No. 22-35047

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE OREGON CLINIC, PC,
Plaintiff-Appellant,

v.

FIREMAN'S FUND INSURANCE COMPANY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON, PORTLAND DIVISION,
NO. 3:21-CV-00778-SB
HON. STACIE F. BECKERMAN, DISTRICT JUDGE

UNOPPOSED MOTION OF *AMICUS CURIAE* UNITED POLICYHOLDERS TO SUBMIT BRIEF IN SUPPORT OF APPELLANT

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

Pursuant to Circuit Rule 29-3, UP has sought and received consent from the parties, by and through their counsel, before filing this Unopposed Motion.

INTEREST OF *AMICUS CURIAE*

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

Since the pandemic began in 2020, UP has played an important role in assisting business owners, whose operations have been significantly impacted by SARS-CoV-2 and COVID-19 with their claims for insurance coverage. In furtherance of its mission, UP cautiously chooses cases and regularly appears as *amicus curiae* in courts nationwide. UP *amicus* briefs help provide an intellectual counterweight to the claims of the insurance industry and facilitate the evenhanded development of the law. While insurers are repeat players in coverage litigation, most policyholders are not. *Travelers Ins. Co. v. Budget Rent-A-Car Sys., Inc.*, 901 F.2d 765, 771 (9th Cir. 1990) (describing insurance companies as "institutional litigants"). Since its founding in 1991, UP has filed *amicus curiae* briefs in numerous federal and state appellate courts across the country. *Amicus* briefs filed by UP have been expressly cited in the opinions of multiple state supreme courts as well as the U.S. Supreme Court. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Sproull v. State Farm Fire & Cas. Co.*, 2021 IL 126446, ¶ 17; *Julian v. Hartford Underwriters Ins. Co.*, 35 Cal. 4th 747, 760 (2005), *as modified* (May 5, 2005); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. v. Wolfe*, 105 A.3d 1181, 1185-86 (Pa. 2014).

The application and interpretation of insurance contracts requires special judicial handling. Insurance contracts are adhesive in nature, which compels judicial balancing and places the burden squarely on the insurer—as the drafters of the

contract—to show that their interpretation of the contract terms is the only reasonable interpretation. *See Miller v. Republic Nat'l Life Ins. Co.*, 714 F.2d 958, 961 (9th Cir. 1983) ("[I]nsurance policies are 'contracts of adhesion,' *i.e.*, standardized contracts prepared entirely by one party to the transaction for acceptance by the other."). In other words, the policyholder's conflicting interpretation of the policy terms need not be the only interpretation of those terms, or even the best interpretation. Unless the insurer can show that the policyholder's interpretation is implausible (*i.e.*, unreasonable), courts must find in favor of the policyholder.

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

LEGAL STANDARD FOR APPOINTING *AMICUS CURIAE*

"The district court has broad discretion to appoint *amic*[*us*] *curiae*." *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982). The purpose of an *amicus curiae* is "to call the court's attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration." 4 Am. Jur. 2d *Amicus Curiae* § 6. An *amicus curiae* "assist[s] in a case of general public interest, supplement[s] the efforts of counsel, and draw[s] the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Lab. & Indus. State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982) (citations omitted). As commentators have explained, an *amicus curiae* is often in a superior position to focus the court's attention on the broad implications of various possible rulings. Stephen M. Shapiro et al., *Supreme Court Practice* 753 (10th ed. 2013).

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

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

Dated: April 27, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 27, 2022, a copy of the foregoing Unopposed Motion was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Court's appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

Dated: April 27, 2022

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CORPORATE DISCLOSURE STATEMENT

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

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INTEREST OF *AMICUS CURIAE*[1]

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

Unlike insurers, individual policyholders are not repeat players on insurance-coverage issues. UP works to provide an intellectual counterweight to the legal arguments made by the insurance industry, in order to help facilitate the evenhanded development of insurance law. During the COVID-19 pandemic, UP's commitment to advocating for policyholders' rights to coverage for their devastating losses is more vital than ever. UP seeks to assist the Court on an issue of immense public importance—coverage for losses caused by SARS-CoV-2 and COVID-19—by identifying arguments and authorities that have escaped the Courts' attention to date. *See* Fed. R. App. P. 29(a)(4)(D).

Pursuant to Fed. R. App. P. 29(a)(2), UP files this brief with the consent of all parties in support of The Oregon Clinic, PC (referred to hereinafter as "Oregon Clinic").

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), UP affirms that no counsel for a party authored this brief in whole or in part and that no person other than UP or its counsel made any monetary contributions intended to fund the preparation or submission of this brief. The undersigned is representing UP in this matter on a pro bono basis.

PRELIMINARY STATEMENT

This appeal presents issues of critical importance that will affect the rights of numerous business owners to recover under their property and business interruption insurance policies for the massive losses resulting from the current COVID-19 pandemic.

The question: Can an ordinary person reasonably read the undefined words "risks of direct physical loss ***or*** damage" to property—used in the insuring clause of Defendant-Appellee Fireman's Fund Insurance Company's ("FFIC") policy and nearly every other "all risks" insurance policy sold nationwide—as covering either (1) molecular alterations to the surface and air of the insured property, or (2) impairments to the insured property's physical function caused by the on-site presence of viral particles?

The District Court erred when it answered this question "no" *at the pleadings stage*, entirely disregarding the scientific allegations relating to the novel and dangerous SARS-CoV-2 virus and COVID-19 communicable disease detailed in the Oregon Clinic's Complaint. Rather than assuming the truth of the factual allegations in a complaint—and leaving their proof (or disproof) to expert scientists—the court invented scientific findings and relied on pseudo-scientific findings from other district judges evaluating other complaints that favored its preferred legal conclusion. In so doing, the District Court joined a troubling trend that threatens to

upend decades of decisional law on the scope of "all risks" insurance.

Going forward, insurance coverage for numerous perils—fumes, odors, smoke and ash, toxic dust, and other damaging or deadly microscopic hazards—will be called into question if the District Court's decision is affirmed. This will not only hurt policyholders who are unlucky enough to suffer atypical types of losses outside of the COVID-19 pandemic, it also will undermine the societal benefits of risk-spreading that are the bedrock of a well-functioning insurance marketplace.

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

SARS-CoV-2 and COVID-19 are precisely the kind of novel, unanticipated, unknown risks that "all risks" insurance is designed to cover. When viral particles from infected persons are deposited on and adhere to the surfaces of a policyholder's property, where they remain viable for weeks or days, they physically transform objects once safe into a vector for transmission of a disease that has killed hundreds

of thousands of Americans. When those particles become suspended in the air of that property, they physically alter its composition, damaging it, as surely as adding dangerous chemicals to water. Particles suspended in the air can persist for extended periods of time until remediated by ventilation or air currents.

The District Court's conclusion that SARS-CoV-2 and COVID-19 cannot cause a "direct physical loss" or "direct physical damage" of property, but rather cause mere "economic" losses, flies in the face of Oregon case law. 1-ER-17, 19. In particular, the District Court failed to distinguish "loss" from "damage." Courts are clear that these terms must mean different things. In so doing, the District Court followed other District Court decisions that incorrectly applied the Oregon Supreme Court's decision in *Wyoming Sawmills*. The *Wyoming Sawmills* case is completely inapposite here, as it focuses on a different line of coverage (general liability, not property) and deals only with the scope of the term "property damage" in such third-party liability coverage. "Property damage" is akin to "physical damage" but not the same as "physical loss." In other words, *Wyoming Sawmills* does not address a policy that, as here, insures for both physical damage ***and*** physical loss.

The District Court also erred in finding that COVID-19 cannot cause "direct physical loss or damage" because "[Oregon Clinic's] allegations do not suggest that any covered property was 'physically damaged' by a virus that persisted in it, or that the costs of removing the virus would have directly rectified the problem." 1-ER-20.

But this is simply not true. Based on the scientific evidence pleaded by Oregon Clinic and facts concerning the spread of COVID-19, which must be accepted as true at this phase, the SARS-CoV-2 virus was, in fact, persistent in its locations at all relevant times and could be remediated. *See, e.g.*, 1-ER-285 (Complaint citing journal article explaining that SARS-CoV-2 aerosols "can remain suspended 'for indefinite periods unless removed by air currents or dilution ventilation'"); 1-ER-297-98 (alleging persistent presence of SARS-CoV-2 at locations). In this way, COVID-19 is no different than a variety of other hazards that have triggered property policies in Oregon, including methamphetamine odors, mold and mildew, wildfire smoke, and lead contamination, each of which rendered such property unusable for its intended purpose.

Setting aside "physical damage" for a moment, the Oregon Court of Appeals has twice directly addressed the form of "physical loss" at issue here and found that the policy responded to the relevant hazard. In the first instance, the insurer did not even contest that the presence of methamphetamine particles caused "accidental direct physical loss" to property, triggering a property policy. *Largent v. State Farm Fire & Cas. Co.*, 116 Or. App. 595 (1992). In the second instance, the Court of Appeals held that "the odor produced by [a] methamphetamine lab" which "had infiltrated the house" triggered a property policy requiring a showing of "direct physical loss" because the odors were "physical," "damaged the house," and

required costs to remove them. *Farmers Ins. Co. of Oregon v. Trutanich*, 123 Or. App. 6, 10-11 (1993) (rejecting insurer argument that odors were not "physical" and did not cause "direct physical loss").

The District Court's disregard of on-point Oregon appellate authority by simply ignoring the Oregon Clinic's allegations that SARS-CoV-2 "persisted" and required "costs" to "rectif[y]" is remarkable and should not be affirmed. *See* 1-ER-20. The District Court also ignored several of its own pre-COVID decisions, which held that the presence of a substance that rendered property unusable for its intended purpose caused a "direct physical loss" of the property. *See Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *9 (D. Or. June 18, 2002) (mold); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co. of Conn.*, No. CIV. 05-1315-JE, 2007 WL 464715, at *8 (D. Or. Feb. 7, 2007) (lead); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-CV-01932-CL, 2016 WL 3267247, at *6 (D. Or. June 7, 2016), *vacated by stipulation upon settlement*, 2017 WL 1034203 (D. Or. Mar. 6, 2017) (wildfire smoke).

Even if the District Court were free to disregard Oregon appellate authority and its own pre-COVID precedent (which it is not), the most the District Court could have found was that the policy at issue is ambiguous. But that, too, establishes coverage. Under settled Oregon law, ambiguous insurance policy provisions are interpreted "against the drafter" (*contra proferentem)*. The District Court's

wholesale adoption of FFIC's interpretation—which is merely one of multiple reasonable interpretations of the *undefined* policy language chosen by FFIC—discounted the protections afforded to Oregon policyholders against insurance companies that build ambiguities into their policies. When FFIC sold its policy, it was well aware that courts for decades interpreted the subject policy language to cover functional impairment in the absence of structural alteration. If FFIC did not intend that interpretation, it needed to expressly say so. But FFIC did not so state.

Finally, reversal does not threaten the stability of FFIC or other insurers. The insurance industry historically has *profited* from large-scale "loss" events, such as Superstorm Sandy and Hurricane Katrina. This pattern holds true here as well; indeed, insurers are already profiting from the pandemic. For years, insurance companies have enjoyed the benefit of the premiums paid by their policyholders. And, now, the insurers are using the pandemic to extract steep premium *increases*—even while refusing to pay their policyholders' pandemic-related claims. Simply put, insurance companies are crying "wolf" when they claim they could go bankrupt if there is coverage for COVID-related losses. This Court should not be cowed by such inaccurate and self-serving claims, which certainly have no place in determining the benefits owed under the insurance contract that FFIC sold to Oregon Clinic.

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

ARGUMENT

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

Businesses pay premiums for policies that cover business interruption so that the businesses are protected in the event their properties cannot operate and generate revenue as intended. When property is impaired—whether from a fire or flood, or from noxious odors or the presence of a deadly virus—the loss or damage is the same. Here, the Oregon Clinic's Complaint squarely alleged that a deadly virus was present at its properties, damaged the properties, impaired the functionality of the properties, and rendered the properties incapable of generating revenues.[2] This is enough, alone, to state a claim under federal pleading standards. *See* Fed. R. Civ. P. 8(a)(1) (requiring only a "a short and plain statement of the claim showing that the pleader is entitled to relief"); Fed. R. Civ. P. 8(e) (requiring that "[p]leadings must be construed so as to do justice"); *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009) (complaint "must state a claim that is plausible on its face").

Allowing this case to proceed makes perfect sense, especially given Oregon's

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[2] For example, Oregon Clinic alleged that it had employees and patients who were infected with COVID-19 and/or that SARS-CoV-2 was present on its properties in early March 2020, and thereafter. *See, e.g.*, 1-ER-296-8 ¶¶ 78-84. Oregon Clinic also alleged that SARS-CoV-2 physically exists in and alters air. *See, e.g.*, 1-ER-282 ¶ 37; 1-ER-284-87 ¶¶ 47, 49-53, 1-ER-292 ¶ 61, 1-ER-294 ¶ 70. And that SARS-CoV-2 transforms surfaces making them unsafe for ordinary use. *See, e.g.*, 1-ER-288-92 ¶¶ 54-61, 1-ER-294 ¶ 70.

case law at the state and federal level concerning coverage under similarly worded property policies *prior to* the COVID-19 pandemic. Importantly, the property insurance policy at issue here, like most, expressly covers both "loss" and "damage" to property. Oregon courts have long recognized that insurance policies must be construed "so that no part of [the policy] is ignored and effect can be given to every word and phrase." *New Zealand Ins. Co. v. Griffith Rubber Mills*, 270 Or. 71, 75 (1974). Accordingly, there must be a set of insured "losses" to real property that are distinct from "damage" to the property, otherwise the word "loss" would be given no effect.

The District Court, relying upon other judges within the District, incorrectly concluded that "loss" can *only* mean losing "possession of [] property." *See* 1-ER-18 (quoting *Dakota Ventures, LLC v. Oregon Mut. Ins. Co.*, 553 F. Supp. 3d 848, 857 (D. Or. 2021)). This overly narrow interpretation of the undefined word "loss" is not only at odds with the English language, but it also is plainly inconsistent with Oregon law, which requires the grant of coverage in an insurance policy to be broadly construed in favor of finding coverage. See *Allstate Ins. Co. v. Braukman*, 278 F. App'x 733, 734 (9th Cir. 2008) (recognizing that "[u]nder Oregon law, insurance policies must be liberally construed in favor of the insureds" and, "[t]hus, the instant policy's grant of coverage . . . must be interpreted broadly"). The District Court ignored Oregon Clinic's allegations that it lost the use and functionality of its

properties, concluding that such allegations of "loss" were insufficient because they did not amount to a *total* or *permanent* dispossession of the properties. The District Court, however, was not at liberty to read this limitation into the policy. *See* ORS 42.230 (when construing a contract, the court "is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted").

If FFIC had wanted to only insure against "the total dispossession of property due to physical damage" in its "all risks" insurance policy, it could have (and should have) made that clear and used those narrow words. *See Baker v. Unigard Ins. Co.*, 269 Or. 204, 212 (1974) (noting that if a policy does not reflect the insurer's intentions, then "it is [the insurer's] responsibility to rephrase the policy"); *Kunin v. Benefit Tr. Life Ins. Co.*, 910 F.2d 534, 540 (9th Cir. 1990) (recognizing that because insurance policies are "drafted by specialists employed by the insurer[,] . . . the insurer should be expected to set forth any limitations on its liability clearly enough for a common layperson to understand; if it fails to do this, it should not be allowed to take advantage of the very ambiguities that it could have prevented with greater diligence"). FFIC, however, instead agreed to broadly insure against "direct physical loss" to property. Oregon law requires that courts must construe "direct physical loss" as written and in the light most favorable to coverage. *Schweigert v. Beneficial Standard Life Ins. Co.*, 204 Or. 294, 301 (1955) ("The language used in a contract

of insurance is entitled to a construction as favorable to the insured as in good conscience will be permitted, and every reasonable intendment will be allowed to support a view that will protect the insured"). The District Court failed to do so here.

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

The phrase "direct physical loss or damage" forms the core organizing principle of "all risks" insurance policies. "*Direct*" means "stemming immediately from a source."[3] UP does not dispute the District Court's conclusion that "direct" means that a non-excluded risk has proximately caused the loss or damage. *See* 1-ER-12 (defining "direct" as "without any intervening space or time"). UP also does not dispute the District Court's conclusion that "physical" requires the loss or damage to be "of or relating to natural or material things." *Id.*[4] These terms indicate that the policy covers risks to material objects (*e.g.*, a building) from material risks (*e.g.*, a fire, or here, SARS-CoV-2 and COVID-19). The use of "physical" makes clear the policy does not cover abstract types of damage or loss.

Critically, the policy uses the word "***or***" between the words "loss" and "damage." The word "loss" and the word "damage" thus must each be given

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

[4] *Physical*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/physical (last visited Nov. 11, 2021).

different, independent meanings. *Griffith Rubber Mills*, 270 Or. at 75.

Physical "loss" focuses on the inability of property to fulfill its intended function due to physical impairment, whereas physical "damage" focuses on injury that impairs value or usefulness relating to material things.

"*Loss*" means "the partial or complete deterioration or *absence of physical capability or function*."[5] In other words, "loss" means "being deprived of, or the failure to keep" some object. In common speech, loss means no longer having effective possession of something. An incumbent's loss of her office does not imply, in common speech, damage to that office; instead, it means that she no longer possesses the office. Moreover, one may "lose" something without suffering a complete dispossession, particularly when it relates to physical spaces, as in, "I was going to watch the game, but I lost the living room to my in-laws."

"*Damage*" means "loss or harm resulting from injury to person, property, or reputation."[6] It also is defined as: "Injury, harm; esp. *physical injury* to a thing, such as *impairs its value or usefulness*."[7] By its plain terms, then, the insuring clause in FFIC's policy covers both loss of property and damage to it. And the ordinary person

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

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

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

would understand that a first-party policy covers, for example, both damage to her property ("physical damage") and its partial or complete "physical loss." *See, e.g.*, *Pope v. Benefit Tr. Life Ins. Co.*, 261 Or. 397, 400 (1972) (terms in insurance policy "must be given the meaning which the ordinary purchaser of a policy of insurance places upon that term when he buys a policy").

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

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

Where property is rendered unfit for its intended use because of physical risk—as by smoke from forest fires, odors from methamphetamine labs, or lead build up—policyholders are entitled to coverage even if property has not been structurally altered.[8] This fact has been true for decades.

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[8] *See, e.g.*, *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12–cv–04418 WHW, 2014 WL 6675934, at *5-6 (D.N.J. Nov. 25, 2014) (concluding that "property can sustain physical loss or damage without experiencing structural alteration," that "the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated," and, therefore, that the ammonia discharge caused direct physical loss or damage).

In 1993, the Oregon Court of Appeals considered in *Trutanich* whether methamphetamine odors caused "direct physical loss" under a homeowner's property insurance policy. The Court agreed that such odors caused a "direct physical loss" and rejected the insurer's argument that odors were not "physical" and that the cost of removing the odors was not a "direct physical loss." 123 Or. App. at 9-10. In so ruling, the Court specifically reviewed the *Wyoming Sawmills* case that the District Court relied on here and concluded that it was inapplicable because "[t]here is evidence that the house was physically damaged by the odor that persisted in it." *Id.* at 10.[9]

One year prior to *Trutanich*, the Oregon Court of Appeals in *Largent* did not even have to consider whether the residue of a methamphetamine laboratory caused "accidental physical loss" to property because the insurer ***conceded it***. 116 Or. App. at 597-99. These cases stand for the proposition that loss of the use of property due to the presence of a noxious substance rendering the property unusable causes a "physical loss."

Since *Trutanich* and *Largent*, the District Court has repeatedly endorsed this

[9] *Wyoming Sawmills* is also wholly inapplicable here because it involves a different line of coverage (general liability, not property), and it considered the meaning of "property damage" without an accompanying "loss" component. *See Wyoming Sawmills, Inc. v. Transp. Ins. Co.*, 282 Or. 401, 404 (1978). The Court is free to rely on *Wyoming Sawmills* to inform on the meaning of "direct physical damage," but it is wholly irrelevant to interpreting "direct physical loss."

principle in the last 20 years. *See Lillard-Roberts*, 2002 WL 31495830, at *8-9 (concluding that mold damage to house could constitute "distinct and demonstrable" damage and that inability to inhabit a building may constitute "direct, physical loss"); *Stack Metallurgical*, 2007 WL 464715, at *8 (finding "physical loss or damage" to a policyholder's heat treater for medical implants when a lead hammer was mistakenly left in the treater; noting that "[t]here is no question that the physical transformation of the furnace which rendered it useless for processing medical devices, the use for which it was specially certified, reduced both the value of the furnace and [the policyholder's] ability to derive business income from the furnace. This reduction of value was caused by an incident that is fairly characterized as 'direct physical damage'"); *Shakespeare Festival*, 2016 WL 3267247, at *5-6 (finding a "direct physical loss or damage to property" where wildfire smoke infiltrated a theater and required not just cleaning, but days of waiting while the smoke naturally dissipated, during which time the insured had to suspend its business because it could not safely use the theater; rejecting the insurer's argument that smoke dissipation time was not covered because it was not a "structural repair" to the property).

Nationally, during the 1950s,[10] the 1960s,[11] the 1970s,[12] the 1980s,[13] and the 1990s[14]—courts consistently have found such losses covered as "physical loss or

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

[11] *Hughes v. Potomac Ins. Co. of D.C.*, 199 Cal. App. 2d 239 (Ct. App. 1962) (finding that the policyholder's home—which became perched on the edge of a cliff after a landslide deprived it of lateral support and stability—was damaged because it became unsafe to live in and was thus, useless); *W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 37 (1968) (finding a "direct physical loss" where a church complied with the fire department's order to close because gasoline vapors made "use of the building dangerous").

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

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

[14] In chronological order: *Hetrick v. Valley Mut. Ins. Co.*, No. 2245 Civil 1988, 1992 WL 524309, at *3 (Pa. Comm. Pl. May 28, 1992) (finding there would be coverage for loss of use of a house if an outside oil spill made the house uninhabitable); *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So. 2d 600, 602 (Fla. Dist. Ct. App. 1995) (finding damage to sewage treatment plant from chemicals that destroyed a bacteria colony necessary for the plant to operate amounted to "direct damage to the structure"); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, No. 9400837, 1996 WL 1250616, at *2 (Mass. Super. Mar. 15, 1996) (finding oil fumes present in house after discovery of oil leak constituted physical damage); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (finding the presence of asbestos could constitute physical loss or damage); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) (finding a home rendered unlivable by falling rocks had suffered a "direct physical loss to [the] property"); *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 93 Cal. Rptr. 2d 364,

damage."

These rulings continued into the 2000s,[15] when insurance companies *covered* claims for losses caused by a novel coronavirus, SARS-CoV-1.[16] Even after that outbreak, insurance companies continued to use "physical loss or damage" in the coverage grant of their policies, and courts continued to find coverage for business

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376 (Ct. App. 2000) (holding that the intermingling of a quarter pound of wood shavings in 80,000 pounds of almonds caused physical loss or damage to the almonds even though the almonds were structurally unchanged), *as modified* (Mar. 29, 2000); *Matzner v. Seaco Ins. Co.*, No. CIV. A. 96-0498-B, 1998 WL 566658, at *3-4 (Mass. Super. Aug. 12, 1998) (concluding that "direct physical loss or damage" was ambiguous and could mean either "only tangible damage to the structure of insured property" or "more than tangible damage to the structure of insured property," and that "carbon monoxide contamination constitutes 'direct physical loss of or damage to' property"); *Bd. of Educ. Of Twp. High Sch. Dist. No. 211 v. Int'l Ins. Co.*, 720 N.E.2d 622, 625-26 (Ill. App. Ct. 1999) (citing liability insurance coverage cases finding that incorporation of asbestos into buildings caused "property damage," defined under liability policies to be "physical injury to or destruction of tangible property"), *as modified* (Dec. 3, 1999).

[15] In chronological order: *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 825-26 (Minn. 2000) (holding that "[a] principal function of any living space [is] to provide a safe environment for the occupants" and "[i]f rental property is contaminated by asbestos fibers and presents a health hazard to the tenants, its function is seriously impaired"); *Cooper v. Travelers Indem. Co. of Ill.*, No. 01-cv-2400-VRW, 2002 WL 32775680, at *1 (N.D. Cal. Nov. 4, 2002) (holding that the presence of coliform bacteria and E. coli could constitute physical loss or damage); *Graff v. Allstate Ins. Co.*, 54 P.3d 1266, 1269 (Wash. Ct. App. 2002) (holding that the presence of methamphetamine vapors could constitute physical loss or damage).

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

interruption losses in the absence of structural alteration.[17] The substantial precedent on this issue was followed by courts nationwide for the next decade, leading up to the COVID-19 pandemic.[18]

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[17] In chronological order: *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 824-27 (3d Cir. 2005) (holding that the presence of E. coli could constitute physical loss or damage); *de Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 722-23 (Tex. App. 2005) (finding mold damage constituted "physical loss to property"); *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, No. 603009/2002, 2005 WL 600021, at *5 (N.Y. Sup. Ct. Mar. 4, 2005) (finding "the presence of noxious particles, both in the air and on surfaces in plaintiff's premises, would constitute property damage under the terms of the policy"); *Cook v. Allstate Ins.*, No. 48D02-0611-PL-01156, 2007 Ind. Super. LEXIS 32, at *9-10 (Ind. Super. Nov. 30, 2007) (finding infestation of house with brown recluse spiders constituted "sudden and accidental direct physical loss" to the house, and "[c]ase law demonstrates that a physical condition that renders property unsuitable for its intended use constitutes a 'direct physical loss' even where some utility remains and, in the case of a building, structural integrity remains"); *Brand Mgmt., Inc. v. Md. Cas. Co.*, No. 05–cv–02293–REB–MEH, 2007 WL 1772063, at *2 (D. Colo. June 18, 2007) (noting that when a sushi manufacturer closed for 15 days to disinfect its premises after discovery of listeria contamination, the insurance company voluntarily paid the business income claim).

[18] In chronological order: *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 968 A.2d 724, 734 (N.J. Super. Ct. App. Div. 2009) ("In the context of this case, the electrical grid was 'physically damaged' because, due to a physical incident or series of incidents, the grid and its component generators and transmission lines were physically incapable of performing their essential function of providing electricity."); *Manpower Inc. v. Ins. Co. of the State of Pa.*, No. 08C0085, 2009 WL 3738099, at *1 (E.D. Wis. Nov. 3, 2009) (finding "direct physical loss . . . or damage to" a building adjacent to a building which collapsed despite the fact that the collapse did not cause any noticeable damage to the policyholder's occupied space); *TravCo Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013) (finding a house built with drywall manufactured in China, that emitted toxic gases, causing the policyholder to move out, had suffered direct physical loss, although it was "physically intact,

The insurance industry is well aware of these decisions. In fact, a trade organization that drafts policy language for the industry admitted that its responsibilities include monitoring such decisions and updating its forms and endorsements in response thereto.[19] Yet it never added a requirement of "structural alteration." Instead, it left the "physical loss or damage" language unchanged, knowing that that phrase had been routinely interpreted by both policyholders and the courts to not require structural alteration. This history makes clear that insurance companies, such as FFIC, never intended the requirement of structural alteration on which they now rely—and that it is unconscionable to read their policies as if that language had been added.

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functional and ha[d] no visible damage;" noting that the majority of cases nationwide find that "physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces") *In re Chinese Manufactured Drywall Prod. Liab. Litig.*, 759 F. Supp. 2d 822, 831-32 (E.D. La. 2010) (finding there "exists a covered physical loss" where "potentially injurious material" is "activated, for example by releasing gases or fibers," and "that the presence of Chinese-manufactured drywall in a home constitutes a physical loss" because it "renders the [policyholders'] homes useless and/or uninhabitable"); *Ass'n of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1068 (D. Haw. 2013) (finding intrusion of arsenic into roof caused "direct physical loss or damage" to the roof); *Gregory Packaging*, 2014 WL 6675934, at *5-6 (*see supra* note 8); *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 803-05 (N.H. 2015) (holding that pervasive odor of cat urine was "physical loss" to condominium).

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

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

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

1. Concessions in Regulatory Filings.

Evidence that structural alteration is not required to trigger coverage under property policies is found in statements that insurance companies have made when seeking approval of policy forms. In 2005, for example, the Greater New York Insurance Companies ("Greater NY") asked the New York State Insurance Department for permission to include a virus exclusion in its property policies. It proposed that the exclusion be optional, as many policyholders would want to continue having coverage for viruses.[20] Greater NY explained that such coverage would exist unless the exclusion was included, stating "our main object of this filing is to remove the carte blanch [sic] application of this Exclusion and not deny coverage to the majority portion of our book" for losses stemming from virus.[21] The admission that standard-form property policies using the "physical loss or damage"

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

[21] *Id.*

formulation cover "this type of loss ('pandemic')"[22] is exactly what FFIC has denied in this action. The District Court erroneously accepted FFIC's position, despite both the overwhelming case law and the regulatory admissions of the insurance industry to the contrary.

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

> [W]e do not anticipate that any of our insureds will voluntarily request this [virus] exclusion; some (habitational risks) because it would never enter their minds as a problem for which they would voluntarily reduce coverage; others (restaurants) because they feel that such an event is well within the realm of possible fortuitous occurrences and should be covered should such an event arise.[23]

The instant case demonstrates that Greater NY was correct, as Oregon Clinic's Complaint makes clear that it expected coverage for the losses suffered when the pandemic and/or related government orders adversely impacted its operations.

2. Concessions in Court Filings.

Three months before the pandemic began, Factory Mutual Insurance Company ("Factory Mutual")—perhaps the most sophisticated property insurance company in the United States—filed a motion in the U.S. District Court for the District of New Mexico, arguing that "physical loss or damage" to property exists when the presence of a physical substance renders property unfit for its intended use,

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[22] *Id.*

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

even when it does not cause structural alterations.[24]

At issue in *Factory Mutual Insurance Co. v. Federal Insurance Co.* was a mold infestation in a "clean room" at a drug manufacturing plant.[25] Mold and its spores, like SARS-CoV-2 virions, exist on the surface of property and in the air. Factory Mutual argued that the mold infestation constituted "physical loss or damage" under a property policy sold by Federal Insurance Company ("Federal") because the mold "destroyed the aseptic environment and rendered [the clean room] unfit for its intended use."[26] It also asserted that case law "broadly interprets the term 'physical loss or damage' in such policies,"[27] relying upon many of the cases discussed above:

> Numerous courts have concluded that loss of functionality or reliability under similar circumstances constitutes physical loss or damage. *See, e.g.*, *W. Fire Ins. Co.*, 165 Colo. at 37 (1968) (church building sustained physical loss or damage when it was rendered uninhabitable and dangerous due to gasoline under the building);[28] *Gregory Packaging*, 2014 WL 6675934, at *6 (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 Auth. of New York & New Jersey v. Affiliated*

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

[25] *Id.* at 3.

[26] *Id.*

[27] *Id.*

[28] The *Trutanich* court also relied on *Western Fire* in finding coverage for methamphetamine lab odor. *Western Fire* is highly instructive here as well.

> *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*, 715 F. Supp. 2d at 709 ("toxic gases" released by defective drywall).[29]

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

> The period of time as well as costs required to bring [the policyholder's] facility to the level of cleanliness following the mold infestation required by [the policyholder's] customers is also physical loss or damage covered by the Federal policy. The facility was damaged by stringent requirements of [the policyholder's] customers regarding production to the same extent it was damaged from the mold infestation itself as the facility was unusable as the result of a covered loss. . . . Without the customers' approval of the restored aseptic conditions following the mold infestation, [the] facility remained unusable.[30]

Factory Mutual further argued that at the very least, its interpretation was reasonable, so even if Federal could propose an alternative, that merely would establish that "physical loss or damage" is ambiguous.[31] Since black-letter law requires ambiguities to be construed against the policy drafter, coverage would exist either way.

Ironically, no policyholder could have said it better. By making the exact argument that Oregon Clinic makes here, Factory Mutual put the lie to FFIC's denial of coverage. The District Court's wholesale adoption of FFIC's arguments about the

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

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

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

meaning of "physical loss or damage" should be reversed.

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

Insurance industry trade associations repeatedly have asserted in *amicus* briefs in COVID-19 cases that determinations in favor of coverage would bankrupt the industry.[32] These outcome-determinative claims, which have proven false before, have no place in contract disputes for several reasons.

First, the expected profits and losses of an insurance company have no relevance to determining coverage, and evaluating unknown risks is a central part of an insurance company's business. It is not the role of courts to protect insurance companies when their actuaries make bad bets. As the California Supreme Court explained, policyholders and insurers are "generally free to contract as they please[]" and "thereby establish[] what was 'fair' and 'just' inter se." *Aerojet-Gen. Corp. v. Transp. Indem. Co.*, 17 Cal. 4th 38, 75 (1997), *as modified* (Mar. 11, 1998). Courts "may not rewrite what they themselves wrote" and "must certainly resist the temptation to do so here simply in order to adjust for chance—for the benefits it has bestowed on one party without merit and for the burdens it has laid on others without

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

desert." *Id.*

Second, at times of crisis, insurance companies are quick to argue that they could be forced into bankruptcy if they are forced to cover resulting claims. For example, for thirty years insurance companies attempted to influence environmental coverage law by asserting that they would be rendered bankrupt if they are required to cover claims that arise from strict liability environmental statutes. *See Insurer Liability for Cleanup Costs of Hazardous Waste Sites*, No. 101-175 (101st Cong., 2d Sess., Sept. 27, 1990) (Committee on Banking, Finance, and Urban Affairs), pp. 18-29 and 75-76. Although the industry was held accountable for many environmental clean-ups, the predicted collapse never arrived.

Lastly, the pandemic has proved very *profitable* for insurance companies—one of the few industries able to make such a claim. To the knowledge of UP, no insurance company has entered insolvency due to the pandemic. Instead, insurance companies have enjoyed enormous windfalls. For example, Allianz, the global insurance conglomerate that owns FFIC, reported substantial growth in profit for both 2020 and 2021.[33] Indeed, despite paying very few COVID-19 related business

[33] Allianz, Full Year and Quarterly Earnings Release 2020, *Allianz Delivers a Strong Finish to 2020* (Feb. 19, 2021), https://www.allianz.com/en/press/news/financials/business_results/210219_Allianz-4Q-FY2020-earnings-release.html; ALLIANZ, 12M 2021 RESULTS UPDATE BRIEFING FEBRUARY 2022, (Feb. 18, 2022), https://www.agcs.allianz.com/content/dam/onemarketing/agcs/agcs/about-

interruption claims, insurance companies significantly *increased* their premium rates in 2020 across all lines of business. One large broker reported that 89% of its clients saw a rate increase for their property insurance—the "highest number recorded since the early 2000s."[34] In late 2020, property insurance companies told consumers to expect increases of 15% to 25% in 2021.[35]

In sum, this Court should apply the policy as written, ignore the false cries of poverty from the industry, and fulfill the primary purpose of insurance—to protect policyholders with covered claims.

CONCLUSION

The dismissal here was premature and unjust. The Oregon Clinic is entitled to its day in court on the ambiguities that FFIC built into its policy. That would be the result if this Court were to reverse the District Court's erroneous decision. UP respectfully submits that this Court should do so.

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agcs/AGCS-Q4-12M-2021-Results-Briefing.pdf.

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

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

Dated: April 27, 2022

Respectfully submitted,

PERKINS COIE LLP

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s): No. 22-35047

I am the attorney or self-represented party.

This brief contains 6,710 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[X] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

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[ ] it is a joint brief submitted by separately represented parties;
[ ] a party or parties are filing a single brief in response to multiple briefs; or
[ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature: */s/ James M. Davis* **Date** April 27, 2022

CERTIFICATE OF SERVICE

On April 27, 2022, a copy of the foregoing brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Court's appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

Dated: April 27, 2022

/s/ James M. Davis

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EXHIBIT 1

ISO Circular

FORMS - FILED JULY 6, 2006

FROM: LARRY PODOSHEN, SENIOR ANALYST

COMMERCIAL PROPERTY LI-CF-2006-175

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

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

BACKGROUND

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

ISO ACTION

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

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

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

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

PROPOSED EFFECTIVE DATE

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

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

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RATING SOFTWARE IMPACT

New attributes being introduced with this revision:

- A new form is being introduced.

CAUTION

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

RELATED RULES REVISION

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

REFERENCE(S)

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

ATTACHMENT(S)

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

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

PERSON(S) TO CONTACT

If you have any questions concerning:

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Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

About This Filing

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

New Form

We are introducing:

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

Related Filing(s)

Rules Filing CF-2006- OVBER

Introduction

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

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

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

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Current Concerns

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

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

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

Features Of New Amendatory Endorsement

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

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COMMERCIAL PROPERTY
CP 01 40 07 06

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

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

Current Concerns

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

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

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

Features Of New Amendatory Endorsement

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

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COMMERCIAL PROPERTY
CP 01 75 07 06

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

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

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

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

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

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

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EXHIBIT 2

Ex. 2 at 1

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

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

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

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

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

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

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

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

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

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

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

Ex. 2 at 2

EXHIBIT C

Exhibit RT-1 – Side by Side Comparison

[Currently Filed and approved ISO Original Rule]

ADDITIONAL RULE(S)

A6. EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

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

[Our Proposed New Rule]

ADDITIONAL RULE(S)

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

A6. EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

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

ISO form CP 01 78 is an optional form.

Premium Determination When Exclusion is Applied:

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

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

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

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

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

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

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

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

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

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

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

RISK CHARACTERISTICS DETERMINING WHEN EXCLUSION IS NOT APPLIED:

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

Premium Determination When Exclusion is NOT Attached:

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

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

EXHIBIT 3

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

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

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

I. INTRODUCTION

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

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

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

II. ARGUMENT

A. Legal Standard.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/*Maureen A. Sanders*
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