AC 44820) APPELLATE COURT
)
HARTFORD FIRE INSURANCE) STATE OF CONNECTICUT
COMPANY,)
)
v.)
)
MODA LLC, ET AL.) October 6, 2021

APPLICATION TO APPEAR AND FILE *AMICUS* BRIEF

United Policyholders hereby respectfully requests, for good cause shown, pursuant to Practice Book §§ 66-2, 66-3 and 67-7, permission to appear as *amicus curiae* in this appeal and file the *amicus* brief attached hereto as Exhibit A. Counsel for Appellee Hartford Fire Insurance Company ("Hartford") has consented to the untimely filing of this motion.

1. **History of the Case.** This case involves Hartford's denial of coverage to Defendants-Appellants[1] (collectively, "Fisher") under two "all risks" insurance policies for over $100 million in losses that Fisher sustained during the COVID-19 pandemic. Fisher has appealed from the trial court's order, dated and entered on June 15, 2021 ("Decision") (A1697–A1719), granting Hartford's motion for summary judgment on its declaratory judgment claim and dismissing Fisher's counterclaims for breach of contract, breach of the implied covenant of good faith and fair dealing, and

[1] Defendants-Appellants are Moda LLC; Marc Fisher LLC; Fisher International LLC; MB Fisher LLC; Fisher Footwear LLC; MFKK, LLC; Unisa Fisher Wholesale LLC; Fisher Licensing LLC, Fisher Accessories LLC; Fisher Sigerson Morrison LLC; MBF Holdings LLC (DE); Marc Fisher Holdings LLC; Fisher Services LLC; MBF Air LLC; Unisa Fisher LLC; MBF Licensing LLC; MBF Invest LLC; MBF Holdings LLC (WY); Fisher Design LLC; Marc Fisher Jr Brand LLC; Marc Fisher International LLC; MF-TFC LLC; Easy Spirit LLC; MFF-NW LLC; and MFF NW Investment LLC.

violation of CUTPA. (A339–A343). The appeal seeks reversal of the Decision and remand to the trial court for the completion of discovery and trial.

Fisher timely filed its opening brief on August 20, 2021. On September 8, 2021, Hartford moved for a 30-day extension of time to file the appellee's brief, to which Fisher consented. On September 9, 2021, the Appellate Court granted Hartford's request and Hartford's brief is now due on October 20, 2021.

2. **Facts Upon Which United Policyholders Relies.** Despite the exercise of reasonable diligence, United Policyholders first learned of this appeal and the issues presented therein after the expiration of the deadline to file *amicus* briefs expired and thus did not have an opportunity to submit a timely application under Practice Book § 67-7.

Hartford will not be prejudiced by this extension since its deadline to file the appellee's brief has been extended until October 20, 2021 and therefore it will have an opportunity to respond to the *amicus* brief. As noted above, Hartford's counsel consents to the late filing of this motion. A copy of the proposed *amicus* brief is attached hereto as Exhibit A.

3. **Legal Grounds Upon Which United Policyholders Relies.** The issues before this Appellate Court, namely (i) whether the language of the insurance policies is ambiguous; (ii) whether the insured suffered physical loss or physical damage from being deprived of the intended use of its property, the contamination of its property and the unmarketability of its property; and (iii) whether certain exclusions bar coverage, have a broad impact beyond the parties before this Court. Further, as the Superior Court has recently recognized in partially denying a motion to strike an

insured's claims, "[w]e are learning something new every day" about COVID-19's impact on physical objects. *New Castle Hotels, LLC v. Zurich Am. Ins. Co.*, No. X07-HHD-CV-21-6142969-S, slip op. at 6 (Ct. Super. Ct. Sept. 7, 2021) (Moukawsher, J.). The COVID-19 insurance coverage case law will undoubtedly continue to evolve as the early trial court decisions are reviewed by appellate courts. *See Com. Off. Furniture Co. v. Charter Oak Fire Ins. Co.*, No. CV 20-4713, 2021 WL 1837412, at *4–5 (E.D. Pa. May 7, 2021) (remanding COVID-19 coverage case to Pennsylvania state court because case law is "unsettled" and "evolving", and the case "bear[s] on policy problems of substantial public import whose importance transcends the result in the case . . . at bar") (internal citations and quotations omitted); *see also* Erik S. Knutsen & Jeffrey W. Stempel, *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 Conn. Ins. L.J. 185, 281 (Fall 2020) (expressing hope that "cluster of better reasoned cases . . . will be persuasive to the appellate courts that will ultimately determine the outcome of the COVID coverage war").

In light of the potentially far-reaching significance of the instant appeal, United Policyholders respectfully requests permission to appear and file an *amicus* brief in this appeal pursuant to Practice Book § 67-7 so that the Appellate Court can have the benefit of helpful information on an important issue of public interest. *See State v. Ross*, 272 Conn. 577, 612 (2005) (noting the historical purpose of *amicus* briefs was to "assist the court" and "provide *impartial* information on matters of law about which there was doubt, especially in matters of public interest") (internal citation and quotation omitted); *Fisher v. Big Y Foods, Inc.*, 298 Conn. 414, 416 n.3 (2010)

(granting request to submit *amicus* briefs "due to the importance of the issue raised by [the] appeal and the frequency with which it potentially may arise").

4. **Good Cause Shown.** Given Hartford's consent and the lack of any prejudice to any party or the Appellate Court, United Policyholders respectfully submits that it has demonstrated good cause for the late filing of this motion.

WHEREFORE, United Policyholders requests permission to appear as *amicus curiae* in this appeal and file the *amicus* brief attached hereto pursuant to Practice Book § 67-7.

Respectfully requested,

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CERTIFICATION

Pursuant to Practice Book § 62-7, the undersigned hereby certifies that (1) on October 5, 2021, a copy of this document was delivered to each other counsel of record by electronic mail as shown below, (2) the document does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and (3) the document complies with all applicable rules of appellate procedure.

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EXHIBIT A

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

AC 44820

HARTFORD FIRE INSURANCE COMPANY

v.

MODA LLC, *ET AL.*

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS

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STATEMENT OF ISSUES OF *AMICUS CURIAE*

Whether the trial court erred in granting summary judgment to the insurance company on the ground that the policyholder could not establish "direct physical loss of or damage to property," given the meaning of these terms in standard-form insurance policies established by courts, policyholders and the insurance industry for more than 60 years.

Whether the trial court erred in granting summary judgment to the insurance company on the ground that a virus exclusion applied, given that the exclusion was a product of regulatory fraud and therefore unenforceable.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae United Policyholders ("UP") submits this brief in support of the position of Defendants-Appellants[1] (collectively, "Fisher") who is insured under two "all risks" insurance policies. UP is substantively aligned with Fisher.

UP is a unique non-profit, tax-exempt, charitable organization founded in 1991 that educates and assists individual and business consumers on insurance matters and works to secure the loss indemnity objective for which people buy insurance. UP monitors legal developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps preserve the integrity of the insurance system by advocating for fair sales and claims practices. Grants, donations and volunteers support the organization's work. UP does not accept funding from insurance companies.

On the topic of Business Interruption related to COVID-19 and public safety orders, UP gave three separate NAIC presentations in 2020.[2] UP called regulators' attention to the

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[1] Defendants-Appellants are Moda LLC; Marc Fisher LLC; Fisher International LLC; MB Fisher LLC; Fisher Footwear LLC; MFKK, LLC; Unisa Fisher Wholesale LLC; Fisher Licensing LLC, Fisher Accessories LLC; Fisher Sigerson Morrison LLC; MBF Holdings LLC (DE); Marc Fisher Holdings LLC; Fisher Services LLC; MBF Air LLC; Unisa Fisher LLC; MBF Licensing LLC; MBF Invest LLC; MBF Holdings LLC (WY); Fisher Design LLC; Marc Fisher Jr Brand LLC; Marc Fisher International LLC; MF-TFC LLC; Easy Spirit LLC; MFF-NW LLC; and MFF NW Investment LLC.

[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; Testimony of Amy Bach on Business Interruption Policies and Claims, Summer National Meeting Property and Casualty Insurance (C) Committee August 12th, 2020, https://3inbm04c0p4j2h1w132uyb5e-wpengine.netdna-ssl.com/wp-content/uploads/2020/10/8-12-20_bach_c_committee_final_3.pdf; Testimony of Amy Bach on COVID-19 Related Business Interruption Claims, Coverage Issues, Disputes and Litigation, Summer National Meeting, Consumer Liaison Committee, August 14th, 2020, https://content.naic.org/sites/default/files/national_meeting/Version%202%20-%20Slideshow%20-%20Consumer%20Liaison%20Cmte%20-%2008.14.20.pdf.

uniform pattern of coverage denials (even where the policy language differed and the policies contained no virus or pandemic exclusion) by insurance companies across the country, coupled with unsupported assertions that paying claims would bankrupt the entire insurance industry. UP shared evidence that insurers were not fully candid with regulators or their customers 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 decrease associated with the policy language change.

In furtherance of its mission, UP cautiously chooses cases and regularly appears as *amicus curiae* in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. UP has been advocating for insureds' rights in the courts for decades. 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); *Sproull v. State Farm Fire & Cas. Co.,* Dkt. No. 126446 (IL 2021), 2021 Ill. LEXIS 619; *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). UP has also weighed in on important insurance issues in matters adjudicated

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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

before this Court and the Connecticut Supreme Court. *See Klass v. Liberty Mut. Ins. Co.*, SC 20451 (decision pending); *Karas v. Liberty Ins. Corp.*, 335 Conn. 62 (2019); *Jemiola v. Hartford Cas. Ins. Co.*, 335 Conn. 117, (2018); *Recall Total Information Mgt., Inc. v. Federal Ins. Co.*, 317 Conn. 46 (2015); *Fireman's Fund Ins. Co. v. TD Banknorth Ins. Agency, Inc.*, 309 Conn. 449 (2013); *Security Ins. Co. v. Lumbermens Mut. Cas. Co.*, 264 Conn. 688 (2003); *Buell Indus., Inc. v. Greater N.Y. Mut. Ins. Co.*, 259 Conn. 527 (2002); *R.T. Vanderbilt Co., Inc. v. Hartford Acc. & Indem. Co.*, 171 Conn. App. 61 (2017); *Capel v. Plymouth Rock Assur. Corp.*, 141 Conn. App. 699 (2013). UP further has abundant experience filing briefs in relation to the issues before this Court. *See* Brief of *Amicus Curiae* United Policyholders in Support of Respondent and Answering the Certified Question in the Affirmative, filed July 30, 2021, in *Neuro Comm. Servs., Inc. v. Cincinnati Ins. Co.*, Case No. 4:20-cv-1275 (Ohio).

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)).

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. Counsel for UP is retained *pro bono* and will accept no money for their legal work in this case.

ARGUMENT

I. FOR MORE THAN SIXTY YEARS, POLICYHOLDERS, COURTS, AND THE INSURANCE INDUSTRY STATED THAT STANDARD-FORM PROPERTY INSURANCE POLICIES COVERED LOSS FROM EVENTS RENDERING PROPERTY UNFIT FOR ITS INTENDED USE. [4]

Policyholders, courts, insurance companies, and insurance industry drafting organizations have – for decades – concluded that the terms "physical loss" or "physical damage" included situations in which events rendered property unfit or unsafe for its intended use, regardless of whether such property had suffered physical "alteration." At a minimum, Hartford knew that its standard-form policy language was at least ambiguous as to whether it applied in such situations.

[4] No counsel for a party contributed to the writing or cost of this brief.

Through the 1950s,[5] 1960s,[6] 1970s,[7] 1980s,[8] 1990s,[9] and early 2000s[10] courts concluded that unusual events – *i.e.*, events other than a fire, collapse or tornado – caused direct physical loss or damage to property under standard-form wordings.

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[5] *American Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957) (radon dust and gas).

[6] *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 655 (Cal. App. 1962) (unstable house after landslide); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968) (gasoline vapors).

[7] In chronological order: *Cyclops Corp. v. Home Ins. Co.*, 352 F. Supp. 931, 937 (W.D. Pa. 1973) (vibrating, undamaged machine); *Henri's Food Prods. Co. v. Home Ins. Co.*, 474 F. Supp. 889, 892 (E.D. Wis. 1979) (salad dressing exposed to vaporized agricultural chemicals).

[8] In chronological order: *Pillsbury Co. v. Underwriters at Lloyd's, London*, 705 F. Supp. 1396, 1401 (D. Minn. 1989) (organisms in its creamed corn); *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986) (risk of collapse).

[9] In chronological order: *Hetrick v. Valley Mut. Ins Co.*, 15 Pa. D. & C. 4th 271, 1992 WL 524309, at *3 (Pa. Comm. Pl. May 28, 1992) (oil spill); *Largent v. State Farm Fire & Cas. Co.*, 842 P.2d 445, 446 (Or. App. 1992) (methamphetamine fumes); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. App. 1993) (methamphetamine odor); *Azalea, Ltd. v. American States Ins. Co.*, 656 So.2d 600, 602 (Fla. Dist. Ct. App. 1995) (damage to a bacteria colony); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, No. 9400837, 1996 WL 1250616, at *2 (Mass. Super. Mar. 15, 1996) (oil fumes); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (asbestos); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) (house threatened by falling rocks); *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 78 Cal. App. 4th 847, 865 (2000) (almonds intermingled with wood chips); *Matzner v. Seaco Ins. Co.*, 9 Mass. L. Rptr. 41, 1998 WL 566658, at *4 (Mass. Super. Aug. 12, 1998) (carbon monoxide); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. 98-434-HU, 1999 WL 619100, at *7-8 (D. Or. Aug. 4, 1999) (mold or mildew); *Board of Educ. v. International Ins. Co.*, 720 N.E.2d 622, 625-26 (Ill. App. 1999) (asbestos).

[10] In chronological order: *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 825-26 (Minn. 2000) (asbestos); *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); *Cooper v. Travelers Indem. Co. of Ill.*, No. 01-cv-2400, 2002 WL 32775680, at *1 (N.D. Cal. Nov. 4, 2002) (coliform bacteria and E.coli); *Graff v. Allstate Ins. Co.*, 54 P.3d 1266, 1269 (Wash. Ct. App. 2002) (methamphetamine vapors); *Yale Univ. v. CIGNA Ins. Co.*, 224 F. Supp. 2d 402, 413 (D. Conn. 2002) (asbestos and lead).

Consistent with this, the insurance industry paid a number of claims for loss caused by the original novel coronavirus, SARS-CoV-1, which led to a pandemic in 2002-2004.[11]

The trend in cases discussed above from 1957 onward continued in the mid-2000s after the industry paid claims from SARS-CoV-1.[12] As a result, insurance-industry drafting organizations the Insurance Services Office ("ISO") and the American Association of Insurance Services ("AAIS"), as discussed below, drafted the Exclusion for Loss Due to Virus or Bacteria in 2006,[13] because, as they stated to regulators, the standard-form language was at least ambiguous as to whether it applied to loss or damage from viruses and bacteria. As shown in the brief of Fisher, at the time it was drafting the exclusion, ISO knew that contamination could trigger coverage under standard form ISO language without causing physical alteration.[14] Note, however, the insurance industry drafting organizations did not do is seek to define "physical loss" or "physical damage" to require physical alteration of property.

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

[12] In chronological order: *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 824, 826–27, 824–26 (3d Cir. 2005) (E. coli); *De Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 722-23 (Tex. App. Mar. 31, 2005) (mold); *Schlamm*, 2005 WL at *4 (noxious particles in the air); *Cook v. Allstate Ins. Co.*, No. 48D02-0611-PL-01156, 2007 Ind. Super. LEXIS 32, at * slip op. at 9-10 (Ind. Super. Ct. Madison County Nov. 30, 2007) (Brown Recluse Spiders); *Brand Mgt., Inc. v. Maryland Cas. Co.*, No. 05-cv-02293, 2007 WL 1772063, at *2 (D. Colo. June 18, 2007) (listeria contamination); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co.*, No. 05-1315, 2007 WL 464715, at *8 (D. Or. Feb. 7, 2007) (lead).

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

[14] Brief of Defendants-Appellants, at 31-32.

After the insurance industry drafted the Virus or Bacteria Exclusion, courts continued to rule for policyholders in circumstances like those here.[15] Beyond this, prior to the run of claims by policyholders as a result of loss from COVID-19 and SARS-CoV-2, insurance companies had confirmed the status of the law discussed above. For instance, three months before the pandemic, Factory Mutual Insurance Company ("FM") – perhaps the most sophisticated property insurance company in the United States – admitted that "physical loss or damage" to property exists when the presence of a physical substance renders property unfit for its intended use, despite it causing **no** structural alteration to property.[16] Moreover, FM conceded that, **at worst**, it had put forward a reasonable interpretation of the undefined phrase "physical loss or damage, "and even if the other insurance company could propose a reasonable reading, this merely rendered the subject policy ambiguous.[17]

Hartford has known for more than 60 years that it is at least ambiguous whether standard-form policies triggered by physical loss or damage respond to events like those in

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[15] In chronological order: *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 968 A.2d 724, 734 (N.J. Super. App. Div. 2009) (electrical grid); *Manpower Inc. v. Insurance Co. of the State of Pa.*, No. 08C0085, 2009 WL 3738099, at *1 (E.D. Wis. Nov. 3, 2009) (risk to building from collapse of adjacent building); *Travco Ins. Co. v. Ward*, No. 2:10cv14, 2010 WL 2222255, at *8-9 (E.D. Va. June 3, 2010) (toxic gases from drywall); *In re Chinese Mfr'd Drywall Prods. Liab. Litig.*, 759 F. Supp. 2d 822, 831 (E.D. La. 2010) (same); *Association of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1068 (D. Haw. 2013) (applying Hawai'i law) (arsenic in roof); *Gregory Packaging*, 2014 WL 6675934, at *5-6 (ammonia); *Mellin v. Northern Sec. Ins. Co.*, 115 A.3d 799, 806 (N.H. 2015) (odor of cat urine); *Oregon Shakespeare Festival*, 2016 WL 3267247, at *5-6 (smoke from wildfires).

[16] FM's Mot. *in Limine* No. 5 re Physical Loss or Damage, filed Nov. 19, 2019 in *Factory Mut. Ins. Co. v. Fed. Ins. Co.*, No. 1:17-cv-00760-GJF-LF (D.N.M.) (attached hereto as Exhibit **3**).

[17] *See id.* at 3 n.1.

this case: contamination of property with a deadly virus. Its failure to address this issue by defining those terms to contain the restrictive meanings for which it advocates here must be construed against it.

II. TO PRESERVE THE INTEGRITY OF THE INSURANCE REGULATORY PROCESS, HARTFORD MUST BE ESTOPPED FROM ENFORCING ITS VIRUS EXCLUSION.

When ISO and AAIS drafted the Virus or Bacteria Exclusion in 2006, they were well aware that, historically, standard-form property policies covered loss and damage arising from all manner of disease-causing agents. They further knew – because it was their job to know – that insurance companies had paid out millions of dollars for loss and damage arising from the first novel coronavirus in 2002-2003; indeed, industry coronavirus payouts motivated ISO and AAIS to draft the Virus or Bacteria Exclusion.

Before their member-companies could sell policies containing the exclusion they drafted, however, ISO and AAIS had to secure approval of that exclusion from state regulators. In the course of so doing, ISO and AAIS, on behalf of their members, misrepresented to regulators that the Virus or Bacteria Exclusion was a **clarification** of coverage, because, according to ISO and AAIS, existing standard property forms did not cover loss from "disease-causing agents." This was not true and ISO and AAIS (and ISO member Hartford[18]) knew it was not true, but they also knew a "clarification" of coverage would draw less regulatory scrutiny and would not lead regulators to reduce premium rates. This gambit worked: regulators approved the new exclusion with no reduction in rates. The standard-form exclusion has since been sold by insurance companies (including

[18] ISO produced documents in the underlying action, which shows that Hartford sat on ISO's Commercial Property Panel and was involved in drafting ISO's standardized virus exclusions. *See* A1427-A1434, A1441-A1472, A1474-1491.

Hartford) to policyholders (including Fisher), with the latter having no further ability to negotiate its terms.

UP submits that, under basic contract law as applied to the unique manner in which insurance policy language is negotiated – *i.e.*, by regulators and drafting organizations – Hartford must be estopped from relying on its virus exclusion.

A. The Only Negotiation of Standard-Form Policies Drafted by Insurance Industry Ratings Organizations and Sold by Their Member Insurance Companies Occurs with State Insurance Regulators.

There are good commercial reasons for insurance companies to sell, and policyholders to buy, standard-form insurance policies. On the insurance company side, standard forms allow the ratings organizations to compile loss information nationwide, and permit insurance companies to evaluate risk. On the policyholder side, meaningful comparison of insurance products would not be possible if every insurance company sold different fifty-page forms. Further, both policyholders and insurance companies are well served by court decisions establishing the parameters of the coverage provided by standard-form insurance policies.

The process by which insurance industry drafting organizations draft and seek approval to sell standard-form insurance policy language is set forth in detail in *Morton International, Inc. v. General Accident Insurance Co.*, 629 A.2d 831 (N.J. 1993). First, the insurance industry will identify a change it wishes to make to standard forms, such as an exposure it wishes to exclude.[19] The insurance industry drafting organizations will draft the change.[20] The insurance industry drafting organizations will then seek regulatory approval,

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19 *Id.* at 849-50.

20 *Id.* at 850.

typically by submitting the same change and the same explanatory memorandum to each of the state regulators and meeting with individual regulators as necessary.[21] The insurance industry drafting organizations will then negotiate with the insurance regulators with regard to the changes they seek to make and whether those changes will require adjustment of rates.[22]

For present purposes, two points are critical. First, once approval is obtained, the standard form is sold throughout the United States, with no ability of individual policyholders to negotiate changes.[23] Second, 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 the IRB said on behalf of its members in New Jersey, Georgia, West Virginia, Kansas, Puerto Rico, *etc.*[24]

B. The Insurance Industry Including ISO and AAIS Was Well Aware from 1957 Onward that Standard-Form Property Policies Covered Loss of Damage from the Presence of Disease-Causing Agents.

As shown above in Section I, from 1957 through the eve of the introduction of the Virus or Bacteria Exclusion in 2006, courts in the United States construing standard-form first-party insurance policies such as that at issue in this case had found that the presence of disease-causing agents on property caused physical loss of or damage to property:

E coli bacteria (*Cooper*, *Hardinger)*

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[21] *Id.* at 851.

[22] *Id.* at 851-52.

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

[24] *See id.* at 851-54.

Radioactive dust (*Keleket)*

Noxious air particles (*Schlamm*)

Lead (*Yale*)

Asbestos (*Yale*, *Sentinel*)

Mold (*Lillard-Roberts*, *Columbiaknit*)

Mildew (*Columbiaknit*)

"[H]ealth-threatening organisms" (*Pillsbury*)

Vaporized agricultural chemicals (*Henri's*)

This was no secret in the insurance industry; indeed, anyone reading one of these decisions would soon learn of the rest.[25]

It certainly was no secret to ISO and AAIS who admit – in the very documents 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.[26]

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[25] For instance, *First Presbyterian Church* (gasoline vapors) was subsequently cited by a host of other similar decisions. *Lillard-Roberts*, 2002 WL 31495830, at *8-9 (mold); *Matzner*, 1998 WL 566658, at *5 (carbon monoxide); *Trutanich*, 858 P.2d at 1335 (methamphetamine fumes); *Hetrick*, 1992 WL 524309, at *3 (oil).

[26] 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 **4**) ("ISO Circular").

Further, the insurance industry and the ratings organizations were well aware that policyholders had made successful claims for loss and damage from the presence of SARS coronavirus in the early 2000s; indeed, this was the primary motivation for ISO and AAIS to draft the Virus or Bacteria Exclusion in 2006.[27] As set forth in the Washington Post, in relation to coverage for COVID-19 claims:

> The forced closure of businesses nationwide because of the novel coronavirus would seem to be the perfect scenario for filing a "business interruption" insurance claim.
>
> But most companies will probably find it difficult to get an insurance payout because of policy changes made after the 2002-2003 SARS outbreak, according to insurance experts and regulators.
>
> SARS, which infected 8,000 people mostly in Asia and is now seen as foreshadowing the current pandemic, led to millions of dollars in business-interruption insurance claims. Among the claims was a $16 million payout to one hotel chain, Mandarin Oriental International.[28]

Not only did the insurance industry know that standard property insurance forms historically had responded to claims from disease-causing agents, it knew that members of the insurance industry had paid claims arising from a coronavirus when the industry sought regulatory approval for changes to its standard forms in 2006.

C. The Insurance Industry Misled Regulators About Previously Existing Coverage for Virus Contamination Claims and Falsely Termed the Virus or Bacteria Exclusion a Clarification, Rather Than a Restriction, of Coverage.

ISO and AAIS represented hundreds of members or subscribing insurance companies in drafting and seeking approval for the new Virus or Bacteria Exclusion in

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

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

2006. On July 6, 2006, ISO submitted an ISO Circular announcing "the submission of forms filings to address exclusion of loss due to disease-causing agents such as viruses and bacteria."[29] In relevant part, ISO's circular states that (1) property policies had not historically been a source of cover for loss from "disease-causing agents"; but (2) ISO wanted to prevent efforts to "expan[d]" coverage contrary to policy intent:

> 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.[30]

In the same time period, AAIS's Filing Memorandum sent to state regulators likewise stated that (1) property policies had not been a source of recovery for loss or damage caused by disease-causing agents; and (2) the new exclusion was intended to "clarify policy intent":

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[29] ISO Circular, at 2 of 13 (attached hereto as Exhibit **4**).

[30] Id. at 7 of 13 (emphasis added).

Virus Or Bacteria Exclusion - Filing Memorandum

> AAIS has developed and is filing a mandatory endorsement for use with the Commercial Properties Program. This new mandatory Virus Or Bacteria Exclusion, CL 0700, is described below.
>
> **Property policies have not been, nor were they intended to be, a source of recovery for loss, cost, or expense caused by disease causing agents.** With the possibility of a pandemic, there is concern that claims may result in efforts to expand coverage to create recovery for loss where no coverage was originally intended. **In light of this possibility, AAIS is filing a Virus Or Bacteria Exclusion that will specifically address virus and bacteria exposures and clarify policy intent.**
>
> This endorsement **clarifies** that loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress is excluded. Avian Flu, SARS, rotavirus, listeria, legionella, or anthrax are examples of disease or illness causing agents addressed by this exclusion but are by no means an exhaustive list.[31]

As shown above, it simply was not true for ISO or AAIS to assert in 2006 that property insurance policies had not been sources of recovery for loss and damage from disease-causing agents like viruses or bacteria. Further, given that the insurance industry had known this since *Keleket* in 1957, and had continued to sell insurance coverage with this knowledge and without any exclusion for disease-causing agents, it was likewise untrue for ISO and AAIS to assert these standard property insurance policies were never intended to be sources of recovery for such losses. ISO and AAIS inserted an exclusion for an existing exposure without drawing critical attention from regulators – the only persons

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[31] Property Lines - PA 10/06, Copyright, American Association of Insurance Services, Inc., 2006, filed in reference to CL 0700 10 06 (emphasis added) (attached hereto as Exhibit **5**). AAIS filed a similarly worded filing in relation to Businessowners' forms. See AAIS Businessowners Virus or Bacteria Exclusion, Businessowners – 10/06, filed in reference to BP 0850 10 06 (attached hereto as Exhibit **6**).

who could meaningfully negotiate standard-form policy language – while simultaneously avoiding an enforced reduction in premiums or rates.

D. Given the Insurance Industry's Misrepresentations, the Court Should Refuse to Permit Hartford To Rely upon the Virus or Bacteria Exclusion.

In *Morton International Inc. v. General Accident Insurance Co.*, 629 A.2d 831 (N.J. 1993), the court held that the standard-form "sudden and accidental" to be clear and unambiguous, but barred insurance companies from relying upon it on the basis of misrepresentations it made to regulators. The *Morton* court examined the standard insurance industry explanatory memoranda submitted to state insurance regulators in 1970 concerning the scope of the so-called "sudden and accidental" polluters exclusion added in 1970 to the 1966 "occurrence" policy. The New Jersey Supreme Court determined that the insurance industry, through its drafting organizations, represented to state insurance regulators in 1970 that the "sudden and accidental" polluters exclusion merely clarified pre-existing insurance coverage. The Supreme Court found that in 1970 the insurance industry had failed to disclose its intent to restrict coverage for gradual pollution damage. The court determined that, "[h]aving 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 by providing coverage at a level consistent with its representations to regulatory authorities."[32]

Since *Morton*, policyholders have obtained the concurrence of many more state supreme courts in the Morton rationale. First, in *St. Paul Fire Insurance Co. v. McCormick & Baxter Creosoting Co.*, 923 P.2d 1200 (Or. 1996), the Oregon Supreme Court looked to

[32] *Id.* at 876.

the insurance industry's regulatory representations as to the meaning of the polluters exclusion, and determined that the exclusion could be interpreted only to exclude "expected and intended" pollution. Even more shocking, the Alabama Supreme Court, in *Alabama Plating Co. v. United States Fidelity & Guaranty Co.*, 690 So.2d 331 (Ala. 1996), reconsidered an earlier anti-policyholder opinion and held that the polluters exclusion is ambiguous in light of the insurance industry's prior statements as to its scope and meaning, and that it must be construed in favor of policyholders. In *Textron, Inc. v. Aetna Casualty & Surety Co.*, 754 A.2d 742 (R.I. 2000), the Rhode Island Supreme Court again reaffirmed the integrity of the regulatory process, holding the industry to representations made in obtaining approval to use the polluters exclusion. Finally, in *Sunbeam Corp. v. Liberty Mutual Insurance Co.*, 781 A.2d 1189, 1195 (Pa. 2001), the Pennsylvania Supreme Court decided that "having represented to the insurance department, a regulatory agency, that the new language in the 1970 policies – 'sudden and accidental' - did not involve a significant decrease in coverage from the prior language, the insurance industry will not be heard to assert the opposite position when claims are made by the insured policyholders."

As several courts have recognized, regulatory estoppel is simply "a form of judicial estoppel." *Sunbeam*, 781 A.2d at 1192. Indeed, judicial estoppel applies even when a proceeding is "administrative rather than judicial." *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 604 (9th Cir. 1996). Like these courts, this Court should not permit Hartford to apply an exclusion obtained through regulatory misrepresentations, and should bar it from relying on the Virus or Bacteria exclusion.

CONCLUSION

For the above reasons, this Court should reverse summary judgment granted below to Hartford on the ground that the policyholder could not show physical loss of or damage to property and that the virus exclusion applied.

Dated: Oct. 6, 2021

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EXHIBIT 1

The Washington Post
Democracy Dies in Darkness

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

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

By Todd C. Frankel

April 2, 2020

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

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

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

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

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

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

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

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

A global pandemic presents unique problems for insurers because, Sampson said, "by its very definition, you

can’t diversify the risk.”

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

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

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

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

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

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

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

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

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

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

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

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

State insurance commissioners are looking into the potential limitations of business insurance coverage for

coronavirus-related claims — with differing viewpoints.

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

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

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

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

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

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

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

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

But not a single policy was sold.

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

Updated June 23, 2021

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EXHIBIT 2

INSURANCE JOURNAL

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

Insurance Unlikely to Cushion Coronavirus Losses – But There Are Exceptions

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

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

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

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

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

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

Health Insurance

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

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

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

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

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

Events Insurance

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

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

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

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

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

Travel Insurance

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

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

Credit Insurance

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

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

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

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

Reinsurance

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

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

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

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

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

Financial Markets

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

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

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

–With assistance from Dan Reichl.

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

Related:

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- Re/Insurers to Feel Coronavirus Impact From Financial Market Volatility: Moody’s
- Global Insurers Face Hefty Claims If Coronavirus Forces Olympics Cancellation
- Coronavirus Raises Insurance Questions But Catastrophe-Tested Insurers Are Prepared
- Insurers Rush to Exclude Coronavirus Epidemic from Event-Cancellation Protection
- Coronavirus Leads Companies with Supply Chain Disruptions to Invoke ‘Force Majeure’
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EXHIBIT 3

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

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

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

I. INTRODUCTION

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

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

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

II. ARGUMENT

A. Legal Standard.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/*Maureen A. Sanders*
Maureen A. Sanders
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SANDERS & WESTBROOK, PC

EXHIBIT 4

Circular

FORMS - FILED
FROM: LARRY PODOSHEN, SENIOR ANALYST

JULY 6, 2006

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.

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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

If you have any questions concerning:

- the content of this circular, please contact:

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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 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.

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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.

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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

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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.

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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 5

AMERICAN ASSOCIATION OF INSURANCE SERVICES

Commercial Properties

Virus Or Bacteria Exclusion - Filing Memorandum

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

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

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

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

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This endorsement changes
the policy
-- PLEASE READ THIS CAREFULLY --

VIRUS OR BACTERIA EXCLUSION

DEFINITIONS

Definitions Amended --

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

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

PERILS EXCLUDED

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

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

   Virus or Bacteria --

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

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

   a. any contamination by any virus, bacterium, or other microorganism; or

   b. any denial of access to property because of any virus, bacterium, or other microorganism.

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

OTHER CONDITIONS

Other Terms Remain in Effect --

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

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EXHIBIT 6

This endorsement changes the policy
-- PLEASE READ THIS CAREFULLY --

VIRUS OR BACTERIA EXCLUSION

The following provisions are added with respect to all property coverages provided by this policy. All other "terms" of the policy apply, except as amended by this endorsement.

1. When "fungus or related perils" is a defined "term", that definition is deleted and replaced by the following, but only with respect to the Property Coverages provided by this policy.

   "Fungus or related perils" means:

   a. a fungus, including but not limited to mildew and mold;

   b. a protist, including but not limited to algae and slime mold;

   c. wet rot;

   d. dry rot; or

   e. a chemical, matter, or compound produced or released by a fungus, a protist, wet rot, or dry rot, including but not limited to toxins, spores, fragments, and metabolites such as microbial volatile organic compounds.

2. The following exclusion is added under Perils Excluded. It applies to all coverages, coverage extensions, supplemental coverages, optional coverages, and endorsements that are provided by the policy to which this endorsement is attached, including, but not limited to, those that provide coverage for property, earnings, extra expense, or interruption by civil authority.

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

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

   a. any contamination by any virus, bacterium, or other microorganism; or

   b. any denial of access to property because of any virus, bacterium, or other microorganism.

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

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

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