No. 21-35637

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FIRST AND STEWART HOTEL OWNER, LLC.,
Plaintiff-Appellant,

v.

FIREMAN'S FUND INSURANCE COMPANY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON (SEATTLE),
NO. 2:21-CV-00344-BJRDLR
HON. BARBARA J. ROTHSTEIN, DISTRICT JUDGE

MOTION OF *AMICUS CURIAE* UNITED POLICYHOLDERS TO SUBMIT BRIEF IN SUPPORT OF APPELLANT FIRST AND STEWART HOTEL OWNER, LLC

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United Policyholders ("UP") moves the Court for an order permitting it to file the enclosed *amicus curiae* memorandum of points and authorities in support of the Appellant. The memorandum, a copy of which is attached, brings to the Court's attention Washington and nationwide precedents and maxims of insurance law that bear directly on the issue of whether coronavirus-related losses are insurable under commercial property policies, but which some lower courts have for far too long overlooked during this pandemic. *Amicus* support is especially vital here because the issues implicated by this case are far-reaching and of critical importance, as they may affect the fate of insurance recoveries for businesses throughout Washington.

INTEREST OF *AMICUS CURIAE*

Policyholders across the country purchase insurance policies to protect against unexpected disasters. Although insurance companies are in business to make a profit for their shareholders, it is most crucial that insurance fulfill its dominant purpose to indemnify the insured in case of loss. Restatement of the L., Liab. Ins. § 2, cmt. c. (Am. L. Inst. 2019) (insurance-policy interpretation helps "effect[] the dominant protective purpose of insurance").

Since the pandemic began in 2020, UP has played an important role in assisting business owners, whose operations have been significantly impacted by SARS-CoV-2 and COVID-19 with their claims for insurance coverage. In furtherance of its mission, UP cautiously chooses cases and regularly appears as

amicus curiae in courts nationwide. UP *amicus* briefs help provide an intellectual counterweight to the claims of the insurance industry and facilitate the evenhanded development of the law. While insurers are repeat players in coverage litigation, most policyholders are not. *Travelers Ins. v. Budget RentA-Car Sys., Inc.*, 901 F.2d 765, 771 (9th Cir. 1990) (describing insurance companies as "institutional litigants"). Since its founding in 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 multiple 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.*, 2021 IL 126446, ¶ 17; *Julian v. Hartford Underwriters Ins.*, 110 P.3d 903, 911 (Cal.), *as modified* (May 5, 2005); *Cont'l Ins. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. v. Wolfe*, 105 A.3d 1181, 1185-86 (Pa. 2014).

The application and interpretation of insurance contracts requires special judicial handling. Insurance contracts are adhesive in nature, which compels judicial balancing and places the burden squarely on the insurer—as the drafters of the contract—to show that their interpretation of the contract terms is the only reasonable interpretation. *See Miller v. Republic Nat'l Life Ins.*, 714 F.2d 958, 961 (9th Cir. 1983) ("[I]nsurance policies are 'contracts of adhesion,' i.e., standardized

contracts prepared entirely by one party to the transaction for acceptance by the other.").

The public at large has a significant interest in this matter, which is being actively litigated in other SARS-CoV-2/COVID-19 coverage disputes across the country, and this Court's disposition of this matter has the potential to affect thousands of policyholders, not only in the Ninth Circuit, but nationwide. Due to the public interest and the importance of this Court's decision, UP has a special interest in fulfilling the traditional role of *amicus curiae* by supplementing the efforts of counsel and drawing the Court's attention to law that may have escaped consideration. The Court will benefit by reviewing the perspective of UP, who has considerable experience in briefing courts on insurance coverage issues and an interest in ensuring a proper ruling under the well-established principles of policy interpretation.

LEGAL STANDARD FOR APPOINTING *AMICUS CURIAE*

"The district court has broad discretion to appoint *amic*[*us*] *curiae*." *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982). The purpose of an *amicus curiae* is "to call the court's attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration." 4 Am. Jur. 2d *Amicus Curiae* § 6 (2004). An *amicus curiae* "assist[s] in a case of general public interest, supplement[s] the efforts of counsel, and draw[s] the court's attention to law that

escaped consideration." *Miller-Wohl Co. v. Comm'r of Lab. & Indus. Mont.*, 694 F.2d 203, 204 (9th Cir. 1982) (citations omitted). As commentators have explained, an *amicus curiae* is often in a superior position to focus the court's attention on the broad implications of various possible rulings. Stephen M. Shapiro et al., *Supreme Court Practice* 753 (10th ed. 2013).

The Ninth Circuit frequently grants leave to nonprofit organizations like UP with industry familiarity and perspective that may assist in the resolution of a case. *See Office Depot, Inc. v. AIG Specialty Ins.*, No. 17-55125, 2018 U.S. App. LEXIS 12191 (9th Cir. 2018) (granting UP's motion for leave to file *amicus curiae* brief); *Probuilders Specialty Ins. v. Phx. Contracting, Inc.*, 743 F. App'x 876, 877 n.1 (9th Cir. 2018) (same); *HotChalk, Inc. v. Scottsdale Ins.*, 736 F. App'x 646, 649 n.4 (9th Cir. 2018) (same).

For the foregoing reasons, UP respectfully requests leave to file the attached *amicus curiae* brief.*

* The undersigned is representing UP in this matter on a pro bono basis. Pursuant to Circuit Rule 29-3, UP has sought consent from the parties before filing this Motion. Fireman's Fund Insurance Company declined to provide consent. First and Stewart Hotel Owner, LLC provided consent.

Respectfully submitted,

November 15, 2021

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *Amicus Curiae* United Policyholders discloses that it is a non-profit section 501(c)(3) organization, it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

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 insurance law. During the COVID-19 pandemic, UP's commitment to advocating for policyholders' rights to coverage for their devastating losses is more vital than ever. With the Court's leave, UP seeks to assist the Court on an issue of immense public importance—coverage for losses caused by SARS-CoV-2 and COVID-19—by identifying arguments and authorities that have escaped the Courts' attention to date. *See* FRAP 29(a)(4)(D).

PRELIMINARY STATEMENT

This appeal presents an issue of critical importance that will affect the rights of numerous business owners to recover under their property and business

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), UP affirms that no counsel for a party authored this brief in whole or in part and that no person other than UP or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

interruption insurance policies for the massive losses resulting from the current COVID-19 pandemic.

The question: Can an ordinary business person reasonably read the undefined words "direct physical loss ***or*** damage" to property (used in the insuring clause of nearly every "all risks" insurance policy sold nationwide) as covering both (1) molecular alterations to the surface and air of their property and (2) impairments to its physical function caused by the on-site presence of viral particles?

The District Court erred when it answered this question "no" at the pleadings stage entirely disregarding the scientific allegations relating to the novel and dangerous SARS-CoV-2 viral particle in the detailed 50-page complaint of Plaintiff-Appellant First and Stewart Hotel Owner, LLC' ("First and Stewart"). Rather than assuming the truth of the factual allegations in a complaint—and leaving their proof (or disproof) to expert scientists—the court invented scientific findings that favored its preferred legal conclusion. In so doing, the District Court joined a troubling trend that threatens to upend decades of decisional law on the scope of "all risks" insurance.

Going forward, insurance coverage for numerous perils—fumes, odors, smoke and ash, toxic dust, and other damaging or deadly microscopic contaminants—will be called into question if the District Court's decision is affirmed. This will not only hurt policyholders who are unlucky enough to suffer

atypical types of losses outside of the COVID-19 pandemic, it also will undermine the societal benefits of risk-spreading that are the bedrock of a well-functioning insurance marketplace.

The undefined phrase "direct physical loss or damage" to property historically has been understood as a broad grant of coverage. It encompasses all direct loss ***or*** damage of material (i.e., physical) things in contrast to merely conceptual losses (loss of title or credit, etc.). Coverage under an "all risks" policy is narrowed *only* if the insurer includes in its policy an express and unequivocal exclusion for a particular peril. And the insurer bears the burden of proof on the application of such an exclusion. So long as the policyholder can point to a physical impairment of its own property, coverage is triggered.

SARS-CoV-2 and COVID-19 are precisely the kind of novel, unanticipated, unknown risks that "all risks" insurance is designed to cover. When viral particles from infected persons are deposited on and adhere to the surfaces of a policyholder's property, where they remain viable for weeks or days, they physically transform objects once safe into a vector for disease. When those particles become suspended in the air of that property, they physically alter its composition, damaging it, as surely as adding dangerous chemicals to water.

The District Court's acceptance of Defendant-Respondent Fireman's Fund Insurance Company's ("FFIC") argument that SARS-CoV-2 and COVID-19 cannot

cause property loss or damage but rather cause "mere economic loss" flies in the face of Washington state caselaw. ER-6. The District Court wrote: "[T]here is no indication that either the Ninth Circuit or Washington state caselaw has accepted the view that a source unnoticeable to the naked eye—such as asbestos—may cause physical loss of covered property." ER-9 (internal quotations omitted). **But this is simply not true**. The Court of Appeals of Washington, Division Two, has directly addressed contamination by "a source unnoticeable to the naked eye" when it found property insurance coverage to be triggered by "hazardous vapors" released into a building even though there was no "visible damage." *Graff v. Allstate Ins.*, 54 P.3d 1266, 1269-70 (Wash. Ct. App. 2002) (disregarded argument that there was no visible damage to house and no physical damage as unpersuasive). The District Court's disregard of on point Washington appellate authority—*Graff* appears nowhere in the Order dismissing First and Stewart's complaint—is remarkable and should not be affirmed. Moreover, Washington state trial courts have allowed COVID-19 business interruption claims to proceed past the motion to dismiss stage. *See, e.g.*, *Perry Street Brewing Co. v. Mut. of Enumclaw Ins.*, No. 20-2-02212-32, 2020 WL 7258116, at *2-3 (Wash. Super. Nov. 23, 2020).

Even if the District Court were free to disregard on point Washington appellate authority, the most it could have found was that the Policy is ambiguous. That fact, too, establishes coverage. Under settled Washington law, ambiguous

insurance policy provisions are interpreted "against the drafter" (*contra proferentem)*. The District Court's wholesale adoption of FFIC's interpretation, which is merely one of many reasonable interpretations of the undefined language chosen by FFIC here, compromised the protections afforded to Washington policyholders against insurance companies that build ambiguities into their policies. When FFIC sold the Policy, it was well aware that courts for decades interpreted the policy language to cover functional impairment in the absence of structural alteration. If FFIC did not intend that interpretation, it needed to spell that out. FFIC did not do so.

Finally, reversal does not threaten the stability of FFIC or other insurers. The insurance industry historically has *profited* from crises like Superstorm Sandy, Hurricane Katrina, and other large-scale events. It is profiting from the pandemic already. For years, insurance companies have enjoyed the benefit of the premiums that First and Stewart and other policyholders paid for their policies. Now, they are using the pandemic to extract steep premium *increases* from customers—even while refusing to pay pandemic-related claims. Insurance companies are crying "wolf" when they claim that they could go bankrupt if there is coverage for COVID-related losses under certain policies. This Court should not be cowed by such inaccurate claims, which certainly have no place in determining the benefits owed under the insurance contract that FFIC sold to First and Stewart.

UP respectfully urges this Court to achieve the interests of justice by reversing the ruling.

ARGUMENT

I. THE TRIAL COURT WAS WRONG TO HOLD THAT SARS-COV-2 AND COVID-19 CANNOT CAUSE "PHYSICAL LOSS OR DAMAGE" TO PROPERTY.

Businesses pay premiums for policies that cover business interruption so that their properties can operate as designed and generate revenues. When property is impaired—whether from a fire or flood, or from noxious odors or the presence of a deadly virus—the loss or damage is the same. Here, First and Stewart's pleading squarely alleged that a deadly virus impaired the functionality of its property and rendered it incapable of generating revenues.[2]

It should be no surprise that Washington state courts have allowed COVID-BI cases to proceed past the pleading stage. In *Perry Street Brewing Co.*, the court found that "the interruption of [the insured's] business operations as a result of [government] proclamations was a direct physical loss of . . . property." 2020 WL 7258116, at *3. "[T]he undefined phrases 'loss of['] and 'damage to' have popular meanings distinct from one another." *Id.* at *3; *see also Hill & Stout PLLC v. Mut. of Enumclaw Ins.*, No. 20-2-07925-1 SEA, 2020 WL 6784271, at *2-3 (Wash. Super.

[2] For example, First and Stewart specifically alleged: it's employees were infected with COVID-19 and that SARS-CoV-2 was present on its property (ER-312); SARS-CoV-2 physically exists in and alters air (ER-320-322); and SARS-CoV-2 transforms surfaces making them unsafe for ordinary use (ER-326).

Nov. 13, 2020); *but cf. Hill & Stout PLLC v. Mut. of Enumclaw Ins.*, No. 20-2-07925-1 SEA, 2021 WL 4189778, at *2-3 (Wash. Super. Sept. 9, 2021).

Allowing COVID-19 business interruption cases to proceed makes perfect sense given Washington state court decisions on coverage for loss under property policies prior to the COVID-19-pandemic. In *Graff*, an insured brought an insurance claim for damage caused by methamphetamine fumes and the insurer denied coverage. The Washington Court of Appeals rejected the insurer's argument that the insured's tenant "caused no visible damage to the house and no physical damage preceded the methamphetamine-related damage." 54 P.3d at 1269-70. The Court specifically acknowledged that noxious substances cause physical damage, writing: "The tenant's methamphetamine lab released hazardous vapors into the house. Moreover, visibility is not the measure of vandalism; the chemical release was measurable, even after it had contaminated the interior of the house." *Id.* at 1270.

Moreover, for property insurance policies like the one at issue here that cover both "loss" and "damage" to property, Washington caselaw acknowledges the pro-policyholder rule that "physical loss means something other than damage." *Nautilus Grp., Inc. v. Allianz Global Risks US*, No. C11–5281BHS, 2012 WL 760940, at *7 (W.D. Wash. Mar. 8, 2012). Accordingly, there must be a set of insured "losses" to real property that are distinct from "damage." Insurance companies will argue that "loss" (when distinct from damage) should be limited to complete or permanent

dispossession, such as theft, even though loss is undefined in the Policy. Theft makes no sense as "loss" in the case of real property, which is an important insured interest in First and Stewart's Policy. Second, there is nothing in First and Stewart's policy that requires losses to be *total* or *permanent* losses. Narrowing FFIC's promise from protection against "loss" to protection against losses only when they are total losses is impermissible. Insurance coverage grants are construed broadly. If FFIC had wanted to only protect against "complete dispossession" in an "all risks" insurance policy, it should have made that clear and used those narrow words instead of the broad term "loss."

A. Protection Against All Risks of "Direct Physical Loss or Damage to Property" Is A Broad Promise.

The phrase "direct physical loss or damage" forms the core organizing principle of all risks insurance policies.

"*Direct*" means "stemming immediately from a source."[3] In first-party insurance, like the FFIC policy here, it is well-settled that "direct" under Washington law means that a non-excluded risk has proximately caused the loss or damage. *See McDonald v. State Farm Fire & Cas. Co.*, 837 P.2d 1000, 1004 (Wash. 1992).

[3] Direct, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/direct (last visited Nov. 11, 2021).

"*Physical*" means "having material existence; . . . of or *relating to material things*."[4] Its use indicates that the Policy covers risks to material objects (e.g., a building) from material risks (e.g., a fire, or here, SARS-CoV-2 and COVID-19). The use of "physical" makes clear the policy does not cover legal or abstract types of damage or loss, such as loss of title. *Nevers v. Aetna Ins.,* 546 P.2d 1240, 1240 (Wash. Ct. App. 1976) (loss of boat due to defective title not physical loss or damage).

Critically, the policy uses the word "***or***" between the words "loss" and "damage." The word "loss" and the word "damage" thus must each be given different, independent meanings. *Bogomolov v. Lake Villas Condo. Ass'n of Apartment Owners*, 127 P.3d 762, 766 (Wash. Ct. App. 2006) ("When interpreting a document, the preferred interpretation gives meaning to all provisions and does not render some superfluous or meaningless.").

Physical "loss" focuses on the inability of property to fulfill its intended function due to physical impairment, whereas physical "damage" focuses on injury that impairs value or usefulness relating to material things. "*Loss*" means "the partial or complete deterioration or *absence of physical capability or function*."[5] In other

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[4] Physical, *Merriam-Webster.com* (emphasis added), https://www.merriam-webster.com/dictionary/physical (last visited Nov. 11, 2021).

[5] Loss, *Merriam-Webster.com* (emphasis added), https://www.merriam-webster.com/dictionary/loss (last visited Nov. 11, 2021).

words, "loss" means "being deprived of, or the failure to keep" some object. In common speech, loss means no longer having effective possession of something. An incumbent's loss of her office does not imply, in common speech, damage to that office; simply that she no longer possess it. Moreover, one may "lose" something without suffering a complete dispossession, particularly when it relates to physical spaces, as in, "I was going to watch the game, but I lost the living room to my in-laws." "*Damage*" means "loss or harm resulting from injury to person, property, or reputation."[6] "Injury, harm; esp. *physical injury* to a thing, such as *impairs its value or usefulness*."[7] By its plain terms, then, the insuring clause covers both loss of property and damage to it. And the ordinary business person would understand that a first-party policy covers, for example, both damage to her property ("physical damage") and its partial or complete "physical loss."

In accordance with a common-sense reading, courts consistently have held the standard "direct physical loss or damage" formulation commonly found in property insurance policies since the 1950s applies to situations in which the functional use of real property is limited by the presence of an unpleasant or deadly substance.

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[6] Damage, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/damage (last visited Nov. 11, 2021).

[7] Damage, *OED.com* (emphasis added), https://www.oed.com/view/Entry/47005 (last visited Nov. 11, 2021).

B. Decades of Decisions Confirm that Property Rendered Unfit for Its Intended Use Has Suffered "Physical Loss or Damage."

Where property is rendered unfit for its intended use because of physical risk—as by smoke from forest fires, toxic dust from nearby building collapses, or microscopic viruses that could kill inhabitants—policyholders are entitled to coverage even if property has not been structurally altered.[8] This fact has been true for decades. During the 1950s,[9] the 1960s,[10] the 1970s,[11] the 1980s,[12] and the 1990s[13]—courts consistently have found such losses covered as "physical loss or damage."

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[8] *See, e.g.*, Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am., No. 2:12–cv–04418 (WHW)(CLW), 2014 WL 6675934, at *5-6 (D.N.J. Nov. 25, 2014) (concluding that "property can sustain physical loss or damage without experiencing structural alteration," that "the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated," and therefore that the ammonia discharge caused direct physical loss or damage); Or. Shakespeare Festival Ass'n v. Great Am. Ins., No. 1:15-cv-01932-CL, 2016 WL 3267247, at *5-6 (D. Or. June 7, 2016) (smoke from wildfires), vacated by joint stipulation, No. 1:15–cv–01932–CL, 2017 WL 1034203 (D. Or. Mar. 6, 2017).

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

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

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

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

[13] In chronological order: *Hetrick v. Valley Mut. Ins.*, No. 2245 Civil 1988, 1992 WL 524309, at *3 (Pa. Comm. Pl. May 28, 1992) (finding there would be coverage for loss of use of a house if an outside oil

These rulings continued into the 2000s,[14] when insurance companies paid claims for losses caused by a novel coronavirus, SARS-CoV-1.[15] Even after that outbreak, they continued to use "physical loss or damage" in their policies, and

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spill made the house uninhabitable); *Largent v. State Farm Fire & Cas. Co.*, 842 P.2d 445, 446 (Or. Ct. App. 1992) (noting that insurance company conceded methamphetamine fumes could cause "accidental direct physical loss"); *Farmers Ins. v. Trutanich*, 858 P.2d 1332, 1335 (Or. Ct. App. 1993) (finding costs of methamphetamine odor covered as direct physical loss or damage); *Azalea, Ltd. v. Am. States Ins.*, 656 So. 2d 600, 602 (Fla. Dist. Ct. App. 1995) (finding damage to sewage treatment plant from chemicals that destroyed a bacteria colony necessary for the plant to operate amounted to "direct damage to the structure"); *Arbeiter v. Cambridge Mut. Fire Ins.*, No. 9400837, 1996 WL 1250616, at *2 (Mass. Super. Mar. 15, 1996) (finding oil fumes present in house after discovery of oil leak constituted physical damage); *Sentinel Mgmt. Co. v. N.H. Ins.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (finding the presence of asbestos could constitute physical loss or damage); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) (finding a home rendered unlivable by falling rocks had suffered a "direct physical loss to [the] property"); *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 93 Cal. Rptr. 364, 376 (Cal. Ct. App. 2000) (holding that the intermingling of a quarter pound of wood shavings in 80,000 pounds of almonds caused physical loss or damage to the almonds even though the almonds were structurally unchanged), *as modified* (Mar. 29, 2000); *Matzner v. Seaco Ins.*, No. CIV. A. 96-0498-B, 1998 WL 566658, at *3-4 (Mass. Super. Aug. 12, 1998) (concluding that "direct physical loss or damage" was ambiguous and could mean either "only tangible damage to the structure of insured property" or "more than tangible damage to the structure of insured property," and that "carbon monoxide contamination constitutes 'direct physical loss of or damage to' property"); *Columbiaknit, Inc. v. Affiliated FM Ins.*, No. 98–434–HU, 1999 WL 619100, at *7-8 (D. Or. Aug. 4, 1999) (finding that policyholder could bear its burden to demonstrate that clothes containing mold or mildew suffered "direct physical loss or damage" if it established "at trial a class of garments which has increased microbial counts and that will, as a result, develop either an odor or mold or mildew"); *Bd. of Educ. v. Int'l Ins.*, 720 N.E.2d 622, 625-26 (Ill. App. 1999) (citing liability insurance coverage cases finding that incorporation of asbestos into buildings caused "property damage," defined under liability policies to be "physical injury to or destruction of tangible property"), *as modified* (Dec. 3, 1999).

[14] In chronological order: *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 825-26 (Minn. 2000) (holding that "[a] principal function of any living space [is] to provide a safe environment for the occupants" and "[i]f rental property is contaminated by asbestos fibers and presents a health hazard to the tenants, its function is seriously impaired"); *Prudential Prop. & Cas. Ins. v. Lillard-Roberts*, No. CV–01–1362–ST, 2002 WL 31495830, at *8-9 (D. Or. June 18, 2002) (concluding that mold damage to house could constitute "distinct and demonstrable" damage and that inability to inhabit a building may constitute "direct, physical loss"); *Cooper v. Travelers Indem. Co. of Ill.*, No. 01-cv-2400-VRW, 2002 WL 32775680, at *1 (N.D. Cal. Nov. 4, 2002) (holding that the presence of coliform bacteria and E.coli could constitute physical loss or damage); *Graff*, 54 P.3d at 1269 (holding that the presence of methamphetamine vapors could constitute physical loss or damage).

[15] The coverage included a $16 million payout to one hotel chain, Mandarin Oriental International. Gavin Souter, *Hotel Chain to get Payout for SARS-Related Losses* (Nov. 02, 2003), https://www.businessinsurance.com/article/ 20031102/story/100013638/hotel-chain-to-get-payout-for-sars-related-losses.

courts continued to find coverage for their business interruption losses in the absence of structural alteration.[16] The substantial precedent on this issue was followed by courts nationwide for the next decade, leading up to the COVID-19 pandemic.[17]

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[16] In chronological order: *Motorists Mut. Ins. v. Hardinger*, 131 F. App'x 823, 824-27 (3d Cir. 2005) (holding that the presence of E. coli could constitute physical loss or damage); *de Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 72223 (Tex. Ct. App. 2005) (finding mold damage constituted "physical loss to property"); *Schlamm Stone & Dolan, LLP v. Seneca Ins.*, 2005 WL 600021, at *5 (N.Y. Sup. Ct. Mar. 4, 2005) (finding "the presence of noxious particles, both in the air and on surfaces of the plaintiff's premises, would constitute property damage under the terms of the policy"); *Cook v. Allstate Ins.*, No. 48D02-0611-PL-01156, 2007 Ind. Super. LEXIS 32, at *9-10 (Ind. Super. Nov. 30, 2007) (finding infestation of house with brown recluse spiders constituted "sudden and accidental direct physical loss" to the house, and "[c]ase law demonstrates that a physical condition that renders property unsuitable for its intended use constitutes a 'direct physical loss' even where some utility remains and, in the case of a building, structural integrity remains"); *Brand Mgmt., Inc. v. Maryland Cas. Co.*, No. 05–cv–02293–REB–MEH, 2007 WL 1772063, at *2 (D. Colo. June 18, 2007) (noting that where a sushi manufacturer which closed for 15 days to disinfect its premises after discovery of listeria contamination, the insurance company voluntarily paid the business income claim); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co. of Conn.*, No. 05–1315–JE, 2007 WL 464715, at *8 (D. Or. Feb. 7, 2007) (finding "physical loss or damage" to a policyholder's heat treater for medical implants when a lead hammer was mistakenly left in the treater; noting that "[t]here is no question that the physical transformation of the furnace which rendered it useless for processing medical devices, the use for which it was specially certified, reduced both the value of the furnace and [the policyholder's] ability to derive business income from the furnace. This reduction of value was caused by an incident that is fairly characterized as 'direct physical damage'").

[17] In chronological order: *Wakefern Food Corp. v. Liberty Mut. Fire Ins.*, 968 A.2d 724, 734 (N.J. Super. Ct. App. Div. 2009) ("In the context of this case, the electrical grid was 'physically damaged' because, due to a physical incident or series of incidents, the grid and its component generators and transmission lines were physically incapable of performing their essential function of providing electricity."); *Manpower Inc. v. Ins. Co. of the State of Pa.*, No. 08C0085, 2009 WL 3738099, at *1 (E.D. Wis. Nov. 3, 2009) (finding "direct physical loss . . . or damage to" a building adjacent to a building which collapsed despite the fact that the collapse did not cause any noticeable damage to the policyholder's occupied space); *Travco Ins. v. Ward*, 715 F. Supp. 2d 699, 708(E.D. Va. 2010) , *aff'd*, 504 F. App'x 251 (4th Cir. 2013); (finding a house built with drywall manufactured in China, that emitted toxic gases, causing the policyholder to move out, had suffered direct physical loss, although it was "physically intact, functional and ha[d] no visible damage;" noting that the majority of cases nationwide find that "physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces") *In re Chinese Mfr'd Drywall Prods. Liab. Litig.*, 759 F. Supp. 2d 822, 831-32 (E.D. La. 2010) (finding there "exists a covered physical loss" where "potentially injurious material" is "activated, for example by releasing gases or fibers," and "that the presence of Chinese-manufactured drywall in a home constitutes a physical loss" because it "renders the [policyholders'] homes useless and/or uninhabitable"); *Ass'n of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins.*, 939 F. Supp. 2d 1059, 1068 (D. Haw. 2013) (applying Hawai'i law) (finding intrusion of arsenic into roof caused "direct physical loss or damage" to the roof); *Gregory Packaging*, 2014 WL 6675934, at *5-6 (*see supra* note 9); *Mellin v. N. Sec. Ins.*, 115 A.3d 799, 803-05 (N.H. 2015)

The insurance industry is well aware of these decisions. In fact, a trade organization that drafts policy language for the industry admitted that its responsibilities include monitoring such decisions and updating its forms and endorsements in response thereto.[18] Yet it never added a requirement of "structural alteration." Instead, it left the language unchanged, knowing that phrase has been interpreted by policyholders and courts alike not to require structural alteration. This history makes clear that FFIC, like the rest of the insurance industry, never intended the requirement of structural alteration on which it now relies—and that it is unconscionable to read the Policy as if that language had been added.

C. Insurance Companies Admit and Argue that Events Rendering Property Unfit for Its Intended Use Cause "Physical Loss or Damage."

Prior to the pandemic, insurance companies freely admitted that coverage is triggered when property was rendered unfit for its intended use. Two prominent examples are discussed below.

1. Concessions in Regulatory Filings.

Evidence that structural alteration is not required to trigger coverage under property policies is found in statements that insurance companies have made when seeking approval of policy forms. In 2005, for example, the Greater New York

(holding that pervasive odor of cat urine was "physical loss" to condominium); *Or. Shakespeare Festival*, 2016 WL 3267247, at *5-6 (*see supra* note 10).

[18] ISO Circular dated July 6, 2006 ("ISO Circular"), at 7 of 13 (Attached here as Ex. 1).

Insurance Companies ("Greater NY") asked the New York State Insurance Department for permission to include a virus exclusion in its property policies. It proposed that the exclusion be optional, as many policyholders would want to continue having coverage for viruses.[19] Greater NY explained that such coverage would exist unless the exclusion was included, stating "our main object of this filing is to remove the carte blanch application of this Exclusion and not deny coverage to the majority portion of our book" for losses stemming from virus.[20] The admission that standard-form property policies using the "physical loss or damage" formulation cover "this type of loss ('pandemic')"[21] is exactly what FFIC denied in this action and the District Court erroneously accepted as true.

Greater NY even admitted that its policyholders reasonably expect such coverage from their property policies:

> [W]e do not anticipate that any of our insureds will voluntarily request this [virus] exclusion; some (habitational risks) because it would never enter their minds as a problem for which they would voluntarily reduce coverage; others (restaurants) because they feel that such an event is well within the realm of possible fortuitous occurrences and should be covered should such an event arise.[22]

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[19] *See* Greater NY's Explanatory Mem., at 1. (Attached here as Ex. 2)

[20] *Id.*

[21] *Id.*

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

The instant case demonstrates that Greater NY was correct, as First and Stewart's complaint makes clear that it expected coverage for the losses suffered when the pandemic shut down its operations.

2. Concessions in Court Filings.

Three months before the pandemic began, Factory Mutual Insurance Company ("Factory Mutual")—perhaps the most sophisticated property insurance company in the United States—filed a motion in the U.S. District Court for the District of New Mexico, arguing that "physical loss or damage" to property exists when the presence of a physical substance renders property unfit for its intended use, even when it does not cause structural alterations.[23]

At issue in *Factory Mutual Insurance Co. v. Federal Insurance Co.* was a mold infestation in a "clean room" at a drug manufacturing plant.[24] Mold and its spores, like SARS-CoV-2 virions, exist on the surface of property and in the air. Factory Mutual argued that the mold infestation constituted "physical loss or damage" under a property policy sold by Federal Insurance Company ("Federal Insurance") because the mold "destroyed the aseptic environment and rendered [the clean room] unfit for its intended use."[25] It also asserted that case law "broadly

[23] Factory Mutual's Mot. *in Lim.* No. 5 re Physical Loss or Damage, filed Nov. 19, 2019 in *Factory Mut. Ins. v. Fed. Ins.*, No. 1:17-cv-00760-GJF-LF (D.N.M. 2019) (Attached here as Ex. 3).

[24] *Id.* at 3.

[25] *Id.*

interprets the term 'physical loss or damage' in such policies,"[26] relying upon many of the cases discussed above:

> Numerous courts have concluded that loss of functionality or reliability under similar circumstances constitutes physical loss or damage. *See, e.g.*, *Western Fire Insurance Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (church building sustained physical loss or damage when it was rendered uninhabitable and dangerous due to gasoline under the building); *Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America*, Civ. No. 2:12-cv-04418 2014 U.S. Dist. LEXIS 165232, 2014 WL 6675934 (D. N.J. 2014) (unsafe levels of ammonia in the air inflicted "direct physical loss of or damage to" the juice packing facility "because the ammonia physically rendered the facility unusable for a period of time."); *Port Authority of N.Y. and N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (asbestos fibers); *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (unpleasant odor in home); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 709 (E.D. Va. 2010), *aff'd*, 504 F. App'x. 251 (4th Cir. 2013) ("toxic gases" released by defective drywall).[27]

According to Factory Mutual, the loss continued until the policyholder's customers viewed the property's use to be safe:

> The period of time as well as costs required to bring [the policyholder's] facility to the level of cleanliness following the mold infestation required by [the policyholder's] customers is also physical loss or damage covered by the Federal policy. The facility was damaged by stringent requirements of [the policyholder's] customers regarding production to the same extent it was damaged from the mold infestation itself as the facility was unusable as the result of a covered loss. . . . Without the customers' approval of the restored aseptic conditions following the mold infestation, [the] facility remained unusable.[28]

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[26] *Id.*

[27] *Id.* at 3-4 (emphasis added).

[28] *Id.* at 4-5 (emphasis added).

Factory Mutual further argued that at the very least, its interpretation was reasonable, so even if Federal could propose an alternative, that merely would establish that "physical loss or damage" is ambiguous.[29] Since black-letter law requires ambiguities to be construed against the policy drafter, coverage would exist either way.

Ironically, no policyholder could have said it better. By making the exact argument that First and Stewart makes here, Factory Mutual put the lie to FFIC's denial of coverage. The District Court's wholesale adoption of FFIC's arguments about the meaning of "physical loss or damage" should be reversed.

II. THE COURT SHOULD NOT BE DISTRACTED BY "CRIES OF WOLF" FROM FFIC AND THE INSURANCE INDUSTRY.

At times of crisis, insurance companies are quick to argue that they could be forced into bankruptcy if they are forced to cover resulting claims. *See* J. Robert Hunter, *The Insurance Industry's Incredible Disappearing Weather Catastrophe Risk: How Insurers Have Shifted Risk and Costs Associated with Weather Catastrophes to Consumers and Taxpayers* at 1 (2012) ("[I]ndustry data demonstrates that insurers have significantly and methodically decreased their financial responsibility for [catastrophic] events in recent years and shifted much of

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

this risk to consumers and taxpayers. . . . [M]ost of these savings have been achieved by hollowing out the coverage in homeowners insurance policies and raising rates.").

For thirty years, insurance companies attempted to color the discussion of environmental coverage by asserting that they would be rendered bankrupt if they are required to cover claims that arise from the strict liability environmental statute, CERCLA. In testimony before Congress, insurance representatives claimed that the cost of such clean-ups will be five times their total "surplus" and could be ruinous. *See Insurer Liability for Cleanup Costs of Hazardous Waste Sites*, No. 101-175 (101st Cong., 2d Sess., Sept. 27, 1990) (Committee on Banking, Finance, and Urban Affairs), pp. 18-29 and 75-76. Although the industry was held accountable for many such clean-ups, the predicted collapse never arrived.

In response to the COVID-19 pandemic, insurance companies are "crying wolf" yet again. Insurance industry trade associations repeatedly have asserted in *amicus* briefs in COVID-19 cases that determinations in favor of coverage would bankrupt the industry.[30] While these outcome-determinative claims have no place in contract disputes,[31] they are overtly false.

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[30] *See, e.g.*, Eli Flesch, *Trade Group Tells 1st Cir. Eateries Not Owed Virus Coverage*, Law360.com (Sept. 15, 2021), https://www.law360.com/insurance-authority/property/articles/1422231/trade-group-tells-1st-circ-eateries-not-owed-virus-coverage.

[31] The expected profits and losses of an insurance company have no relevance to determining coverage, and evaluating *unknown* risks is a central part of an insurance company's business. It is not the role of courts to protect insurance company's when their actuaries make bad bets. As stated by the California Supreme Court in *Aerojet General Corp. v. Transport Indemnity Co.*, 948 P.2d 909, 932 (Cal. 1997), *as modified* (Mar. 11, 1998): "We shall assume for argument's sake that Aerojet has enjoyed great good

The pandemic has proved very *profitable* for insurance companies—one of the few industries able to make such a claim. To the knowledge of UP, no insurance company has entered insolvency due to the pandemic. Instead, insurance companies have enjoyed enormous windfalls. Here, Allianz, the global insurance conglomerate that owns FFIC, reported on November 10, 2021 that "operating profit grew by 11% to EUR3.2bn ($4.3bn) in the third quarter with high claims from natural catastrophes offset by negligible Covid-19 losses and a considerably improved run-off result."[32] This "11% increase" in profit for this quarter was over the EUR2.9bn in profit from the 2020 third quarter. Indeed, Allianz reported a 2020 operating profit for their global Property-Casualty insurance business EUR $4.4bn (total operating profit of EUR10.8bn for all operations, including any negative Covid-19 impacts).[33] Similarly, in July 2020, Progressive Insurance Company "reported an 83% increase in net income" which works out to about $811 million increase.[34] Chubb Limited

luck over against the insurers. But the pertinent policies provide what they provide. Aerojet and the insurers were generally free to contract as they pleased. . . . They evidently did so. They thereby established what was 'fair' and 'just' inter se. We may not rewrite what they themselves wrote. . . . We must certainly resist the temptation to do so here simply in order to adjust for chance—for the benefits it has bestowed on one party without merit and for the burdens it has laid on others without desert."

[32] Samuel Casey, *Allianz Q3 Profits up 11% to EUR2.2bn Despite EUR659mn Cat Claims*, Ins. Insider (Nov. 10, 2021), https://www.insuranceinsider.com/article/29au3jdu73ih6iyfktreo/allianz-q3-profits-up-11-to-eur3-2bn-despite-eur659mn-cat-claims.

[33] Allianz, Full Year and Quarterly Earnings Release 2020, *Allianz Delivers a Strong Finish to 2020* (Feb. 19, 2021), https://www.allianz.com/en/press/news/financials/business_results/210219_Allianz-4Q-FY2020-earnings-release.html.

[34] Richard Holober, *Progressive Insurance Hoards Covid-19 Windfall Profits*, Consumer Federation of Cal. (Aug. 13, 2020), https://uphelp.org/wp-content/uploads/2021/02/cfc_progressive.pdf.

reported net income of $1.19 billion in its third quarter, in 2020—up 9.4%, or $100 million, from the year before.[35] CNA Insurance similarly reported a $106 million increase in net income in the same period.[36] W.R. Berkley Corporation reported a massive 161% increase in its fourth quarter, in 2020.[37]

Indeed, despite not paying any COVID-19 related business interruption claims, insurance companies significantly *increased* their premium rates in 2020 across all lines of business. One large broker reported that 89% of its clients saw a rate increase for their property insurance—the "highest number recorded since the early 2000s."[38] From April through June 2020, property insurance rates spiked by 22%.[39] Insurance companies ratcheted up prices again between July and September, with a total increase of 24% for commercial property coverage.[40] From October to

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[35] Claire Wilkinson, *Chubb Reports Gains in Q3 Profit, Net Premium Written*, Bus. Ins. (Oct. 28, 2020), https://www.businessinsurance.com/article/20201028/NEWS06/912337411/Chubb-reports-gains-in-Q3-profit,-net-premium-written.

[36] Angela Childers, *CNA Reports Higher Net Income Despite Cat Losses*, Bus. Ins. (Nov. 2, 2020), https://www.businessinsurance.com/article/00010101/NEWS06/912337508/CNA-reports-higher-net-income-despite-cat-losses.

[37] Judy Greenwald, *Berkley Reports 161% Jump in Profits*, Bus. Ins. (Jan. 26, 2021), https://www.businessinsurance.com/article/00010101/NEWS06/912339367/Berkley-reports-161-jump-in-profits.

[38] Matthew Lerner, *Most Policyholders See Rate Hikes Across Multiple Lines*, Bus. Ins. (Oct. 26, 2020), https://www.businessinsurance.com/article/20201026/NEWS06/912337341/Most-policyholders-see-rates-hikes-across-multiple-lines-Arthur-J-Gallagher-Re.

[39] Matthew Lerner, *U.S. Commercial Property Pricing up 22% in Q2*, Bus. Ins. (Aug. 10, 2020), https://www.businessinsurance.com/article/00010101/NEWS06/912336034/US-commercial-property-pricing-up-22-in-Q2.

[40] Claire Wilkinson, *Insurance Prices Increased Sharply in Third Quarter*, Bus. Ins. (Nov. 5, 2020), https://www.businessinsurance.com/article/00010101/NEWS06/912337590/Insurance-prices-increased-sharply-in-third-quarter-Marsh.

December 2020, premiums increased another 20%.[41] In late 2020, property insurance companies told consumers to expect increases of 15% to 25% in 2021.[42] The pandemic has been very profitable for insurance companies, including FFIC, and yet they refuse to pay business interruption claims for businesses teetering on the edge of collapse. This Court should apply the Policy as written, ignore the false cries of poverty from the industry, and fulfill the primary purpose of insurance - to protect policyholders with covered claims.

III. CONCLUSION

The dismissal here was premature and unjust. First and Stewart is entitled to its day in court on the ambiguities that FFIC built into its policies. That would be the result if this Court were to grant First and Stewart's appeal. UP respectfully submits that such relief should be granted.

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[41] Matthew Lerner, *Global Prices Rise 22% in Q4: Marsh*, Bus. Ins. (Feb. 4, 2021), https://www.businessinsurance.com/article/20210204/NEWS06/912339588/Global-prices-rise-22-in-Q4-Marsh-Global-Insurance-Market-Index-.

[42] Judy Greenwald, *Continued Rate Increases Expected: Willis*, Bus. Ins. (Nov. 19, 2020), https://www.businessinsurance.com/article/20201119/NEWS06/912337904/Continued-rate-increases-expected-Willis-Towers-Watson.

Respectfully submitted,

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Dated: November 15, 2021

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 21-35637

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This brief contains 6,252 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

On November 15, 2021, a copy of the foregoing brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Court's appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

November 15, 2021

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EXHIBIT 1

ISO Circular

FORMS - FILED JULY 6, 2006

FROM: LARRY PODOSHEN, SENIOR ANALYST

COMMERCIAL PROPERTY LI-CF-2006-175

NEW ENDORSEMENTS FILED TO ADDRESS EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This circular announces the submission of forms filings to address exclusion of loss due to disease-causing agents such as viruses and bacteria.

BACKGROUND

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

ISO ACTION

We have submitted forms filing CF-2006-OVBEF in all ISO jurisdictions and recommended the filing to the independent bureaus in other jurisdictions. This filing introduces new endorsement CP 01 40 07 06 - Exclusion Of Loss Due To Virus Or Bacteria, which states that there is **no coverage for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease**.

Note: In Alaska, District of Columbia, Louisiana*, New York and Puerto Rico, we have submitted a different version of this filing, containing new endorsement CP 01 75 07 06 in place of CP 01 40. The difference relates to lack of implementation of the mold exclusion that was implemented in other jurisdictions under a previous multistate filing.

Both versions of CF-2006-OVBEF are attached to this circular.

* In Louisiana, the filing was submitted as a recommendation to the Property Insurance Association of Louisiana (PIAL), the independent bureau with jurisdiction for submission of property filings.

PROPOSED EFFECTIVE DATE

Filing CF-2006-OVBEF was submitted with a proposed effective date of January 1, 2007, in accordance with the applicable effective date rule of application in each state, with the exception of various states for which the insurer establishes its own effective date.

Upon approval, we will announce the actual effective date and state-specific rule of effective date application for each state.

RATING SOFTWARE IMPACT

New attributes being introduced with this revision:

- A new form is being introduced.

CAUTION

This filing has not yet been approved. If you print your own forms, do not go beyond the proof stage until we announce approval in a subsequent circular.

RELATED RULES REVISION

We are announcing in a separate circular the filing of a corresponding rules revision. Please refer to the **Reference(s)** block for identification of that circular.

REFERENCE(S)

LI-CF-2006-176 (7/6/06) - New Additional Rule Filed To Address Exclusion Of Loss Due To Virus Or Bacteria

ATTACHMENT(S)

- Multistate Forms Filing CF-2006-OVBEF
- State-specific version of Forms Filing CF-2006-OVBEF (Alaska, District of Columbia, Louisiana, New York, Puerto Rico)

We are sending these attachments only to recipients who asked to be put on the mailing list for attachments. If you need the attachments for this circular, contact your company's circular coordinator.

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Copyright Explanation

Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

About This Filing

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

New Form

We are introducing:

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

Related Filing(s)

Rules Filing CF-2006- OVBER

Introduction

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

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

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

Current Concerns

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

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

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

Features Of New Amendatory Endorsement

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

Copyright Explanation

Important Note

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

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

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

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

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

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

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

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

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

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

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ALASKA, DISTRICT OF COLUMBIA, LOUISIANA, NEW YORK, PUERTO RICO
COMMERCIAL FIRE AND ALLIED LINES
FORMS FILING CF-2006-OVBEF

Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

About This Filing

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

New Form

We are introducing:

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

Related Filing(s)

Rules Filing CF-2006-OVBER

Introduction

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

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

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

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

Current Concerns

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

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

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

Features Of New Amendatory Endorsement

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

Copyright Explanation

Important Note

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

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

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

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

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

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

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

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EXHIBIT 2

Ex. 2 at 1

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

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

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

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

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

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

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

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

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

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

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

Ex. 2 at 2

EXHIBIT C

Exhibit RT-1 – Side by Side Comparison

[Currently Filed and approved ISO Original Rule]

ADDITIONAL RULE(S)

A6. EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

Attach New York - Exclusion Of Loss Due To Virus Or Bacteria Endorsement **CP 01 78** to all policies.

[Our Proposed New Rule]

ADDITIONAL RULE(S)

The following Additional Rule in the ISO State Exceptions is amended:

A6. EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

RULE A6. EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA is replaced by the following:

ISO form CP 01 78 is an optional form.

Premium Determination When Exclusion is Applied:

Upon the introduction of this endorsement in 2006, the ISO position regarding the above Exclusion endorsement is that this exposure represents a "pandemic exposure to loss" and therefore is not assumed in the promulgation of Commercial Fire and Allied Lines data collection which is the basis for the development of loss costs. ISO indicates that they never anticipated extending such an exposure under the existing coverage form(s) of the period (at that time, filings would have assumed the CP 04 02 edition of the Commercial Property Coverage Forms.

Under the unmodified ISO rule attributed to this endorsement, this endorsement is applied to all policies on a mandatory basis. We have modified this rule to make it an Optional endorsement, based on Risk Characteristics indicated in the sections which follow.

Because coverage for such a pandemic exposure was not anticipated for coverage, there is therefore no increment included in ISO Commercial Fire and Allied Lines loss costs currently that represents a charge for this exposure. There is therefore no credit afforded in the application of the exclusion to any policy if added to any specific risk in accordance with the following exposure to loss:

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

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

insured's premises or due to contact with the insured's operations, employees; or products.

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

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

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

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

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

RISK CHARACTERISTICS DETERMINING WHEN EXCLUSION IS NOT APPLIED:

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

Premium Determination When Exclusion is NOT Attached:

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

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

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,	)	**CASE NO.: 1:17-cv-00760-GJF-LF**
vs.	)	
FEDERAL INSURANCE COMPANY and DOES 1-10,	)	
Defendants.	)	

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

I. INTRODUCTION

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

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

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

II. ARGUMENT

A. Legal Standard.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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