "more challenging interpretive question is whether the restrictions imposed on the [policyholders]' use of their premises count as *physical* loss." 2021 U.S. Dist. LEXIS 32351, *38. It

concluded that they did. Although the restaurants could offer take-out services, the Covid-19 orders "impose a *physical* limit: the restaurants are limited from using much of their physical space." *Id.*, *39. "It is not as if the shutdown orders imposed a *financial* limit on the restaurants by, for example, capping the dollar-amount of daily sales the restaurant could make." *Id.* "No, instead the [policyholders] cannot use (or cannot fully use) the physical space." *Id.*

That is what happened to Santo's. Responding to a pandemic, the Governor's edict caused Santo's to lose the full use of its property. In every sense, that loss "relates to natural or material things." *Physical*, WEBSTER'S THIRD NEW INT'L DICTIONARY 1706 (1993) (contrasting "physical" things with "things mental, moral, spiritual, or imaginary").

The decision below argues that no "physical force has altered or otherwise affected the property." [R. 23, PID 453.] That rewrites the policy, which does not require alteration of the property. It requires only "physical loss of" the property. Regardless, there was a "physical" force here—the pandemic. The danger caused by the pandemic "ma[de] further use of the building highly dangerous," no less than the gasoline fumes in *First Presbyterian*, 437 P.2d at 55, or the rocks in *Murray*, 509 S.E.2d at

16-17. In both cases, the government subordinated the owners' property rights to its interest in protecting human life. *See id.*

It did not matter that the policies insured property, and not people. The government barred the use of physical property in response to a physical threat, and that was enough. *Id.* Churches, houses, or restaurants that are unsafe for human use can "scarcely be considered [churches, houses, or restaurants] in the sense that rational persons would be content to reside there." 509 S.E.2d at 17.

Finally, *Society* addressed one final argument, which the district court incorrectly adopted here:

> Remember that Society promised to pay only for loss of business income during the "period of restoration" . . . . The definition of "Period of Restoration" says that coverage for loss of business income "ends . . . when the property at the described premises should be repaired, rebuilt, or replaced with reasonable speed and similar quality; or the date when business is resumed at a new permanent location." In Society's view, "repaired, rebuilt, or replaced" implies that covered "physical loss or damage" is necessarily tangible, requiring a physical injury to the covered property rather than mere loss of use.

2021 U.S. Dist. LEXIS 32351, *40-41 (cleaned up).

Judge Chang considered and rejected this point. Reading the policy as a whole, "too many textual clues point the other way." *Id.*, *41. The

Period of Restoration "describes a *time* period during which loss of business income will be covered, rather than an explicit definition of coverage." *Id.* The coverage grant applied to "loss of" property, not just "damage to" property. *Id.* The construction-as-a-whole canon cannot be used to render other terms meaningless. *Id.*

Further supporting this reading was that "repair" and "replace" need not be construed narrowly. *Id.* "Repair," for example, means "to restore to a sound or healthy state." *Repair,* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1055 (11th ed. 2003). "Replace" means "to restore to a former place or position." *Replace*, MERRIAM-WEBSTER ONLINE DICTIONARY.

"There is nothing inherent in the meanings of those words that would be inconsistent with characterizing the [policyholders]' loss of their space due to the shutdown orders as a physical loss." *Society*, 2021 U.S. Dist. LEXIS 32351, *40-41. "If, for example, the coronavirus risk could be minimized by the installation of partitions and a particular ventilation system, then the restaurants would be expected to 'repair' the space by installing those safety features." *Id.* Other courts agree. *Derek Scott Williams*, 2021 U.S. Dist. LEXIS 37096, *12 ("'Repair,' however, is not

inherently physical; one need only consider common references to repairing a relationship or repairing one's health.") (citing Merriam-Webster); *see also NECO*, 2021 U.S. Dist. LEXIS 28761, *19-20; *Cherokee Nation*, 2020 WL 506271, *7-8 & n.15; *Ungarean*, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2, *18-21.

At worst, tension exists under either side's interpretation. The court could either ignore the disjunctive coverage grant, or it could adopt an alternate (though still reasonable) reading of "repair" and "replace." *Society*, 2021 U.S. Dist. LEXIS 32351, *40-41. As a result, the policy was ambiguous and the tie went to the policyholder. *Id.* That should have occurred here. *Kevin Tucker*, 64 F.3d at 1007; *Harrison*, 874 N.E.2d at 1161 ("If provisions are susceptible to more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured."). Santo's interpretation of the policy is reasonable. The district court erred in dismissing the case on the pleadings.

A court cannot avoid this ambiguity by reading "loss of" as meaning only a total loss. Acuity defined "suspension" as the "partial slowdown or complete cessation of your business activities." [R. 7-7, PID 131 (emphasis added).] It also requires Santo's to mitigate its damages (by

reducing business-income payments if Santo's could have, but did not, resume some of its operations). [*Id.* at 150 (§7).] A court cannot construe "loss of" to mean "total loss" where the policy covers the "partial slowdown" of business operations due to a "loss of" real property, and where the insurer compels a partial resumption as a condition of coverage. [*Id.* at 131.]

In sum, Acuity's interpretation fails to give meaning to (1) the disjunctive "loss of or damage to;" (2) the period-of-restoration terms; and (3) the guarantee of coverage for the "partial slowdown" of operations. Judge Chang's and Santo's interpretation gives meaning to all three. Ohio law requires this court to adopt that reading.

III. *Mastellone* and *Universal Image* are not persuasive.

The district court relied on two cases in denying coverage. *Mastellone* v. *Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130, 1143 (Ohio Ct. App. 2008); *Universal Image Prods., Inc.* v. *Federal Ins. Co.*, 475 Fed. App'x 569, 573 (6th Cir. 2012). Neither case is persuasive.

A. *Mastellone* construed "physical injury," not "physical loss."

Mastellone addressed different language. In denying coverage, the court stated that "we construe the term 'physical injury' to mean a harm to the property that adversely affects the structural integrity of the house." 884 N.E.2d at 1143. But Acuity did not insure against "physical injury." It promised to pay for "physical loss of or damage to" the property. [R. 7-7, PID 130-31.] Those are different words, with different meanings.

An Ohio court has already rejected the argument that *Mastellone* controls here. *McKinley Dev. Leasing Co.* v. *Westfield Ins. Co.*, 2021 Ohio Misc. LEXIS 17, *5-10 (Stark Cnty., Ohio, Feb. 9, 2021). So has Judge Polster, who acknowledged *Mastellone*, but found it (and the decision below) unpersuasive. *Henderson Road*, 2021 U.S. Dist. LEXIS 9521, *23-24, 27, 34-38. This Court should follow suit.

Despite the distinction between "physical loss" and "physical injury," the district court thought *Mastellone* applied anyway. [R. 23, PID 458.] It cited the "other terms" in the definition of "property damage," [*id.*], including the policy's limitation to damage that is "a physical loss to property." 884 N.E.2d at 1143. Judge Polster noticed this anomaly,

stating that "[i]t is unclear why the *Mastellone* court found that 'physical loss to property' equated to 'physical injury.'" 2021 U.S. Dist. LEXIS 9521, *27 & n.5.

But this point of Ohio-law trivia highlights the error in the decision below. Whatever *Mastellone* was doing, it certainly was not construing property insurance writ large. The panel said that "we construe the term 'physical injury," full stop. 884 N.E.2d at 1143 (emphasis added). It exclusively analyzed those terms. The district court erred in forcing *Mastellone* on language it did not address. It should have just examined the text and interpreted it as required.

B. *Universal Image* misconstrues Michigan law and is under scrutiny in another appeal.

The district court also relied on *Universal Image*, an unpublished disposition from this Court. [R. 23, PID 452-53.] That case involved Michigan law and held that "physical loss" required "tangible damage." *Universal Image*, 475 F. App'x at 573-74. It referred to *Mastellone* in dicta, but otherwise did not address that case. *Id.*; *Henderson Road*, 2021 U.S. Dist. LEXIS 9521, *29. Regardless, *Universal Image* is not binding and does not support the decision below.

First, *Universal Image* lacks the textual analysis Michigan law requires. It predicted that the Michigan Supreme Court would require "tangible damage" based on an inference from an unpublished Michigan Court of Appeals case that did not address "physical loss." 475 F. App'x at 573-74. It drew support for that conclusion from a case that ruled against the insurer on the "physical loss" issue. *Id.* (discussing *de Laurentis* v. *United Servs. Auto. Ass'n*, 162 S.W.3d 714 (Tex. Ct. App. 2005)).

Second, *Universal Image* involved different facts. There, the policyholder abandoned the property after conceding it was safe. 475 F. App'x at 570-71. That is not true here, where the state forcibly barred Santo's from using part of its property due to a deadly pandemic.

Finally, *Universal Image* is under scrutiny in a Covid-19 appeal governed by Michigan law. *Kirsch* v. *Aspen Am. Ins. Co.*, 6th Cir. No. 21-1038. UP has filed a brief in that case explaining that *Universal Image* misconstrued Michigan law and should not be followed. *See id.*, ECF#22 (Brief of UP as *Amicus Curiae*). The Court should not rely on *Universal Image* here.

IV. The Court should remand for discovery on whether regulatory estoppel bars Acuity from enforcing the virus exclusion.

The district court held, in the alternative, that a virus exclusion barred coverage. That was error. When Acuity proposed the virus exclusion to the Ohio Department of Insurance ("ODOI"), it represented that it did not affect coverage. Now, after collecting premiums based on that representation, Acuity asserted below that the exclusion does narrow coverage. [R. 13, PID 289-90.]

Well-established law estops Acuity from making that argument. *Morton Int'l, Inc.* v. *Gen. Acc. Ins. Co.*, 629 A.2d 831 (N.J. 1993). This principle, known as "regulatory estoppel," binds Acuity to the scope of coverage it represented to regulators. *Id.* at 876. At a bare minimum, the nature and impact of those misrepresentations present "factual distinctions" that "cannot appropriately be resolved by a motion to dismiss." *Hart* v. *Hillsdale Cnty.*, 973 F.3d 627, 643 (6th Cir. 2020).

Santo's asked for discovery on this issue. [R. 13, PID 289-90; R. 13-1, PID 301-04.] The district court refused because it also dismissed the case on the "physical loss" issue. [R. 23, PID 459 n.4.] Since that holding was error, the Court should remand for discovery on estoppel.

A. The insurance-regulatory process

The virus exclusion here is part of a standard-form insurance policy developed by insurers and their trade associations. Standard-form products allow insurers to evaluate loss and risk on a nationwide basis. On the policyholder side, standardization allows meaningful comparison of rates and service.

The McCarran-Ferguson Act exempts insurers from federal antitrust laws so that they can collaborate in this way. 15 U.S.C. §1012(b). However, the lack of actual negotiation of form terms, along with the antitrust exemption, makes state oversight essential. *Id.* (imposing antitrust liability "to the extent that such [insurance] business is not regulated by State Law.").

When insurers want to change their forms, drafting organizations typically prepare the change. *Morton*, 629 A.2d at 849-50. The exclusion in this case was developed by the Insurance Services Organization ("ISO"). *See ISO Multistate Forms Revisions Circular* BP-2009-OFR09, at 20 (attached as Appendix A). ISO then seeks regulatory approval, usually by submitting the change and explanatory memoranda to all 50 states. *Morton*, 629 A.2d at 851. ISO also negotiates with regulators

about whether changes will require adjustment of rates. *Id.* at 851-52. Two points about this process are critical.

First, once approved, the forms are sold to thousands of individual policyholders who cannot negotiate and who "rarely see[] the policy form until after the premium has been paid." *Id.* Thus, "to the extent that [an exclusion] ever was subjected to arms-length evaluation by interests adverse to the insurance industry, that evaluation occurred only when the clause was submitted to and reviewed by state regulatory authorities." *Id.* at 852-53.

Second, ISO seeks approval for all of its member companies. Its statements to any regulator as to the content of the standard form bind all of the member companies everywhere. *See id.*

B. When it proposed this virus exclusion, ISO was well-aware that standard-form property policies covered risk arising from disease-causing agents.

For decades prior to the drafting of the virus exclusion, standard-form property-insurance policies covered risks generated by disease-causing agents. *Supra*, §I.A. Courts in the United States—including this one—held that these policies covered loss of use in the face of

contamination by e-coli bacteria,[8] radioactive dust,[9] noxious air particles,[10] lead,[11] asbestos,[12] mold and mildew,[13] "health-threatening organisms,"[14] vaporized agricultural chemicals,[15] and pesticides.[16] This was no secret; anyone reading one decision would soon learn of the rest.[17] It certainly was no secret to ISO, which monitors court decisions as a service to its member companies. ISO knew—because it was its job to know—that the law allowed recovery for virus-and-bacteria-based losses.

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[8] *E.g.*, *Hardinger*, 131 F. App'x at 827.

[9] *Alliance*, 248 F.2d at 925.

[10] *Schlamm Stone & Dolan, LLP* v. *Seneca Ins. Co.*, 2005 WL 600021, *3-5 (N.Y. Supr., Mar. 16, 2005).

[11] *Yale Univ.* v. *CIGNA Ins. Co.*, 224 F. Supp. 2d 402, 413 (D. Conn. 2002).

[12] *Sentinel*, 615 N.W.2d at 825-26.

[13] *Prudential Prop. & Cas. Ins. Co.* v. *Lillard-Roberts*, 2002 WL 31495830, *8-9 (D. Or., June 18, 2002).

[14] *Pillsbury Co.* v. *Underwriters at Lloyd's, London*, 705 F. Supp. 1396, 1401 (D. Minn. 1989).

[15] *Henri's Food Prods. Co.* v. *Home Ins. Co.*, 474 F. Supp. 889, 892 (E.D. Wis. 1979).

[16] *General Mills*, 622 N.W.2d at 152.

[17] For instance, *First Presbyterian*, 437 P.2d at 55 (gasoline vapors) was subsequently cited by other similar cases. *E.g.*, *Lillard-Roberts*, 2002 WL 31495830, *8-9; *Matzner* v. *Seaco Ins. Co.*, 1998 WL 566658 (Mass. Super., Aug. 12, 1998) (carbon monoxide); *Trutanich*, 858 P.2d at 1335 (meth fumes).

Indeed, the SARS epidemic in 2002-03 prompted ISO to draft virus exclusions. L. de Paoli, et al., *Insurance Unlikely to Cushion Coronavirus Losses—But There Are Exceptions,* INS. J. (March 4, 2020), www.insurancejournal.com/news/international/2020/03/04/560126.htm.

As one writer explained at the start of the Covid-19 pandemic:

> The forced closure of businesses nationwide because of the novel coronavirus would seem to be the perfect scenario for filing a "business interruption" insurance claim. But most companies will probably find it difficult to get an insurance payout because of policy changes made after the 2002-2003 SARS outbreak, according to insurance experts and regulators.

T. Frankel, *Insurers Knew the Damage a Viral Pandemic Could Wreak on Businesses. So They Excluded Coverage.*, WASH. POST (April 2, 2020), www.washingtonpost.com/business/2020/04/02/insurers-knew-damage-viral-pandemic-could-wreak-businesses-so-they-excluded-coverage.

SARS infected 8,000 people and led to millions of dollars in business-interruption claims. One insurer paid $16 million to a single hotel chain in the face of a SARS-based business closure. *See id.*

C. ISO and Acuity misled Ohio regulators about this exclusion, falsely claiming that it did not affect coverage.

Instead of asking for permission to narrow coverage, however, the insurance industry lied. It told ODOI that the exclusion did not alter coverage, knowing full well it was meant to narrow coverage.

When Acuity proposed the changes to form CB-0002 (8-15)—the form sold here—it told ODOI that the change "adopt[s] ISO's 2010 Multistate Forms Revisions Circular BP-2009-OFR09." *Acuity Ohio Explanatory Memo.*, at 2 (Attached as Appendix B). That Circular assured regulators that "[t]here is no impact on coverage." App'x A, at 21. In addition, the "background" section states:

> Although property policies have not traditionally been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or 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.

Id. at 20 (emphasis added). This was not a true statement in light of existing law, including the law in this Circuit, which found coverage for risks created by disease-causing agents. *Supra*, §IV.B.

Had Acuity and ISO told the truth—that this exclusion was intended to reduce coverage—ODOI could and likely would have responded differently. In exchange for letting Acuity avoid multi-million-dollar payouts, ODOI could have: (1) enforced a rate reduction; (2) modified the exclusion;[18] or (3) done both. By misrepresenting the intent behind the language to the only entity who could negotiate, Acuity seeks to benefit from narrower coverage after charging policyholders premiums for broader coverage. This Court should not allow that.

D. Santo's has the right to pursue estoppel on remand.

There is a well-established remedy for this misbehavior. Having collected premiums for broader coverage, Acuity must provide it. *Morton*, 629 A.2d at 876. A remand is necessary to allow Santo's to develop this argument.

Morton is the textbook example. That case arose out of the pollution exclusions added in response to CERCLA. The New Jersey Supreme Court held that the exclusion was unambiguous, but it barred the insurer

[18] This happened with ISO's terrorism exclusion. J. Woodward, *The ISO Terrorism Exclusions: Background and Analysis*, INS. RISK MGMT. INSTITUTE (Feb. 2002), www.irmi.com/articles/expert-commentary/the-iso-terrorism-exclusions-background-and-analysis.

from enforcing it. The Court determined that the insurance industry misled regulators by claiming that the exclusion "clarified" coverage—even though the intent and effect of the exclusion, under New Jersey law, was to narrow coverage. *Id.*

The remedy was simple. "Having profited from that nondisclosure by maintaining pre-existing rates for substantially-reduced coverage, the industry justly should be required to bear the burden of its omission." *Id.* The Court ordered the industry to "provid[e] coverage at a level consistent with its representations to regulatory authorities." *Id.*

At least four additional high courts have followed *Morton*. *St. Paul Fire Ins. Co.* v. *McCormick & Baxter Creosoting Co.*, 923 P.2d 1200 (Or. 1996); *Textron, Inc.* v. *Aetna Cas. & Sur. Co.*, 754 A.2d 742 (R.I. 2000); *Sunbeam Corp.* v. *Liberty Mut. Ins. Co.*, 781 A.2d 1189 (Pa. 2001). A fourth state overruled precedent enforcing the exclusion after being informed of the insurers' misstatements. *Ala. Plating Co.* v. *U.S. Fidelity & Guar. Co.*, 690 So. 2d 331 (Ala. 1996).

Estoppel is critical here. The virus exclusion was developed in response to the 2002-03 SARS outbreak. *See* de Paoli, Frankel, *supra*. The insurance industry paid millions of dollars in claims for business

closures caused by that event. *See id.* It sought to avoid further claims by writing a new exclusion. Then it lied to regulators about the scope of the exclusion (saying, as Acuity did, that "[t]here is no impact on coverage") to avoid a rate decrease. Now that its policyholders are hemorrhaging cash, Acuity reveals the "truth"—it did mean for the exclusion to narrow coverage. Not only that, it wanted the exclusion to block coverage in this exact situation. That is a classic case for estoppel.

Santo's preserved this issue below and asked to take discovery on it. [R. 13, PID 289-90.] The documents UP is submitting with this brief are only the tip of the iceberg. Santo's is entitled to do more digging in discovery, and Acuity is entitled to defend itself. But that cannot occur for the first time on appeal. Because the district court's physical-loss ruling was error, the Court ought to remand for discovery. It can consider the scope of the virus exclusion once the parties develop a record on estoppel.

CONCLUSION

The judgment should be **VACATED**, and the case **REMANDED** for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because it is prepared using Microsoft Word using New Century Schoolbook 14-point font.

I also certify that this document complies with the type-volume limit set out in FED. R. APP. P. 29(a)(5), by reference to FED. R. APP. P. 32(a)(7)(B)(i) because it is prepared in a proportionally spaced font and contains 6,493 words, exempting the portions specified in FED. R. APP. P. 32(f).

/s/ *Christopher E. Kozak* /

CERTIFICATE OF SERVICE

I certify that on April 9, 2021, I served a copy of the foregoing on all counsel of record using the Court's CM/ECF filing system. Parties can access this filing through the Court's system.

/s/ *Christopher E. Kozak* /

APPENDIX A

Exclusions – Virus Or Bacteria

Introduction

We are incorporating the provisions of Exclusion Of Loss Due To Virus Or Bacteria Endorsement BP 06 01 into the Businessowners Coverage Form.

Background

Currently, **Section I – Property** of the Businessowners Coverage Form is amended by Exclusion Of Loss Due To Virus Or Bacteria Endorsement BP 06 01 which, in general, excludes coverage for any loss or damage caused by or resulting from any virus, bacterium or other microorganims that induces or is capable of inducing physical distress, illness or disease.

Although property policies have not traditionally been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or 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 incorporating the function of endorsement BP 06 01 into the Businessowners Coverage Form.

Explanation of Changes

To incorporate the exclusion of loss due to virus or bacteria into the Businessowners Coverage Form we are revising **Section I – Property** by:

- Adding a new Exclusion **B.1.j.** Virus Or Bacteria. Paragraph **B.1.j.** provides that:
  - There will be no payment 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 Virus Or Bacteria exclusion does not apply to loss or damage caused by or resulting from "fungi" wet rot or dry rot;
  - The Virus Or Bacteria exclusion supersedes any exclusion relating to "pollutants".
- Deleting the word "bacteria" throughout exclusion Paragraph **B.1.i.** (currently titled "Fungi", Wet Rot, Dry Rot And Bacteria.) In addition, we are making editorial changes to complement the removal of the word "bacteria".

- Adding the word "computer" throughout Paragraphs **A.5.p.** Electronic data and **A.5.q.** Interruption Of Computer Operations to reinforce that the reference to "virus", within these paragraphs, refers to a computer virus.
- Removing the word "bacteria" throughout Paragraph **A.5.r.** (currently titled Limited Coverage For "Fungi", Wet Rot, Dry Rot And Bacteria).

To complement these revisions, we are also withdrawing Exclusion Of Loss Due To Virus Or Bacteria endorsement BP 06 01 from use.

In addition to the aforementioned revisions to the Businessowners Coverage Form, we are:

- Revising Food Contamination Endorsement BP 04 31 to reflect that the newly added Exclusion Paragraph **B.1.j.** Virus Or Bacteria does not apply to the coverage provided within this endorsement.
- Revising Changes Limited Fungi Or Bacteria Coverage Endorsement BP 05 76 by removing the word "bacteria" from the endorsement entirely. In addition, we are making editorial changes to complement the removal of the word "bacteria".
- Revising Restaurants Endorsement BP 07 78 to reflect that the newly added Exclusion Paragraph **B.1.j.** Virus Or Bacteria does not apply to the coverage provided within this endorsement.

Impact

There is no impact on coverage.

Related Revisions

- Changes – Limited Fungi Or Bacteria Coverage Endorsement BP 05 76
- Food Contamination Endorsement BP 04 31
- Restaurants Endorsement BP 07 78

Withdrawn Forms

Exclusion Of Loss Due To Virus Or Bacteria Endorsement BP 06 01

APPENDIX B

ACUITY, A Mutual Insurance Company is filing for approval the following: new forms, revised forms, revised Declarations, and forms that will be withdrawn. We are requesting a New Business Date of 5/23/16 and a Renewal Business Date of 7/23/16.

New Forms

CB-0781(1-10) Residential Cleaning Services
This new form is similar to ISO's BP 07 81 01 10 with formatting and editorial changes.

CB-1231(1-10) Additional Insureds – Building Owners
This new form is similar to ISO's BP 12 31 01 10 with formatting and editorial changes.

CB-1403(1-10) Theft of a Clients' Property
This new form is similar to ISO's BP 14 03 01 10 with formatting and editorial changes.

CB1404(1-10) Windstorm or Hail Losses To Roof Surfacing – Actual Cash Value Loss Settlement
This new form is similar to ISO's BP 14 04 01 10 with formatting and editorial changes.

CB1410(1-10) Brands and Labels
This new form is similar to ISO's BP 14 10 01 10 with formatting and editorial changes.

CB1415(1-10) Limited Exclusion – Personal an Advertising Injury – Lawyers Endorsement
This new form is similar to ISO's BP 14 15 01 10 with formatting and editorial changes.

CB1419(1-10) Exclusion – Damage To Work Performed By Subcontractors on your Behalf
This new form is similar to ISO's BP 14 19 01 10 with formatting and editorial changes.

CB1420(1-10) Exclusion – Damage To Work Performed By Subcontractors On Your Behalf – Designated Sites or Operations
This new form is similar to ISO's BP 14 20 01 10 with formatting and editorial changes.

CB1430(1-10) Discretionary Payroll Expense Endorsement
This new form is similar to ISO's BP 14 30 01 10 with formatting and editorial changes.

CB-7410(8-15) Civil Authority Changes
This new endorsement broadens coverage by removing the one mile limitation for civil authority in the Deluxe Bis-Pak Property Coverage Form.

CB-7406(6-15) Exclusion – Unmanned Aircraft
This new endorsement modifies the ACUITY Bis-Pak Liability and Medical Expenses Coverage Form and excludes bodily injury and property damage arising out of the use of any unmanned aircraft.

Revised Forms

The forms below were revised to adopt ISO's 2010 Multistate Forms Revisions Circular BP-2009-OFR09

CB-0002(8-15) Deluxe Bis-Pak Property Coverage Form
Adopting the revisions made in Circular BP-2009-OFR09. In addition to the revisions addressed in circular BP-2009-OFR09, we will be adding the following exclusion: Exclusion of Certain Computer-Related Losses.

CB-0006(8-15) Bis-Pak Liability and Medical Expenses Coverage Form
Adopting the revisions made in Circular BP-2009-OFR09.

CB-0312(1-10) Windstorm or Hail Percentage Deductibles
This form is similar to BP 03 12 01 10 with formatting and editorial changes.

CB-0417(1-10) Employment-related Practices Exclusion
This form is similar to BP 04 17 01 10 with formatting and editorial changes.

CB-0456(1-10) Utility Services – Direct Damages
This form is similar to BP 04 56 01 10 with formatting and editorial changes.

CB-0457(1-10) Utility Services – Time Element
This form is similar to BP 04 57 01 10 with formatting and editorial changes.

CB-0547(1-10) Computer Fraud And Funds Transfer Fraud
This form is similar to BP 05 47 01 10 with formatting and editorial changes.

CB-0576 (8-15) Limited Fungi Coverage (Property)
This form is similar to BP 05 76 10 with formatting and editorial changes.

CB-0805(1-10) Veterinarians Professional Liability
This form is similar to BP 08 05 01 10 with formatting and editorial changes.

CB-1203(1-10) Loss Payable Clauses
This form is similar to BP 12 03 01 10 with formatting and editorial changes.

The following ACUITY specific forms are being revised

CB-7104(8-15) Exclusion – Designated Products Endorsement
Language has been added to amend the definition of insured contract. That part of any contract or agreement that applies to bodily injury or property damage included in the products-completed operations hazard and arising out of any of your products in the Schedule is not an insured contract.

CB-7262(8-15) ACUITY Advantages – Property Coverages

The Outdoor Property Extension of Coverage is being added with a limit of $10,000 and a sublimit of $1,000 for any one tree, shrub, or plant.

CB-7263(8-15) ACUITY Advantages – Church Property
The Property Coverage Extension for Outdoor Trees, Shrubs, and Plants is being revised to increase the sublimit for anyone tree, shrub, or plant to $1,000. The Outdoor Property Extension is also being revised to increase the limit or fences and detached retaining walls to $10,000 per occurrence, and increase the limit for Outdoor radio, television antennas (including satellite dishes), including their masts, towers, and lead-in wiring to $10,000 per occurrence.

CB-7266(8-15) ACUITY Enhancements – Property Coverages
The Outdoor Property Coverage Extension is being revised to increase the limit to 25,000 and the sublimit for anyone tree, shrub or plant to $1,000.

CB-7267(8-15) ACUITY Enhancements – Church Property
The Outdoor Trees, Shrubs and Plants Extension is being revised to increase the sublimit for anyone tree, shrub or plant to $1,000.The Outdoor Property Extension is being revised to increase the limit to $25,000 per occurrence.

CB-7268(8-15) ACUITY Enhancements – Liability Coverages
This endorsement is revised so that coverage for liability arising out of performance of a contract by any insurer is outside the scope of the coverage provided for Employee Benefits Liability Coverage.

CB-7270(8-15) Extended Reporting Period for Employee Benefits Coverage Endorsement
This endorsement is being revised editorially to correct references.

CB-7136(8-15) Business Income Changes – No Waiting Period
In relation to Civil Authority, the period of coverage is increasing from three consecutive weeks from the date of action to four consecutive weeks.

CB-7269(8-15) ACUITY Enhancements – Church Liability
This endorsement is revised so that coverage for liability arising out of performance of a contract by any insurer is outside the scope of the coverage provided for Employee Benefits Liability Coverage.

CB-7193(8-15) Flood Damages Endorsements
This endorsement has been revised so that the coverage it provides aligns with revisions to the water exclusion changes in the base coverage form.

The forms below were revised to adopt ISO’s 2010 Multistate Forms Revisions Circular BP-2009-OBPFO

CB-1003(1-10) Earthquake

This form is similar to BP 10 03 01 10 with formatting and editorial changes.

The forms below were revised to adopt ISO's 2010 Multistate Forms Revisions Circular BP-2012-OFR12

CB-1703(7-13) Condominium Commercial Unit-Owners Optional Coverage
This form was revised to be similar to BP 17 03 07 13 with formatting and editorial changes.

Withdrawing

CB-0601 Exclusion of Loss Due to Virus or Bacteria
This exclusion will now be built into the base coverage form.

CB-1009 Named Perils

CB-1004A Exclusion of Certain Cumputer-Related Losses
This exclusion will now be built into the base coverage form.

Declarations

CB-7000(4-16) Bis-Pak Coverage Part

The Bis-Pak Declarations is being revised to include an Optional Coverages Deductible field.