Nos. 21-1109; 21-1038; 21-1039; 21-1106; 21-1107; 21-1294

IN THE

United States Court of Appeals for the Third Circuit

1 S.A.N.T., INC.,

Plaintiff-Appellant,

v.

BERKSHIRE HATHAWAY, *et al.*,

Defendants-Appellees.

(*captions continued on next page*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE EASTERN AND WESTERN DISTRICTS OF PENNSYLVANIA

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLANTS AND REVERSAL

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No. 21-1038 LH DINING L.L.C. D/B/A RIVER TWICE v. ADMIRAL INDEMNITY COMPANY,	**No. 21-1107** ATCM OPTICAL, INC., OMEGA OPTICAL, INC., OMEGA OPTICAL AT COMCAST CENTER LLC v. TWIN CITY FIRE INSURANCE COMPANY,
No. 21-1039 NEWCHOPS RESTAURANT COMCAST LLC D/B/A CHOPS v. ADMIRAL INDEMNITY COMPANY,	**No. 21-1294** WHISKEY FLATS INC. v. AXIS INSURANCE COMPANY
No. 21-1106 ADRIAN MOODY AND ROBIN JONES D/B/A MOODY JONES GALLERY v. THE HARTFORD FINANCIAL GROUP, INC. AND TWIN CITY FIRE INSURANCE CO.	

ON APPEAL FROM THE JUDGMENTS OF THE
UNITED STATES DISTRICT COURTS FOR THE EASTERN AND WESTERN DISTRICTS OF PENNSYLVANIA
DATED FROM DECEMBER 2020 THROUGH FEBRUARY 2021

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 21-1109

(see additional case numbers and captions attached)

1 S.A.N.T., INC.

v.

BERKSHIRE HATHAWAY, et al.,

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, (Amicus) United Policyholders makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations: United Policyholders ("UP") is a non-profit 50(c)(6), tax exempt organization, organized under the laws of the State of California and funded by donations and grants. UP does not have a parent corporation.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

UP is a non-profit 50(c)(6), tax exempt organization, organized under the laws of the State of California and funded by donations and grants. There is no publicly held corporation that owns 10% or more of UP's stock.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A

/s/ Charles A. Fitzpatrick IV Dated: 11/15/2021
(Signature of Counsel or Party)

Attachment to
Corporate Disclosure Statement and
Statement of Financial Interest

No. 21-1038 LH DINING L.L.C. D/B/A RIVER TWICE v. ADMIRAL INDEMNITY COMPANY,	**No. 21-1107** ATCM OPTICAL, INC., OMEGA OPTICAL, INC., OMEGA OPTICAL AT COMCAST CENTER LLC v. TWIN CITY FIRE INSURANCE COMPANY,
No. 21-1039 NEWCHOPS RESTAURANT COMCAST LLC D/B/A CHOPS v. ADMIRAL INDEMNITY COMPANY,	**No. 21-1294** WHISKEY FLATS INC. v. AXIS INSURANCE COMPANY
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INTEREST OF AMICUS CURIAE

United Policyholders ("UP") is a non-profit 501(c)(3) organization whose mission is to be a trustworthy information resource and respected voice advocating for insurance consumers throughout the United States. Since its founding in 1991, UP has been a dedicated insurance advocate for individuals and small businesses. For example, UP helps policyholders facing natural disasters that cause substantial economic losses to their businesses across the country. It provides a voice in judicial, legislative, and regulatory forums, advocating for fair sales and claims practices and seeking to protect the integrity of the insurance system. Importantly, UP has maintained its commitment to protecting the rights of small businesses and other insurance consumers during the COVID-19 pandemic. As a result, UP is well-positioned to provide this Court with its unique, long-focused perspective on the coverage issues in this case.

Over the past three decades, UP has filed amicus briefs in federal and state courts in over 450 cases, including many before the Pennsylvania Supreme Court.[1] Its briefs have been helpful to these courts and have been cited in many decisions regarding insurance coverage issues. *See, e.g., Humana Inc. v. Forsyth*, 525 U.S.

[1] *E.g.*, *Rancosky v. Washington National Ins. Co.*, 170 A.3d 364 (Pa. 2017); *Babcock & Wilcox Co. v. American Nuclear Insurers*, 131 A.3d 445 (Pa. 2015); *Allstate Property & Casualty Co. v. Wolfe*, 105 A.3d 1181 (Pa. 2014); *American & Foreign Ins. Co. v. Jerry's Sport Center, Inc.*, 2 A.3d 526 (Pa. 2010); *ACE American Ins. Co. v Underwriters at Lloyds & Cos.*, 971 A.2d 1121 (Pa. 2009).

299, 314 (1999); *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 at 1185-86. Specifically, during the pandemic, UP has filed approximately 45 amicus briefs in insurance coverage lawsuits involving losses associated with COVID-19.

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.

PRELIMINARY STATEMENT

The regulatory estoppel doctrine, which was adopted by the Pennsylvania Supreme Court in *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1189 (Pa. 2001), serves a crucial consumer protection purpose of deterring insurers from deceiving their policyholders through misrepresentations to state insurance regulators about the impact of changes in standardized insurance policies. This doctrine *Sunbeam* adopted is grounded in the recognition that the regulatory review process by which insurers secure approval to sell standardized insurance policies in each state generally provides the only meaningful opportunity for negotiation regarding new exclusionary provisions and any corresponding reduction of the premiums to be charged. The doctrine mandates that, when insurers misrepresent to regulators that a new policy exclusion will not restrict coverage in securing regulatory approval, they will be estopped in subsequent coverage litigation from relying on the exclusion as a basis for repudiating coverage. Under Pennsylvania's regulatory estoppel doctrine, courts thus play a vital role in ensuring that insurers do not unfairly profit from their misrepresentations to state regulators.

In granting dismissals with prejudice, the district courts abdicated the crucial role that *Sunbeam* requires them to play in policing the truthfulness of the representations insurers make to state regulators to secure approval of new standardized policy exclusions. In opposing dismissal, the policyholders relied on

evidence, gleaned from publicly available sources and without the benefit of discovery, that the insurers misrepresented to regulators that the virus exclusion that insurers adopted after the first novel Coronavirus epidemic – the SARS pandemic of 2002-04 – was merely a clarification of existing coverage, falsely claiming that the policies' existing grant of coverage for business interruption losses resulting from "physical loss or damage" to property did not encompass losses from "disease-causing agents." Contrary to those representations, the insurers knew that courts repeatedly had held that these policy provisions provided coverage for such losses. The insurers now argue that this same exclusion, which that they represented to regulators did not materially change coverage, in fact bars coverage for losses their policyholders have suffered as a result of the COVID-19 pandemic. Based on this limited evidence alone, the policyholders' allegations about the deceptive conduct in which the insurers allegedly engaged support application of the regulatory estoppel doctrine to preclude them from relying on the virus exclusion and deter similar misconduct in the future.

At the very least, the policyholders' allegations below about the deceptive conduct in which the insurers allegedly engaged raised grave factual issues about the truthfulness of the insurers' representations regarding the intended impact of the new virus exclusions that could not properly be adjudicated at the pleadings stage. Indeed, for the vital protective purposes of the regulatory estoppel doctrine to be

served, it is essential that policyholders be given the opportunity to conduct the discovery needed to develop a complete factual record about the representations insurers made in securing regulatory approval of new exclusionary provisions. The district courts' decisions dismissing the policyholders' coverage claims at the pleading stage therefore should be reversed.

ARGUMENT

I. THE REGULATORY ESTOPPEL DOCTRINE PREVENTS INSURERS FROM DECEIVING THEIR POLICYHOLDERS BY MISLEADING REGULATORS ABOUT THE IMPACT OF NEW POLICY EXCLUSIONS

The regulatory estoppel doctrine serves an important consumer protection purpose – it prevents insurers from unfairly profiting by misleading state regulators about the impact of standardized policy language for which approval is required. In *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1189 (Pa. 2001), the Pennsylvania Supreme Court followed the New Jersey Supreme Court's landmark decision in *Morton International, Inc. v. General Accident Insurance Co.*, 629 A.2d 831 (N.J. 1993), in also adopting the regulatory estoppel doctrine under Pennsylvania law. This doctrine is rooted in the crucial role state insurance regulators play in protecting policyholders having no ability to negotiate changes in standardized policy terms from unfair practices by insurers.

A. The Regulatory Estoppel Doctrine Recognized in *Morton* Holds Insurers Accountable for Their Representations to State Regulators

Morton grounded its adoption of the regulatory estoppel doctrine in recognition that policyholders have no ability to negotiate the terms of standardized insurance-industry-drafted policies, and that state regulators, who approve such policy language for sale to consumers, alone can effectively raise questions about the impact of insurers' changes to such standardized policy terms. *Morton* emphasized that the absence of any further bargaining over standardized policy exclusions once regulatory approval occurs made it crucial for courts to hold the insurers to the representations they made to regulators, and ensure that they did not profit by making misrepresentations to state regulatory agencies.

Morton based these conclusions on a thorough review of the process through which insurers in each state secure regulatory approval to sell standardized policies to state residents, including, in particular, language creating and expanding policy exclusions. *Id.* at 848-50. Insurance companies must obtain regulatory approval of standardized insurance policies to ensure uniformity and consistency and to set premium rates. *Id.* at 848. Many such standardized polices are drafted by insurance industry drafting organizations, which seek regulatory approval for the policy amendments on behalf of their member companies, usually by providing an explanatory memorandum to each state regulatory agency. *Id.* at 850-51. Before

granting approval, regulators review such submissions to determine whether changes to proposed revisions, including new exclusions, will be required and whether new proposed restrictions require a reduction in premium rates that the insurers are permitted to charge. *Id.* at 851-52. Thus, "to the extent that [an exclusion] ever [is] subjected to arms-length evaluation by interests adverse to the insurance industry, that evaluation occur[s] when the clause was submitted to and reviewed by state regulatory authorities." *Id.*

Once regulatory approval is obtained, insurers are free to sell policies containing the new exclusions nationwide, and insureds generally have no ability to negotiate further modifications. *Id.* at 852-55. Indeed, once regulatory approval is obtained, policies utilizing approved policy language are sold to a multitude of policyholders who "*rarely see[] the policy form until after the premium has been paid.*" *Id.* at 852 (emphasis added). State regulatory agencies therefore play a critical role in protecting policyholders, and, to ensure that this protective regulatory function can be performed, it is crucial that courts hold insurers accountable for misrepresentations made to regulators through application of the doctrine of regulatory estoppel.[2] *Id.*

[2] Because of the important state public policy interests involved, several state attorneys general, including the Attorney General of Pennsylvania, submitted amicus briefs to the *Morton* court urging it to estop the insurers from relying on the exclusions that they misrepresented to state insurance regulators. *Id.* at 855.

Guided by these considerations, *Morton* held that the insurers were barred from enforcing a pollution exclusion they had added to their standardized insurance policies because approval of the exclusion was secured by misrepresentations that the insurers' representative, the Insurance Rating Bureau ("IRB"), a predecessor to the Insurance Services Office ("ISO"), had made to regulators. Contrary to the reading of the pollution exclusion the insurers had begun advocating after securing regulatory approval, IRB led the state authorities to reasonably believe that the amended exclusionary language merely "clarified," and was consistent with, prior occurrence-based coverage. *Id*. at 872. Contradicting these representations, the insurers later denied coverage on the ground that these new exclusions served to "materially and dramatically reduce the coverage previously available for property damage caused by pollution." *Id.*

Morton imputed IRB's misrepresentations to all insurers selling policies including the approved pollution exclusion (obtained through misrepresentation), and ruled that the insurers were estopped from unfairly profiting by invoking the pollution exclusion to deny coverage to policyholders. The New Jersey Supreme Court ruled that the regulatory estoppel doctrine required the exclusion to be interpreted the way insurers' representatives had reasonably led the regulators to understand the exclusion, irrespective of the exclusion's literal language, and that

the insurers were estopped from arguing that the exclusionary language was broader in scope than their representatives had led the regulators to believe.

Indeed, *Morton* held that regulatory estoppel applied, notwithstanding the determination that the exclusion was clear and unambiguous. To hold otherwise, the *Morton* Court reasoned, would "violate this State's strong public policy requiring regulation of the insurance business in the public interest," and "reward the industry for its misrepresentation and nondisclosure to state regulatory authorities." *Id.* at 873. "As a matter of equity and fairness," *Morton* held that "the insurance industry should be bound by the representations of . . . its designated agent, in presenting the pollution-exclusion clause to state regulators." *Id.* at 874. "Having profited from that nondisclosure by maintaining pre-existing rates for substantially-reduced coverage, the industry justly should be required to bear the burden of its omission." *Id.* at 876. The Court therefore applied regulatory estoppel, requiring the insurance industry to "provid[e] coverage at a level consistent with its representations to regulatory authorities." *Id.*

B. In *Sunbeam*, the Pennsylvania Supreme Court Followed *Morton* in Recognizing the Regulatory Estoppel Doctrine

In *Sunbeam*, the Pennsylvania Supreme Court considered the impact of the same insurance industry misrepresentations to state insurance regulators regarding the same pollution exclusion considered in *Morton*, which excluded coverage for pollution unless "sudden and accidental." 781 A.2d at 1192. As they had done in

securing the New Jersey regulators' approval, insurers had "promised the [Pennsylvania] insurance department that the new [exclusionary] language proposed … did not reduce the coverage provided by the policies," and had "entreated" Pennsylvania regulators "to approve the new language without requiring a reduction in premiums." *Id.* at 1194. As had the insureds in *Morton*, the insureds in *Sunbeam* alleged that the regulatory estoppel doctrine precluded the insurers from profiting from these misrepresentations by invoking the new exclusion to deny coverage. The trial court rejected this argument and granted the insurer's motion to dismiss the complaint. The Pennsylvania Superior Court affirmed, but the Pennsylvania Supreme Court reversed.

Embracing the *Morton* Court's reasoning, the Pennsylvania Supreme Court emphasized that the insurance industry had "submitted to the Pennsylvania insurance department a memorandum which asserted that the disputed language—excluding coverage for pollution unless it was 'sudden and accidental'—would not result in any significant decrease in coverage." *Id.* at 1192. The insured alleged that regulators had relied on "the industry's representation when it approved the disputed language for inclusion in standard comprehensive general liability policies without a reduction in premiums to balance a reduction in coverage." *Id.* The *Sunbeam* Court ruled that the trial court erred in dismissing this claim at the pleading stage, reasoning that even if the trial court had viewed the allegation of reliance as

implausible, it should have been accepted as true for purposes of the motion.

Most importantly, *Sunbeam* further held that, even absent reliance by regulators, the insured's assertion of regulatory estoppel remained valid. Reliance was not required because regulatory estoppel was, like judicial estoppel, designed to protect the integrity of the system by preventing parties from "playing fast and loose" with the tribunal "by adopting whatever position suits the moment." *Id.* The Court concluded that, because the policyholders had set forth a viable claim that the insurers had obtained approval of the exclusions through misrepresentations to the regulatory agencies, "it was error to dismiss the complaint without applying the doctrine of regulatory estoppel." *Id.* at 1193.

In sum, *Morton* and *Sunbeam*[3] recognize that policyholders, who generally are unable to negotiate standardized insurance terms, rightly rely on state regulatory authorities to protect them from unfair practices by their insurers, and that courts necessarily play an integral role in safeguarding the integrity of the regulatory

[3] Other state Supreme Courts have also adopted the reasoning of *Morton*. In *Textron, Inc. v. Aetna Casualty & Surety Co.*, 754 A.2d 742 (R.I. 2000), the court likewise held the insurers to the representations they made to regulators. Similarly, in *St. Paul Fire Insurance Co. v. McCormick & Baxter Creosoting Co.*, 923 P.2d 1200 (Or. 1996), the Oregon Supreme Court held that, in light of the insurance industry's representations to regulators regarding the meaning of the same pollution exclusion, the exclusion was ambiguous and must be construed against the insurers. Additionally, in *Alabama Plating Co. v. United States Fidelity & Guaranty Co.*, 690 So.2d 331 (Ala. 1996), the court interpreted the same pollution exclusion to be consistent with the insurance industry's statements to regulators as to its scope.

process by preventing insurers from profiting by misleading regulators as to the effect of the such standardized policy language. Because insurers use the same standardized base policy form in every state, courts can effectively police this process only if they know what representations insurers are making nationwide. *See Morton*, 629 A.2d at 849-51 (court considers representations to regulators in a variety of states).

For policyholders in Pennsylvania and many other states, the regulatory estoppel doctrine provides policyholders with the only effective remedy when insurers seek to misuse this process. While Pennsylvania's Unfair Insurance Practices Act, 40 Pa. Stat. Ann. § 1171.1 *et seq.*, prohibits unfair or deceptive acts or practices in the insurance industry – such as "[m]isrepresenting pertinent facts or policy or contract provisions relating to coverages at issue," *id.* § 1171.5 – the statute does not confer a private right of action upon consumers to seek remedies for violations. As a result, Pennsylvania policyholders, like those in many other states, are able to protect their rights in subsequent coverage litigation only by asserting regulatory estoppel. And to do that effectively, they need to be able to establish the representations that insurers make to regulators, a showing that *necessarily requires discovery*.

II. INSURERS KNEW OF THE DECADES OF CASES HOLDING THAT THEIR STANDARDIZED POLICIES COVERED IMPERCEPTIBLE CAUSES OF LOSS OR DAMAGE, SUCH AS THOSE RESULTING FROM DISEASE-CAUSING AGENTS.

It is false to claim that the law of Pennsylvania, or that of a majority of states, requires perceptible, physical alteration of property to trigger coverage for "physical loss" in a business-interruption insurance policy – or that as a result of this purported perceptible, physical alteration requirement, standard property policy language would not, absent an exclusion, provide coverage for the actual or imminent presence of disease-causing agents. For example, in *Port Authority of New York & New Jersey v. Affiliated FM Insurance Co.*, 311 F.3d 226 (3d Cir. 2002),[4] this Court specifically acknowledged that the "physical loss" required to trigger property coverage is satisfied when a property's airspace is rendered dangerous because of the presence of, or "imminent threat of the release of" an invisible, disease-causing agent (asbestos fibers, in that case), such that the property is rendered unfit for use, or the function of the property is nearly eliminated.[5] *Id.* at 234; *see also Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 826 (3d Cir. 2005) (relying on *Port*

[4] In *Port Authority*, the Court predicted New Jersey and New York insurance law and did not address Pennsylvania insurance law.

[5] The standard articulated in *Port Authority* is consistent with a long line of cases finding coverage for "loss," absent visible damage, due to the premises being rendered unsafe for their intended use. *See, e.g.*, *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, 2014 WL 6675934, at *5 (D. N.J. Nov. 25, 2014) ("property can sustain physical loss or damage without experiencing structural alteration" where ammonia released inside facility); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 701, 703 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013) (direct physical loss where a home was rendered uninhabitable by toxic gases); *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 803 (2015) (cat urine odor constituted direct physical loss; "'physical loss' need not be read to include only tangible changes to the property that can be seen or touched").

Authority to find bacterial contamination of water supply could constitute a direct physical loss to property "in a case where sources unnoticeable to the naked eye have allegedly reduced the use of the property to a substantial degree"). Throughout the 1950s,[6] 1960s,[7] 1970s,[8] 1980s,[9] 1990s,[10] and early 2000s[11] courts held that unusual

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

[7] *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).

[8] *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).

[9] *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).

[10] *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); *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).

[11] *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.*

events – i.e., events other than a fire, collapse or tornado – caused direct physical loss or damage to property under standard-form wordings.

Consistent with this understanding of the law, the insurance industry paid claims for loss caused by the original novel coronavirus, SARS-CoV-1, including a payment of $16 million to a single hotel chain in the face of a SARS-based business closure, in 2002-2004.[12]

As a result of the 2002-2004 SARS pandemic, and several additional cases decided in the early 2000s finding coverage for losses resulting from imperceptible causes of loss or damage, including from disease-causing agents, under standardized commercial property policies,[13] ISO and the American Association of Insurance Services ("AAIS"), working on behalf of insurers, drafted the Exclusion for Loss Due to Virus or Bacteria ("Virus Exclusion") in 2006. As the above discussion makes clear, ISO, AAIS and the insurers knew that, when the exclusion was drafted, imperceptible causes of loss or damage, such as those resulting from disease-causing agents, could trigger coverage under standard-form property policies insuring against "physical loss" of property, regardless of whether visible/tangible physical

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Co., 224 F. Supp. 2d 402, 413 (D. Conn. 2002) (asbestos and lead); *De Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 722-23 (Tex. App. Mar. 31, 2005) (mold).

[12] *See* Todd C. Frankel, "Insurers knew the damage a viral pandemic could wreak on businesses. So they excluded coverage," Washington Post (April 2, 2020).

[13] *See supra* note 9.

alteration of the property resulted. Indeed, before the COVID-19 pandemic, Factory Mutual Insurance Company, one of the largest and most sophisticated commercial property insurers in the country, stated that "physical loss or damage" to property exists when the presence of a physical substance renders property unfit for its intended use, even in the absence of any physical alteration to the premises. *See* Factory Mutual'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.) (Dkt. 127) (Attached as Exhibit A hereto).

III. INSURERS MISREPRESENTED TO REGULATORS THAT THE NEW VIRUS EXCLUSIONS DID NOT RESTRICT PREEXISTING COVERAGE

As discussed above, when ISO and the insurers drafted the Virus Exclusion in 2006, they knew that standard-form property policies had been repeatedly held, over the course of decades, to insure against imperceptible causes of loss or damage, such as disease-causing agents that did not cause perceptible alteration of the covered premises, and that insurance companies had paid out millions of dollars for loss and damage arising from the first novel coronavirus in 2002-2004. It was for this very reason that ISO created the Virus Exclusion. Before the exclusion could be included in insurance policies sold to commercial consumers, however, ISO had to obtain approval for the new language from state regulators. In order to obtain regulatory approval for this policy language – which ISO and the insurers hoped

would limit coverage – without decreasing premiums, ISO, on behalf of its members such as Defendants, misrepresented to regulators that the Virus Exclusion was merely a **clarification** of existing coverage, falsely claiming that existing policy language did not cover loss from "disease-causing agents." Insurers knew this was not true.

Specifically, ISO submitted a circular to state regulators which stated that (1) property policies had not historically provided coverage for losses from "disease-causing agents"; but (2) ISO wanted to preclude any efforts to "expan[d]" coverage beyond the then-existing, supposedly limited scope represented to the regulators by ISO:

> 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.

Exhibit B hereto (emphasis added).

In the same time period, AAIS submitted a Filing Memorandum to state regulators. It likewise stated that (1) property policies had not provided coverage for loss or damage caused by disease-causing agents; and (2) the new exclusion was merely intended to "clarify policy intent":

> **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.

Exhibit C hereto (emphasis added).

It was clear that insurers and their representatives knew these statements were false and misleading. As explained above, insurers were aware that courts had interpreted standard policy language to provide coverage for losses resulting from imperceptible causes of loss or damage, such as disease-causing agents, and that the new exclusionary language was therefore intended to **narrow** the scope of coverage, not to **clarify** it. Indeed, in internal ISO discussions, ISO described an earlier draft exclusion that would have included viruses within a "contamination" exclusion as follows: "Impact: This change is a reduction in coverage." *Madera Group, LLC v. Mitsui Sumitomo Insurance USA, Inc.*, No. 2:20-cv-07132-JAK-AFM (C.D. Cal.), Exhibit A of Exhibit E to Amended Complaint (Dkt. 68-5), Exhibit D hereto, at 6. The accurate statement in this internal draft was subsequently changed to its opposite: "There is no change in coverage," purportedly because "the existing Pollution exclusion is intended to encompass contamination." *Id.* at 8. By changing a statement of fact regarding the impact on coverage to a false statement regarding the impact on coverage, ISO, and the insurers on whose behalf it acted deceived state insurance regulators.

In sum, it is simply not true, as insurers led regulatory agencies to believe, that pre-2006 insurance policies did not provide coverage for losses resulting from imperceptible causes of loss or damage to property including disease causing agents; nor was it true that the additions or changes to exclusions sought by the insurers in

the wake of the SARS pandemic were intended not to affect the scope of coverage, and therefore did not justify a change in premiums. ISO and AAIS inserted an exclusion for an existing exposure while misleading regulators – the only persons who could meaningfully negotiate standard-form policy language – as to the effect of the exclusions, thereby avoiding an enforced reduction in premiums or rates. The insurers knew that their representations to regulators, on which the regulators relied in approving these exclusions without requiring a decrease in the premiums they received, were false. They knew that courts around the country had for decades held that losses resulting from imperceptible causes of loss or damage, such as disease-causing agents were covered under the existing language of standardized commercial property policies, and indeed insurance companies had paid claims for similar losses during the SARS epidemic.[14] The new exclusions were not, as represented to regulators, mere clarifications that did not materially limit the scope of coverage. Insurers now claim that the exclusions effectively preclude coverage for disease-causing agents, contrary to how courts had interpreted the preexisting coverage-granting provisions of standardized property policies. Under the doctrine of regulatory estoppel, the insurers are therefore barred from enforcing the exclusions to bar coverage for COVID-19 related insurance claims.

[14] *See* Todd C. Frankel, "Insurers knew the damage a viral pandemic could wreak on businesses. So they excluded coverage," Washington Post (April 2, 2020).

It makes no difference, for purposes of applying the regulatory estoppel doctrine, that insurers have been consistent in maintaining that their exclusions were intended to exclude losses caused by a virus or other disease-causing agent or that they consistently (with some exceptions) have maintained that the pre-2006 policies did not provide coverage for disease-causing agents. As in *Morton*, regulatory estoppel is based not on inconsistency, but on misrepresentations to regulators who, as a practical matter, have the only opportunity to object to or negotiate policy language and thus protect consumers from unfair practices by insurers. When insurers make representations to regulators that are misleading, even if (indeed, especially if) they consistently mislead regulators regarding the same issues, regulatory estoppel applies; that insurers' misrepresentations were consistent, and that they made the same false representations to regulators, insureds and courts, is certainly no defense. Thus, a number of the courts below erred in requiring that there be an inconsistency, rather than a misrepresentation, as a prerequisite to applying regulatory estoppel. *E.g., Newchops Restaurant Comcast LLC v. Admiral Indemnity Company*, 507 F.Supp.3d 616, 629 (E.D. Pa. 2020) (court below rejected the regulatory estoppel argument made by Appellant in No. 21-1039 on the ground that "[e]ven if ISO's statement was fraudulent or misleading, the insureds have not identified how Admiral's position contradicts ISO's earlier statements").

To obtain regulatory approval for the virus exclusions without any corresponding decrease in premiums, the insurers and their representatives falsely represented to regulatory authorities that the new exclusionary language merely "clarified" rather than restricted coverage, just as they had done in securing regulatory approval of the new pollution exclusion at issue in *Sunbeam* and *Morton*. Here, insurers and their agents falsely claimed to state regulators that the existing policy language did not provide coverage for loss or damage caused by disease-causing agents, and then misrepresented to state regulators that the exclusions were mere clarifications of the existing policy language, and not a reduction of existing coverage. Instead of asking for permission to narrow coverage, the insurance industry misrepresented that the exclusions did not alter coverage, knowing full well that the exclusions were meant to narrow coverage.

Moreover, the insurers and their representatives failed to disclose to regulatory authorities that they had paid losses caused by viruses like SARS, and that this was the very reason they wanted the exclusion. Had they told the truth, regulators likely would have responded differently; insurance consumers, however, never had an opportunity to negotiate the terms, and were left at the mercy of the insurers. By misrepresenting the intent behind the policy language to the only entities having an ability to negotiate with the insurers, the insurers unfairly sought

to benefit from narrower coverage after charging policyholders premiums for broader coverage.

For the reasons enumerated in *Morton* and *Sunbeam*, the insurers should be estopped from denying coverage based on virus exclusions that they misled regulators to believe had no impact on the coverage granted by their standardized policies.

IV. THE DISTRICT COURTS ERRED IN DEPRIVING PLAINTIFFS OF THEIR RIGHT TO CONDUCT DISCOVERY REGARDING THE INSURERS' REPRESENTATIONS TO REGULATORS

For the vital consumer protective purposes of the regulatory estoppel doctrine to be served, it is essential that policyholders be given the opportunity to conduct the discovery required to establish the representations insurers and their industry representatives made in obtaining approval of the exclusionary provisions now being invoked to deny their policyholders' claims for coverage for the business interruption losses caused by the Covid-19 pandemic. Given the magnitude of these losses, this is an issue of great public importance to Pennsylvania businesses, and the question of whether the insurers have made misrepresentations to Pennsylvania and other insurance regulators dictating application of the regulatory estoppel doctrine is one that courts should adjudicate only once presented with a fully developed factual record.

In granting the insurers' motions to dismiss complaints with prejudice, and before the policyholders in consolidated appeals had any opportunity to conduct discovery in support of their regulatory estoppel claims, the courts below failed to perform the consumer protection functions that the regulatory estoppel doctrine confers upon them and gave the insurance industry license to play fast and loose with the regulatory process for securing approval of standardized policy language.

UP submits that the limited information, secured without discovery, itself provides a basis for application of the regulatory estoppel doctrine. But the documents UP is submitting with this brief are only the tip of the iceberg. Different insurers may have made different statements to the regulators of different states. In *Morton*, the court recognized that statements to different state regulatory agencies needed to be considered. Here, Plaintiffs in several cases alleged that Defendants should be estopped from arguing that the exclusions barred coverage. As the *Sunbeam* court recognized, allegations giving rise to regulatory estoppel, like other factual allegations, must be accepted as true for purposes of a motion to dismiss, and such claims cannot be disposed of at the pleading stage. Moreover, this Court should be able to review the district court's regulatory estoppel decision on a fully-developed record, which cannot happen without discovery. Thus, the district courts erred, at a minimum, in not permitting discovery before they improperly rejected Plaintiffs' regulatory estoppel arguments at the pleading stage.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgments of the district courts in the above-captioned cases.

Dated: November 15, 2021

Respectfully submitted,

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COMBINED CERTIFICATE OF COMPLIANCE

On this fifteenth day of November, 2021, the undersigned certifies that:

1. This brief on behalf of amicus United Policyholders complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and this Court's October 8, 2021 order because this brief contains 5,760 words, as determined by the word-count function of Microsoft Word 365, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman font.

3. I am a member in good standing of the bar of this Court.

4. The text in the electronic copy of this brief is identical to the text in the paper copies of the brief filed with the Court.

5. This brief was scanned for viruses using Microsoft Defender, version 1.353.717.0, and no viruses were detected.

/s/Charles A. Fitzpatrick IV
Charles A. Fitzpatrick IV

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2021, I caused a copy of the foregoing Brief Of *Amicus Curiae* United Policyholders In Support Of Appellants and Reversal to be filed through the Court's electronic docketing system, which will electronically serve upon all counsel of record a notification of the filing.

/s/Charles A. Fitzpatrick IV
Charles A. Fitzpatrick IV

EXHIBIT A

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

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

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

I. INTRODUCTION

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

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

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

II. ARGUMENT

A. Legal Standard.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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EXHIBIT B

ISO Circular

FORMS - FILED JULY 6, 2006

FROM: LARRY PODOSHEN, SENIOR ANALYST

COMMERCIAL PROPERTY LI-CF-2006-175

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

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

BACKGROUND

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

ISO ACTION

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

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

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

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

PROPOSED EFFECTIVE DATE

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

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

RATING SOFTWARE IMPACT

New attributes being introduced with this revision:

- A new form is being introduced.

CAUTION

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

RELATED RULES REVISION

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

REFERENCE(S)

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

ATTACHMENT(S)

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

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

PERSON(S) TO CONTACT

If you have any questions concerning:

- the content of this circular, please contact:

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

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

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

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

Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

About This Filing

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

New Form

We are introducing:

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

Related Filing(s)

Rules Filing CF-2006- OVBER

Introduction

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

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

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

Current Concerns

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

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

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

Features Of New Amendatory Endorsement

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

Copyright Explanation

Important Note

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

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

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

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

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

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

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

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

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

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

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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 C

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.

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.

EXHIBIT D

EXHIBIT E

EXHIBIT A

Gibboney, Thomas

From: Newman, Loretta F.
Sent: Tuesday, April 18, 2006 12:09 PM
To: Pineda, John P.
Cc: Podoshen, Lawrence; Pinnaro, Sally; Gibboney, Thomas; Scarazzini, Louis J.; Bellanca, Reid J.
Subject: RE: Biological Contamination

Importance: High

see: LI-CF-2006-175,176 dtd 7/6/06 CP01750706

Please do not use this draft. We are not going forward with it for Commercial Property. Instead, we're working on a virus/bacteria exclusion for acclerated filing action, and will likely forgo intro of a general contamintion exclusion until the pollution exclusion is revised. FYI to complete the picture -- our general m/s revision will address errors in production, which has an impact on losses related to adulteration.

From: Gibboney, Thomas
Sent: Tuesday, April 18, 2006 11:59 AM
To: Pineda, John P.
Cc: Podoshen, Lawrence; Pinnaro, Sally; Newman, Loretta F.
Subject: FW: Biological Contamination

Here are the latest draft exclusion and a draft EM. These documents have not been finalized.

<< File: Contam Excl.DOC >> << File: Contam EM.doc >>

Tom

From: Podoshen, Lawrence
Sent: Tuesday, April 18, 2006 11:38 AM
To: Gibboney, Thomas
Cc: Pineda, John P.
Subject: FW: Biological Contamination

Tom, see below. The Multistate status report says you are working on this module - do you have anything we can send over to John in GL?

From: Pineda, John P.
Sent: Tuesday, April 18, 2006 11:27 AM
To: Podoshen, Lawrence
Subject: Biological Contamination

Hi Larry,

I am working on a Biological Contamination Item for our next GL panel meeting. I was wondering if your area has a copy of the Draft mentioned in the attached document. Thank you.

John P. Pineda
(201) 469-2867
<< File: DCF5002p.DOC >>

Bio Contam 4/06

Contamination Exclusion

Introduction

This filing introduces a new exclusion specific to naturally occurring or man-made contamination.

Some examples of contamination of property include:

- Growth of listeria bacteria in milk;
- Bacterial contamination of meat processing equipment;
- Contamination of office equipment and/or products by anthrax or by a virus such as Severe Acute Respiratory Syndrome (SARS) or Avian Influenza.
- Adulteration of a product by intentional introduction of inorganic or inert materials.

Background

Prior to the introduction of the pollution exclusion circa 1986, Property policies had addressed "contamination" within the exclusion of "rust, mold, wet or dry rot".

The pollution exclusion is constructed as an extremely broad exclusion intended to encompass contamination. In recent years, however, there has been a trend to treat various subjects ("hot" topics, emerging exposures or frequently-encountered types of loss) with more focused exclusions. Examples are the mold exclusion in Property and Liability policies and a General Liability exclusion (recently filed) addressing silica dust. The "laser" treatment may enhance an insured's understanding of the policy and avert claims disputes and litigation.

Several current exclusions figure into the analysis of the policy's response to various types of contamination losses:

- Pollution exclusion;
- Dampness or dryness of atmosphere; changes in or extremes of temperature;
- Any quality in property that causes it to damage or destroy itself;
- "Fungus", Wet Rot, Dry Rot And Bacteria, subject to the Additional Coverage - Limited Coverage For "Fungus", Wet Rot, Dry Rot and Bacteria; however, that exclusion and the related Additional Coverage have been revised in a related filing to delete reference to Bacteria because that cause of loss is more specifically addressed in this filing.

Contamination & Spoilage 1122 Pollution

Explanation of Changes

We are adding a new exclusion to specifically address the risk of loss due to contamination.

Impact

This change is a reduction in coverage.

Revised Forms

CP 10 10 04 02 - Causes of Loss - Basic Form

CP 10 20 04 02 - Causes of Loss - Broad Form

CP 10 30 04 02 - Causes of Loss - Special Form

CP 00 70 04 02 - Mortgageholders Errors and Omissions Coverage Form

CP 00 99 04 02 - Standard Property Policy

Related Filings

- "Fungus", Wet Rot, Dry Rot And Bacteria exclusion and Additional Coverage - Limited Coverage For "Fungus", Wet Rot, Dry Rot And Bacteria;
- Product Errors Exclusion
- Food Contamination

Draft of Contamination Exclusion

B.2. We will not pay for loss or damage caused by or resulting from any of the following:

Contamination or threat of contamination, whether naturally-occurring, or induced by conditions intrinsic or extrinsic to property, or engineered, of any Covered Property by any:

a. Ppathogenic or poisonous biological agent, including but not limited to viruses and bacteria, whether naturally-occurring, or induced by conditions intrinsic or extrinsic to property, or engineered.; or

b. Inorganic or inert material introduced with intent to reduce the value or usefulness of the Covered Property.

But if such contamination results in fire, we will pay for the loss or damage caused by that fire.

With respect to any loss or damage to which this exclusion applies, this exclusion supersedes the exclusion relating to "pollutants".

This exclusion does not apply to "fungus" or wet or dry rot[, or to bacteria when involved in an occurrence of loss or damage by "fungus" or wet or dry rot]. A separate exclusion applies to [such occurrences] loss or damage from such conditions.***

***STAFF COMMENT: We are considering revision to the Exclusion and Additional Coverage relating to "fungus, wet rot, dry rot or bacteria", to remove reference to bacteria in light of the breadth and terminology of the contamination exclusion. Concomitantly, the last paragraph of the contamination exclusion would be revised to eliminate the bracketed [—] text and add the text that follows the second set of brackets.

NOTES:

- Added loss due to *threat* of contamination.
- Added a new category to exclude loss of value or usefulness when someone *intentionally* (e.g., Vandalism or domestic terrorism) introduces an *inorganic* ingredient that reduces the value of the Covered Property by adulteration or results in other loss or damage. The Special Causes of Loss form allows pollution caused by vandalism (as a specified cause of loss). Do we want to do the same here?
- Assumed the previous insertion of "or induced by conditions intrinsic or extrinsic to property" is accepted; made that applicable to both organic and inorganic contamination.
- Added "any Covered Property" per minutes of September CPP.
- Deleted reference to bacteria in the exception, assuming the other exclusion and additional coverage will be revised in a related filing.
- No impact on Rules.

Multistate Module

Contamination Exclusion

NOTES:

1. Question that relates to companion change to "Fungus". Is it a "related filing" or part of the multistate?

2. See sample page from CF-2001-O01FR. Should we insert caption of form titles/numbers affected.

3. I believe we need to change "Related Filings" to "Related Forms" if these changes are part of the multistate.

4. "Impact" - Since the existing Pollution exclusion is intended to encompass contamination, I believe we should state, "There is no change in coverage".

5. Revised Forms - Use new edition dates (XX 06 for now). Do we have a proposed Effective Date in mind yet?

6. Exclusion Draft - Tom indicated 2 concepts not addressed by Panel that I believe warrant consideration. One is should we include "threat of contamination", and the other is whether we should "give back" coverage for contamination resulting from vandalism.

Aside from these questions, I only had minor editorial comments on the exclusion draft.

8/2/19

not going forward w/Contamination exclusion

Contamination

- Exclusion of loss caused by continuous or repeated seepage or leakage of water that occurs over a period of 14 days or more
- Exclusion of faulty design, specifications, workmanship, construction, repair or materials

In some claims involving mold, there is an attempt to circumvent these exclusions by characterizing the loss as a covered water damage loss. We are making various revisions, as described in the next section, in an effort to support existing exclusions and to mitigate an exposure that is increasing to an unacceptable level.

Explanation of Changes

Causes of Loss Forms CP 10 10, CP 10 20, CP 10 30 and Coverage Forms CP 00 70 and CP 00 99

The revisions outlined below are described in the context of CP 10 30, the Causes of Loss - Special Form. Equivalent revisions are being made under named perils forms CP 10 10 and CP 10 20 and coverage forms CP 00 70 and CP 00 99.

- The exclusion pertaining to continuous or repeated seepage/leakage is revised to refer to the presence or condensation of humidity, moisture or vapor. This revision is in line with the exclusion's function in excising coverage for water damage that develops over time. It is also consistent with the exclusion of faulty design, construction, etc., to the extent that such problems lead to the accumulation of moisture.
- Today's fungus exclusion also deals with rust, corrosion, decay, deterioration, hidden or latent defect and any quality in property that causes it to damage or destroy itself. This exclusion is revised by removing reference to fungus. Further, the term rust is elaborated by referring to rust and other corrosion; this associates rust with corrosion as opposed to plant rust, which is a form of fungus.
- Fungus (which is newly defined and encompasses mold) and bacteria are addressed in a separate exclusion, which is made subject to anti-concurrent causation lead-in language. The terms wet and dry rot are also used in the exclusion (instead of being part of the definition of fungus) due to their wide recognition. Hereafter in this explanatory memorandum, the term mold will be used as shorthand instead of repeatedly referring to *fungus, wet and dry rot and bacteria*. The exclusion does not apply to the extent that limited coverage for mold is provided in an Additional Coverage, discussed below. The exclusion and limited coverage do not apply when mold results from fire or lightning; that claims scenario has not proved to be problematic.

Contamination Exclusion + Product Errors Exclusion.

Contamination Exclusion

Tom 11/22

Introduction

This filing introduces a new exclusion specific to naturally occurring or man-made contamination.

Some examples of contamination of property include:

- Growth of listeria bacteria in milk;
- Bacterial contamination of meat processing equipment;
- Contamination of office equipment and/or products by anthrax or by a virus such as Severe Acute Respiratory Syndrome (SARS) or Avian Influenza.
- Adulteration of a product by intentional introduction of inorganic or inert materials.

Background

Prior to the introduction of the pollution exclusion circa 1986, Property policies had addressed "contamination" within the exclusion of "rust, mold, wet or dry rot".

The pollution exclusion is constructed as an extremely broad exclusion intended to encompass contamination. In recent years, however, there has been a trend to treat various subjects ("hot" topics, emerging exposures or frequently-encountered types of loss) with more focused exclusions. Examples are the mold exclusion in Property and Liability policies and a General Liability exclusion (recently filed) addressing silica dust. The "laser" treatment may enhance an insured's understanding of the policy and avert claims disputes and litigation.

Several current exclusions figure into the analysis of the policy's response to various types of contamination losses:

- Pollution exclusion;
- Dampness or dryness of atmosphere; changes in or extremes of temperature;
- Any quality in property that causes it to damage or destroy itself;
- "Fungus", Wet Rot, Dry Rot And Bacteria, subject to the Additional Coverage - Limited Coverage For "Fungus", Wet Rot, Dry Rot and Bacteria; however, that exclusion and the related Additional Coverage have been revised in a related filing to delete reference to Bacteria because that cause of loss is more specifically addressed in this filing.

Delete first of the multistate or a separate filing?

Explanation of Changes

We are adding a new exclusion to specifically address the risk of loss due to contamination.

Impact

This change is a reduction in coverage.

Revised Forms

CP 10 10 04 02 - Causes of Loss - Basic Form

CP 10 20 04 02 - Causes of Loss - Broad Form

CP 10 30 04 02 - Causes of Loss - Special Form

CP 00 70 04 02 - Mortgageholders Errors and Omissions Coverage Form

CP 00 99 04 02 - Standard Property Policy

Related Filings

- "Fungus", Wet Rot, Dry Rot And Bacteria exclusion and Additional Coverage - Limited Coverage For "Fungus", Wet Rot, Dry Rot And Bacteria;
- Product Errors Exclusion
- Food Contamination

Draft of Contamination Exclusion

B.2. We will not pay for loss or damage caused by or resulting from ~~any of the following.~~

Contamination or threat of contamination, whether naturally-occurring, or induced by conditions intrinsic or extrinsic to property, or engineered, of any Covered Property by any:

a. Ppathogenic or poisonous biological agent, including but not limited to viruses and bacteria, ~~whether naturally-occurring, or induced by conditions intrinsic or extrinsic to property, or engineered.~~; or

b. Inorganic or inert material introduced with intent to reduce the value or usefulness of the Covered Property.

But if such contamination results in fire, we will pay for the loss or damage caused by that fire.

With respect to any loss or damage to which this exclusion applies, this exclusion supersedes the exclusion relating to "pollutants".

This exclusion does not apply to "fungus" or wet or dry rot~~[, or to bacteria when involved in an occurrence of loss or damage by "fungus" or wet or dry rot]~~. A separate exclusion applies to ~~[such occurrences]~~ loss or damage from such conditions.***

~~***STAFF COMMENT: We are considering revision to the Exclusion and Additional Coverage relating to "fungus, wet rot, dry rot or bacteria", to remove reference to bacteria in light of the breadth and terminology of the contamination exclusion. Concomitantly, the last paragraph of the contamination exclusion would be revised to eliminate the bracketed [ ] text and add the text that follows the second set of brackets.~~

NOTES:

- Added loss due to *threat* of contamination. could be a legitimate concern. no panic discussion
- Added a new category to exclude loss of value or usefulness when someone *intentionally* (e.g., Vandalism or domestic terrorism) introduces an *inorganic* ingredient that reduces the value of the Covered Property by adulteration or results in other loss or damage. The Special Causes of Loss form allows pollution caused by vandalism (as a specified cause of loss). Do we want to do the same here? actually, could look to inorganic + pathogenic
- Assumed the previous insertion of "or induced by conditions intrinsic or extrinsic to property" is accepted; made that applicable to both organic and inorganic contamination.
- Added "any Covered Property" per minutes of September CPP.
- Deleted reference to bacteria in the exception, assuming the other exclusion and additional coverage will be revised in a related filing.
- No impact on Rules.

1. Introduction

1.1 Rationale for the continued vigilance for SARS

Severe acute respiratory syndrome (SARS) was first recognized as a global threat in mid-March 2003. The first known cases of SARS occurred in Guangdong province, China, in November 2002 (*1,2*) and WHO reported that the last human chain of transmission of SARS in that epidemic had been broken on 5 July 2003. The etiological agent, the SARS coronavirus (SARS-CoV) (*3,4,5*) is believed to be an animal virus that crossed the species barrier to humans recently when ecological changes or changes in human behaviour increased opportunities for human exposure to the virus and virus adaptation, enabling human-to-human transmission (*6*). By July 2003, the international spread of SARS-CoV resulted in 8098 SARS cases in 26 countries, with 774 deaths (*7*). The epidemic caused significant social and economic disruption in areas with sustained local transmission of SARS and on the travel industry internationally in addition to the impact on health services directly. While much has been learnt about this syndrome since March 2003, our knowledge about the epidemiology and ecology of SARS-CoV infection and of this disease remains incomplete.

The natural reservoir of SARS-CoV has not been identified but a number of wildlife species – the Himalayan masked palm civet (*Paguma larvata*), the Chinese ferret badger (*Melogale moschata*), and the raccoon dog (*Nyctereutes procyonoides*) – consumed as delicacies in southern China have shown laboratory evidence of infectionn with a related coronavirus (*2,8*). Domestic cats living in the Amoy Gardens apartment block in Hong Kong were also found to be infected with SARS-CoV (*9*). More recently, ferrets (*Mustela furo*) and domestic cats (*Felis domesticus*) were infected with SARS-CoV experimentally and found to efficiently transmit the virus to previously uninfected animals housed with them (*10*). These findings indicate that the reservoir for this pathogen may involve a range of animal species. The masked palm civet is the wildlife species most often associated with animal-to-human transmission; however, whether the civet is the natural reservoir of SARS-like coronaviruses remains unproven. The modes and routes of inter-species transmission from animals to humans or to other animal species need further investigation.

At the time of writing in October 2004, the world is in an inter-epidemic period for SARS. At this time, the most probable sources of infection with SARS-CoV are exposure in laboratories where the virus is used or stored for diagnostic and research purposes, or from animal reservoirs of SARS-CoV-like viruses. It remains very difficult to predict when or whether SARS will re-emerge in epidemic form.

Since July 2003, there have been four occasions when SARS has reappeared. Three of these incidents were attributed to breaches in laboratory biosafety and resulted in one or more cases of SARS (Singapore (*11–13*), Taipei (*14*) and Beijing (*15,16*)). Fortunately only one of these incidents resulted in secondary transmission outside of the laboratory. The most recent incident was a cluster of nine cases, one of whom died, in three generations of transmission affecting family and hospital contacts of a laboratory worker. For this reason, WHO strongly urges countries to conduct an inventory of all laboratories working with cultures of live SARS-CoV or storing clinical specimens actually or potentially contaminated with SARS-CoV. WHO also recommends that each country ensures that the correct biosafety procedures are followed by all laboratories working with the SARS coronavirus and other dangerous pathogens (*17*) and that appropriate monitoring and investigation of illness in laboratory workers is undertaken.

The fourth incident (Guangzhou, Guangdong province, China (*18–20*) resulted in four sporadic, community-acquired cases arising over a six-week period. Three of the cases were attributed to exposure to animal (*20*) or environmental sources while the source of exposure is unknown in the other case. There was no further community transmission.

These events demonstrate that the resurgence of SARS leading to an outbreak remains a distinct possibility and does not allow for complacency. In the inter-epidemic period, all countries must remain vigilant for the recurrence of SARS and maintain their capacity to detect and respond to the re-emergence of SARS should it occur.

1.2 Using *WHO guidelines for the global surveillance of SARS* and linked documents

This document replaces all previous WHO guidance on SARS surveillance and response.

It includes a surveillance strategy for the inter-epidemic period, once chains of human transmission of SARS-CoV have occurred, and for the period after an epidemic when human SARS-CoV transmission has been interrupted.

The WHO guidelines are aimed at the early detection and investigation of individuals with clinically apparent SARS-associated coronavirus infection i.e. **symptomatic cases only**.

These guidelines are based on the most common clinical features of SARS and the most important risk factors for infection with SARS-CoV and SARS-CoV-like viruses. WHO recognizes that SARS-CoV causes a spectrum of clinical illness from the severe form of respiratory disease after which the syndrome was named, to milder or atypical presentations of SARS which may not meet the clinical criteria defined by WHO (see section 2.4). Such cases are likely to be missed unless there is supportive epidemiological and laboratory evidence suggesting a SARS-CoV infection, and a high level of awareness about the spectrum of disease caused by the SARS coronavirus among clinicians, laboratory staff and public health professionals. Early clinical recognition of SARS poses significant challenges. Cases of SARS can easily escape early detection particularly as acute respiratory infections account for the majority of diagnoses in adults presenting to primary care. In many regions, febrile illness is also a common complaint. SARS may be initially missed due to the non-specific nature of presenting symptoms, the possibility of absence of fever on initial measurements, atypical presentations, co-morbidities masking SARS and the recognized difficulties of clinically diagnosing an atypical pneumonia.

However, adopting more sensitive (inclusive) criteria for raising the clinical suspicion of SARS (i.e. using clinical criteria for SARS that do not include radiological evidence of pneumonia) would require that SARS be considered in the differential diagnosis of a potentially large number of acute respiratory infections (ARIs) when the real risk is low. WHO is concerned that such an approach would quickly overwhelm alert, verification and response systems, especially in countries at higher risk of SARS and with a high incidence of ARIs.

The decision to exclude asymptomatic infections from global surveillance is based on epidemiological evidence that SARS-CoV is transmitted by symptomatic individuals and that asymptomatic infection poses no significant public health risk (*21–22*). Accordingly, WHO requests that countries report only symptomatic cases of SARS.

This document refers to four categories of cases – "preliminary positive", "probable", "confirmed" and "unverifiable" cases of SARS to be used in accordance with diagnostic certainty and during relevant epidemiological phases (see section 4.1). Only individuals fulfilling one of these case definitions should be officially reported to WHO.

World Health Organization

Food safety issues
November 2005

The H5N1 avian influenza virus is not transmitted to humans through properly cooked food. The virus is sensitive to heat. Normal temperatures used for cooking (so that food reaches 70oC in all parts) will kill the virus. To date, no evidence indicates that any person has become infected with the H5N1 virus following the consumption of properly cooked poultry or poultry products, even in cases where the food item contained the virus prior to cooking. Poultry and poultry products from areas free of the disease can be prepared and consumed as usual, with no fear of acquiring infection with the H5N1 virus. As a standard precaution, WHO recommends that poultry and poultry products should always be prepared following good hygienic practices, and that poultry meat should be properly cooked. This recommendation protects consumers from some well-known and common foodborne diseases that may be transmitted via inadequately cooked poultry.

Most strains of avian influenza virus are found only in the respiratory and gastrointestinal tracts of infected birds, and not in meat. Available studies indicate that highly pathogenic viruses, including the H5N1 virus, spread to virtually all parts of an infected bird, including meat. For this reason, proper handling of poultry and poultry products during food preparation and proper cooking are extremely important in areas experiencing outbreaks of H5N1 avian influenza in poultry.

Consumers in areas with outbreaks need to be aware of the risks of cross-contamination between raw poultry and other foods that will not be cooked prior to their consumption. Juices from raw poultry or poultry products should never be allowed, during food preparation, to touch or mix with items eaten raw. When handling raw poultry or raw poultry products, persons involved in food preparation should wash their hands thoroughly and clean and disinfect surfaces in contact with the poultry products. Soap and hot water are sufficient for this purpose.

In countries with outbreaks, thorough cooking is imperative. Consumers need to be sure that all parts of the poultry are fully cooked (no "pink" parts) and that eggs, too, are properly cooked (no "runny" yolkes).

The H5N1 virus can survive for at least one month at low temperatures. For this reason, common food preservation measures, such as freezing and refrigeration, will not substantially reduce the concentration of virus in contaminated meat or kill the virus. In countries with outbreaks, poultry stored under refrigeration or frozen should be handled and prepared with the same precautions as fresh products.

In countries with outbreaks, eggs may contain virus both on the outside (shell) and inside (white and yolk). Eggs from areas with outbreaks should not be consumed raw or partially cooked. Raw eggs should not be used in foods that will not be treated by heat high enough to kill the virus (70°C).

To date, a large number of human infections with the H5N1 virus have been linked to the home slaughter and subsequent handling of diseased or dead birds prior to cooking. These practices represent the highest risk of human infection and are the most important to avoid. Proper handling and cooking of poultry and poultry products can further lower the risk of human infections.

For more information

Highly pathogenic H5N1 avian influenza outbreaks in poultry and in humans: Food safety implications [pdf 47kb]
Avian influenza: food safety issues
Five keys to safer food

in·or·gan·ic (ĭn'ôr-găn'ĭk)
adj.

1.
   a. Involving neither organic life nor the products of organic life.
   b. Not composed of organic matter.
2. *Chemistry* Of or relating to compounds not containing hydrocarbon groups.
3. Not arising in normal growth; artificial.
4. Lacking system or structure.

in'or·gan'i·cal·ly *adv.*

in·ert (ĭn-ûrt')
adj.

1. Unable to move or act.
2. Sluggish in action or motion; lethargic. See Synonyms at inactive.
3. *Chemistry* Not readily reactive with other elements; forming few or no chemical compounds.
4. Having no pharmacologic or therapeutic action.

[Latin iners, inert-: in-, *not*; see in-[1] + ars, *skill*; see ar- in Indo-European roots.]

in·ert'ly *adv.*

in·ert'ness *n.*

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New S

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Gibboney, Thomas

From: Newman, Loretta F.
Sent: Thursday, October 20, 2005 3:14 PM
To: Gibboney, Thomas
Cc: Pinnaro, Sally
Subject: Filing Module - Multistate Revision - Biological Contamination and Errors in Production

Sensitivity: Private

Refer to the September 28 CPP agenda and minutes on the captioned topic (CPP -2005-008). After acquainting yourself with the material, let's discuss. There are still changes to be made to the text, as indicated in the minutes; that will be done in the course of your development of the filing module.

Loretta Newman, CPCU
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Bio:
bacteria - related [illegible] -- e.g. "bacteria" to "biological contamination" in [illegible] [illegible]
- delete ref to "bacteria" in an [illegible] to increase limits (?) [illegible] delete "bacteria" from excl. (? (usually)

CPP-2005-008 Biological Contamination And Errors In Production

INTRODUCTION

In this item, ISO staff continues with the development of additional exclusionary language in the Causes of Loss - Special Form to address: (1) biological contamination of property; and (2) property damage caused by production errors.

REFERENCE

- CPP-2004-001, Teleconference of December 9, 2004

BACKGROUND AND UPDATE

Contamination of Property

Prior to the introduction of the pollution exclusion circa 1986, Property policies had addressed "contamination" within the exclusion of "rust, mold, wet or dry rot".

In 1992, the Commercial Property Committee (forerunner to the CPP) discussed the advisability of reinstating a separate contamination exclusion (apart from the pollution exclusion) in Property policies. That discussion (which was prompted by a claim that involved the growth of listeria bacteria in milk) included consideration of the efficacy of the words " discharge, dispersal, seepage, migration, release or escape" (in the pollution exclusion) in precluding coverage for contamination of products and property. It was concluded that, at the time, it was not necessary to modify Property policies.

The pollution exclusion is constructed as an extremely broad exclusion intended to encompass contamination. In recent years, however, there has been a trend to treat various subjects ("hot" topics, emerging exposures or frequently-encountered types of loss) with more focused exclusions. Examples are the mold exclusion in Property and Liability policies and a General Liability exclusion (recently filed) addressing silica dust. The "laser" treatment may enhance an insured's understanding of the policy and avert claims disputes and litigation.

Some examples of contamination of property include:

- The aforementioned growth of listeria bacteria in milk;
- Bacterial contamination of meat processing equipment;
- Contamination of office equipment and/or products by anthrax or by a virus such as SARS.

Several current exclusions figure into the analysis of the policy's response to various types of contamination losses:

(1) Pollution exclusion;
(2) Dampness or dryness of atmosphere; changes in or extremes of temperature;
(3) Any quality in property that causes it to damage or destroy itself.

CPP-2005-008 Biological Contamination And Errors In Production

In the interest of stimulating discussion on whether a "biological contamination" exclusion is needed, and to illustrate the concept, **ISO staff presented a preliminary draft in the Agenda for the December, 2004 teleconference.** In addition, we commented that, in assessing the efficacy of an exclusion of biological contamination, it is necessary to consider the effect, if any, of the current Additional Coverage - Limited Coverage For Fungus, Wet Rot, Dry Rot And Bacteria under Special Causes of Loss Form CP 10 30.

Several panel members commented favorably on the concept of a contamination exclusion. In discussion, a panel member expressed the opinion that the terminology used in the preliminary draft might not be sufficiently broad to encompass contamination by listeria bacteria (an example of contamination mentioned in the Agenda).

Since the December 2004 Panel meeting, ISO staff has made refinements to the draft; refer to the attachment.

Errors in Production

Errors in production can result in contamination. However, excluding errors in production transcends contamination. An error may lead to various outcomes. An error in the production process is a business risk; it is not a "peril" intended to be insured under standard Commercial Property contracts. The current exclusion of faulty workmanship has been generally held to apply to losses involving construction.

Following are several examples of property damage due to errors in production:

- Contamination of food products by foreign matter (e.g., nut clusters contaminated by wood chips);
- Use of a wrong ingredient (e.g., salt instead of sugar);
- Wrong measure of a particular element (e.g., in the production of cement);
- Wrong blending of wines.

The basis for some claims of this type has been alleged contamination of the product or the need to destroy a now-useless product (alleged to be physical loss to stock). The latter basis represents a broad and non-traditional interpretation of the concept of physical damage.

In the interest of stimulating discussion on whether an "errors" exclusion is needed, and to illustrate the concept, **ISO staff presented a preliminary draft in the Agenda for the December, 2004 teleconference.**

Several panel members commented favorably on the concept of an errors exclusion. In discussion, these panel members expressed the opinion that the terminology used in the preliminary draft would benefit from elaboration concerning the stages of production and source of the error. A panel member also advised consideration of including coverage for ensuing explosion; the preliminary draft ran only to ensuing fire.

Meeting of September 28, 2005

Commercial Property Panel
Agenda CPP-2005-008

CPP-2005-008 Biological Contamination And Errors In Production

Since the December 2004 Panel meeting, ISO staff has made refinements to the draft; refer to the attachment.

AUTOMATED SYSTEMS IMPACT

Low (text change)

STATISTICAL PLAN IMPACT

To be determined

ATTACHMENT

- Revised drafts of contamination exclusion and errors exclusion

REQUEST FOR ADVICE FROM PANEL MEMBERS

Panel members are asked to comment on the revised drafts.

Panel:

· limit to "products"? make pollution exclusion everything & including other contamination · Outline of pollution?

Specify "products" - contamination exclusion

· Contamination in general, not necessarily biological

Draft of Contamination Exclusion
(difference between the original draft and new draft is shown in bold)

We will not pay for loss or damage caused by or resulting from any of the following:

Contamination by any pathogenic or poisonous biological agent, including but not limited to viruses and bacteria, whether naturally-occurring, **or induced by conditions intrinsic or extrinsic to property,** or engineered. But if such contamination results in fire, we will pay for the loss or damage caused by that fire.

With respect to any loss or damage to which this exclusion applies, this exclusion supersedes the exclusion relating to "pollutants".

This exclusion does not apply to "fungus" or wet or dry rot[, or to bacteria when involved in an occurrence of loss or damage by "fungus" or wet or dry rot]. A separate exclusion applies to [such occurrences] loss or damage from such conditions.***

***STAFF COMMENT:** We are considering revision to the Exclusion and Additional Coverage relating to "fungus, wet rot, dry rot or bacteria", to remove reference to bacteria in light of the breadth and terminology of the contamination exclusion. Concomitantly, the last paragraph of the contamination exclusion would be revised to eliminate the bracketed [ ] text and add the text that follows the second set of brackets.

Draft of Errors Exclusion

Original Draft
We will not pay for loss or damage to a product caused by or resulting from error in any stage of the production or processing of that product. This exclusion encompasses any effect that compromises the form, substance or quality of the product. But if such error results in fire, we will pay for the loss or damage caused by that fire.

Revised Draft
We will not pay for loss or damage to a product caused by or resulting from error by any person or entity (including those having possession under an arrangement where work or a portion of the work is outsourced) in any stage of the development, production or use of the product, including planning, testing, processing, packaging, installation, maintenance or repair. This exclusion encompasses any effect that compromises the form, substance or quality of the product. But if such error results in fire or explosion, we will pay for the loss or damage caused by that fire or explosion.

CPP-2005-008 Biological Contamination And Errors In Production

PANEL DISCUSSION

The contamination exclusion is intended to encompass contamination of any Covered Property, including premises and products. A panel member commented that this point needs to be made explicit in the text of the exclusion.

STAFF NOTE

ISO staff will take this into consideration in finalizing the text of the exclusion. We do not anticipate seeking further input from the panel.

electromagnetic energy generated or emitted by any source.

b. Solar flares or any naturally occurring, induced, or man-made phenomenon or activity in or outside the atmosphere, that disrupts power supply or communication supply, including those delivered by satellite.

But if any of the events in a. or b. above results in fire, we will pay for the loss or damage caused by that fire.

Food Contamination

We probably should go ahead and split food poisoning from communicable disease in the definition.

B. For the purposes of this endorsement, "food contamination" means:

1. An incidence of food poisoning to one or more of your customers as result of:

   a. Tainted food you purchased; or
   b. Food which has been improperly stored, handled or prepared.

2. Transmission of a communicable disease by or through one or more of your employees or agents.

MLPDC

Under Rule 3. Who May Be Insured, A.1.a we might include other organizations such as LLCs:

a. An individual, partnership, factor, corporation, or other legal entity, or any combination of these.

Under B. Location, what is a "noncommunicating building"? Should it say something else?

In D.3.f., should the rule say "recognizing" instead of "recognizable"?

Biological Contamination/Errors in Production

I fear that the targeted exclusion approach to these topics could backfire by being overly-specific. I think I would prefer to put contamination in Pollution and Errors in faulty workmanship.

Do we want to exclude contamination from anthrax and SARS-type losses (vandalism/terrorism)?

Do we need to address contamination by a substance that is not biological, i.e, it's inert and/or not a health hazard? Suppose, for example, after a product is manufactured, someone accidentally uses an incorrect ingredient. In the example of using salt instead of sugar, after the product is sold, is that resulting loss in value considered Biological Contamination? an Error in Production? The revised draft of the Errors exclusion seems to go beyond errors in production by including errors in use, maintenance, and repair.

Did you consider and reject expanding the existing definition of Pollutants to encompass something like, "...the presence or growth of any unintended, pathogenic or poisonous substance..."? If not in the definition of pollutants, I'd recommend changing the first sentence of the new Contamination exclusion to: "Contamination by the presence or growth of any unintended..."

I agree that it would be appropriate to move bacteria out of the existing fungus and rot exclusion if it is our intent to exclude it under contamination.

For Errors, we could add the wording to section c. Faulty, inadequate or defective:

9/27/2005

(5) development, production or use of a product, including planning, testing, processing, packaging, installation or repair by any person or entity (including those having possession under an arrangement where work or a portion of the work is outsourced);

Civil Authority

I think an insured would have a reasonable expectation of coverage if ordered to cease business by a government authority.

Is it our intention to limit coverage both before and after a direct loss? The current and proposed wording only deal with orders during or after a direct loss, not with a precautionary evacuation.

Narrowing the affected area to one mile from the insured location could tend to discourage an insured to take steps to protect his or her property (e.g., boarding up windows) if a hazard, for example a hurricane, is not predicted to be that close. Is the draft provision saying there would be no coverage if actual damage is more than a mile away? It seems to be in the insurer and the insured's interests to cover additional expenses to evacuate and maintain business under those circumstances.

Besides, many businesses can't reopen if the public and its employees aren't allowed back in.

Perhaps a 10 mile limit would be a good compromise. Otherwise, I think we should assume there's a good reason for the order and honor it.

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9/27/2005

New or Changed	Emerging Issue Description	Status
	number of days of intense rainfall per year has been increasing steadily. Some scientists predict that the world's weather will become more violent and a major business risk. Insurers have been hit by a run of climate-related disasters such as the four hurricanes that devastated homes and businesses in Florida and last year. Concern about the Greenhouse Effect has already helped drive new markets for weather derivatives. Plaintiffs could attempt to file cases before the United Nation's International Court of Justice or before the World Trade Organization to recover damages from carbon dioxide emissions, including the liability of power companies to keep up with a changing environment and D&O suits against directors who did not order their companies to reduce emissions	Participant; Co a polluter?
	Contamination – The anthrax attacks and SARS epidemics bring up issues of contamination and clean-up. Contamination of property is also related to errors in production and processes.	ISO staff developed preliminary drafts of a biological contamination exclusion and an errors-in-production exclusion. Following discussion with the Commercial Property panel on December 9, 2004, we are in the process of refining those drafts and will seek further input during 2005.
	EMP Bombs – In addition to NBC, European insurers are attempting to exclude terrorism attacks using electromagnetic-pulse devices from their contracts with European airlines. High powered electromagnetic pulse bombs produce a very short but intense electromagnetic shock wave, which can be sufficiently strong to transmit thousands of Volts to exposed electrical conductors, such as wires or printed circuit boards. The damage inflicted is	An item was brought to the Commercial Property Panel on December 9, 2004. ISO staff is conducting further research on updating current exclusionary provisions to more explicitly address this exposure. drop to 9/05 CPP

The Total Recall Brand Protection Policy

cc: Food contamination

October, 1999

Underwriters at Lloyd's of London

1. INTRODUCTION. Manufacturers of consumable products (food, drugs, etc.) face the risk of having their products contaminated. Such contamination may happen accidentally or it may be the result of an intentional act, meant to disrupt the company's operation or to discredit it for some reason.

One of the most famous product contamination cases in the United States happened during the 1980's when several people died because they took Tylenol capsules that were contaminated with cyanide. As a result, the makers of Tylenol faced huge expenses in recalling their products and reforming their manufacturing process. Shortly thereafter, drug manufacturers stopped marketing drugs in capsules that could be opened.

When such an incident occurs, a manufacturer faces expenses just like Tylenol did. Certain underwriters offer a policy to cover these expenses that arise out of malicious contamination, accidental contamination, and products extortion.

2. CONTACT:
Control Risks Group
83 Victoria St.
London, England SW1 0HW
44 (171) 222 1552

3. UNDERWRITING GUIDELINES. Not made available.

4. AVAILABILITY OF COVERAGE. Worldwide.

5. LIMITS AVAILABLE/DEDUCTIBLES. Limits are available to the extent needed by the individual insured.

6. INSURING AGREEMENT. Subject to the insured's payment of the premium and the deductible, the insurer agrees to *reimburse* the insured for any covered expenses incurred as a result of an "insured event" that is discovered during the policy period. The agreement goes on to list the three "insured events" covered by the policy:

A. *Malicious contamination.* This portion of the policy covers pre-recall expenses, recall expenses, product replacement, product rehabilitation, and loss of profits that the insured incurs due to the intentional contamination of the products that are named in the declarations.

B. *Accidental contamination.* This part provides coverage for recall expenses, product replacement, product rehabilitation, and loss of profits that the insured incurs due to accidental contamination of their products.

C. *Products extortion.* This coverage provides reimbursement for monies that the insured pays "under duress" to meet an extortion demand.

7. DEFINITIONS. The following terms are defined for use in the policy:

A. *Malicious contamination.* This is the altering or adultering of the named products, that gives the *

insured a "reasonable cause to believe" that its products have been made "unfit or dangerous" to use. The altering of the product may be actual or threatened. The act must be "intentional, malicious, and illegal."

B. *Products extortion.* This is when the insured pays money to someone who has threatened to alter the named products, unless certain demands are met. The money must be paid away from the insured's premises and the payment must be made "under duress."

C. *Accidental contamination.* This type of contamination occurs during the manufacturing process. It may involve blending, mixing, packaging, or labeling errors. These errors, in turn, bring about a recall because the insured believes that use of its products would lead to "bodily injury, sickness, disease, or death" of anyone using the products.

D. *Control Risks Group.* A company that specializes in international security and crisis management. It has been hired by the underwriters to provide assistance to the insured in case of an insured event.

E. *Pre-recall expenses.* The policy specifies two types of these expenses: the fees charged by Control Risks Group and the chemical analysis performed to determine if the insured's products have been contaminated. Such tests also "ascertain the potential effect" of malicious contamination or products extortion. The policy specifies that the deductible and coinsurance do not apply to Control Risks' fees.

F. *Insured event.* This is what the policies insures against—malicious contamination, products extortion, or accidental contamination. The definition emphasizes that a series of malicious contaminations or products extortions constitute a single insured event, if they were "carried out in the furtherance, one of another."

G. *Named products.* These are specified on the declarations page as the products being protected against the perils of the policy.

H. *Contaminated products.* The "named products" that are the subject of an "insured event"—the specified products that have been contaminated or that are the subject of extortion.

I. *Recall expenses.* These are the expenses the insured incurs because of the recall of contaminated products. Such covered expenses include:

1. Amounts spent for communications, public relations, advertising, etc.

2. Amounts spent for direct return of the products from customers. These amounts include emergency phone lines, postage, and rebates.

3. The expense to rent additional warehouse space.

4. Additional personnel, other than regular employees.

5. Extra money paid to employees as a result of the insured event.

6. Any expenses the employees in #5 incur as a result of the insured event. This does not include transportation of the employee to and from his/her normal place of work.

7. The costs to examine and "rework or destroy" the contaminated products.

Also covered as recall expenses are those incurred by a customer of the named insured. If a customer uses the insured's products in other products and must recall those products, that customer's expenses are

covered by this policy.

J. *Product replacement costs.* Once the named products are destroyed, the policy covers the expenses to deliver new products to the customer, in order to minimize any loss of profits to the named insured.

K. *Product rehabilitation.* These are expenses incurred by the insured in order to "re-establish the reputation and market share" of contaminated products. The policy provides up to 25% of the limit of liability for this coverage. This amount is included in the limit of liability.

L. *Loss of profits.* Covered for up to 3 months after the insured event is discovered.

M. *Territory, underwriters representative, investigating accountants, policy period, and coinsurance.* These are all specified on the declarations.

8. WHO IS INSURED. The named insured.

9. WHAT IS INSURED. The named insured's products are covered against certain insured events.

10. PERILS. The policy covers the named insured against loss caused by malicious contamination, accidental contamination, or products extortion.

11. EXCLUSIONS. The following exclusions apply:

A. Any expenses incurred from any cause other than an insured event.

B. Any illegal "alteration" of a competitor's products.

C. Fraudulent or criminal acts of an officer or director.

D. Any insured event not reported to the insurer during the policy period or within 30 days after the expiration of the policy.

E. Any third party liability.

F. Government bans.

G. Any "loss of public confidence" in the named insured's products.

H. Millennium exclusions.

I. War and nuclear.

12. CONDITIONS. The following conditions apply:

A. *Computation of Loss.* The amount of loss due to product contamination will be determined by examining the books, accounts, etc. of the named insured. The examination is conducted by the investigating accountants, named on the declarations page. The investigating accountants determine the amount due for "loss of profit" by examining the previous 12 months and making a "reasonable projection" of what profits would be in the absence an "insured event."

B. *Products Extortion.* Before the insurer pays a ransom due to products extortion, the insured must make all possible efforts to determine if the threat to the named products was actual.

C. *Pre-Recall Expenses.* While the policy does not provide automatic coverage for such expenses, the underwriters may agree to cover them if they "believe a recall is likely to take place."

D. *Notice of Circumstances.* The insured must give notice of any loss to the control risks group.

E. *Due Diligence.* The insured must do everything necessary to avoid or diminish covered losses, including using his/her "best endeavors" to keep knowledge of the insurance restricted.

F. *New Products.* The insured must tell the underwriters about any new products at least 30 days prior to their introduction. New products may result in a higher premium being charge or special terms and conditions being applied.

G. *Liquidation.* If the insured goes into liquidation, the policy ceases to afford coverage. Note: this is a substantial difference from most insurance policies where the bankruptcy of the insured has no effect upon the obligations of the insurer.

H. *Mergers and Acquisitions.* The insured must notify the underwriters of any mergers or acquisitions regarding the control of the company or its assets. A change in control of the assets may result in an additional premium.

I. *Continued Recall after Expiry.* If the policy expires while an insured event is in progress, the policy will continue for up to 12 months until the event is completed.

J. *Interim Payments.* The insured may request payments during the course of an insured event at a frequency of not more than each 60 days.

K. *Inspection and Audit.*

L. *Other Insurance.* This policy does not apply at all if the insured has other similar coverage for the insured event.

M. *Salvage and Recoveries.*

N. *Subrogation.*

O. *Arbitration.* Disputes between the insured and the insurer are referred to a "Court of Arbitration." Here, each party hires an arbitrator and the arbitrators hire an umpire. The decision of any two is binding.

P. *Changes.*

Q. *Assignment.* Is not allowed.

R. *Cancellation.* Cancellation for nonpayment of premium requires a 30-day notice.

S. *Governing Clause.* The policy specifies that it is governed by the laws of the country listed as the named insured's address.