

SUPREME COURT OF NORTH CAROLINA

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NORTH STATE DELI, LLC d/b/a LUCKY'S DELICATESSEN, MOTHERS & SONS, LLC d/b/a MOTHERS & SONS TRATTORIA, MATEO TAPAS, L.L.C. d/b/a MATEO BAR DE TAPAS, SAINT JAMES SHELLFISH LLC d/b/a SAINT JAMES SEAFOOD, CALAMARI ENTERPRISES, INC. d/b/a PARIZADE, BIN 54, LLC d/b/a BIN 54, ARYA, INC. d/b/a CITY KITCHEN and VILLAGE BURGER, GRASSHOPPER LLC d/b/a NASHER CAFE, VERDE CAFE INCORPORATED d/b/a LOCAL 22, FLOGA, INC. d/b/a KIPOS GREEK TAVERNA, KUZINA, LLC d/b/a GOLDEN FLEECE, VIN ROUGE, INC. d/b/a VIN ROUGE, KIPOS ROSE GARDEN CLUB LLC d/b/a ROSEWATER and GIRA SOLE, INC. d/b/a FARM TABLE and GATEHOUSE TAVERN,

From Durham County  
No. COA 21-293

Plaintiffs-Appellants,

v.

THE CINCINNATI INSURANCE COMPANY;  
THE CINCINNATI CASUALTY COMPANY;  
MORRIS INSURANCE AGENCY INC.; and  
DOES 1 THROUGH 20, INCLUSIVE,

Defendants-Appellees.

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BRIEF OF *AMICI CURIAE* UNITED POLICYHOLDERS  
AND NATIONAL INDEPENDENT VENUE ASSOCIATION  
IN SUPPORT OF PLAINTIFFS-APPELLANTS

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IN SUPPORT OF PLAINTIFFS-APPELLANTS<sup>1</sup>

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<sup>1</sup> Pursuant to N.C. R. App. P. 28.1(b)(3)(c), *amici* certify that no person or entity—other than *amici* and their counsel—directly or indirectly either wrote this brief or contributed money for its preparation.

**STATEMENT OF IDENTITY OF *AMICI CURIAE***  
**AND THEIR INTEREST IN THE CASE**

United Policyholders and National Independent Venue Association submit this *amicus curiae* brief in support of Plaintiffs-Appellants. United Policyholders is a respected national non-profit section 501(c)(3) organization and policyholder advocate. National Independent Venue Association is a trade association of independent performing arts venues formed in 2020, with nearly 2,000 charter members from all 50 states. The issues implicated by this case are of critical importance, as they may affect insurance recoveries for businesses throughout North Carolina, which include *amici's* members and those for whom *amici* advocate.

**INTRODUCTION AND SUMMARY OF ARGUMENT**

After businesses were forced to close due to the COVID-19 pandemic, many sought relief from their insurers. However, despite having promised to provide coverage for all risks of physical loss or damage unless specifically excluded, insurers denied claim after claim. Disputes over these denials have now reached the courts.

This appeal concerns the narrow issue of whether specified government orders caused “direct physical loss” of Plaintiffs-Appellants’ property. The North Carolina Court of Appeals ruled that they did not. This Court should not reach beyond the Court of Appeals’ decision and should refuse to adopt an unwarranted and broader ruling that the COVID-19 virus does not cause “physical loss of or damage to” property. Said otherwise, the Court of Appeals’ decision is restricted to a narrow question—whether government orders alone can cause “direct physical



loss” of property. This Court should reject insurance industry invitations to issue a ruling broader than that question, in the absence of any record.

The Court of Appeals ignored the decades of case law demonstrating that courts, the insurance industry, and policyholders have, in any case, long shared an understanding that “all risks” policies like the one Cincinnati sold to North State Deli<sup>2</sup> cover a broad range of physical perils that rob property of its intended use, including carbon monoxide, odors, and even viruses such as the SARS-CoV-1 virus. The virus that causes COVID-19 is such a peril that triggers coverage under an “all risks” policy.

### **ARGUMENT**

#### **I. ALL RISKS INSURANCE POLICIES PROMISE EXPANSIVE COVERAGE TO POLICYHOLDERS.**

An “all risks” insurance policy, like the one Cincinnati sold North State Deli, covers all risks that are not otherwise excluded. *See Avis v. Hartford Fire Ins. Co.*, 283 N.C. 142, 146, 195 S.E.2d 545, 547 (1973) (“Recovery will be allowed under a policy affording ‘all risks’ coverage for all losses of a fortuitous nature not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding loss from coverage.”).

Policyholders, courts, and insurers—including Cincinnati—have for decades understood all risks policies to provide expansive coverage, including in situations where property was rendered unfit or unsafe for its intended use, regardless of

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<sup>2</sup> “North State Deli” refers to all Plaintiffs-Appellants.

whether there was physical alteration to that property. When a policyholder cannot use property as intended due to an external physical peril, that is the type of “physical loss” to property that all risks insurance policies were marketed, sold, and purchased to address. Insurers’ assertion that the policy only operates when the insured property suffers visible or structural damage amounts to a post-loss revision of their promise.

**A. Courts Have Long Held that No Tangible Alteration of Property Is Necessary to Trigger Coverage Under an “All Risks” Policy.**

Before the Court of Appeals, the Insurance Industry *Amici* sought a narrow construction of insurers’ duties under policies such as that sold to North State Deli, suggesting that property insurance policies historically covered the risk of fire and then “later expanded to include loss arising from other perils that damage property, such as theft, hurricanes, floods, and riots.” APCIA Br. 2. It is true that Insurers, including Cincinnati, have expanded the scope of property insurance coverage over the years. For instance, when the Insurance Services Office (“ISO”)—an industry trade group that drafts widely used standard form policies that many insurers use as the basis for their policies— began drafting policies decades ago, coverage was triggered only if the property was “damaged or destroyed.” *See* Frank S.

Glendening, *Business Interruption Insurance: What Is Covered* 100 (1980).

However, the ISO form property policies—like the Cincinnati policies at issue here—now include two broad triggers of coverage: physical “loss” or “damage.”

Thus, by their plain text, property insurance policies now cover a broad range of physical perils that rob property of its intended use even if they do not cause

visible, structural damage in the way that fires and hurricanes do (though even those perils often cause damage that is not apparent to the naked eye). Indeed, Insurance Industry *Amici* conceded before the Court of Appeals that “theft” is covered and often theft does *not* damage property in the same way that a fire might. APCIA Br. 9–10. Rather, theft is covered because if property is stolen, the policyholder cannot use that property for its intended use due to an external force beyond the policyholder’s control. *See, e.g., Intermetal Mexicana, S.A. v. Ins. Co. of N. Am.*, 866 F.2d 71, 76 (3d Cir. 1989); *Great N. Ins. Co. v. Dayco Corp.*, 620 F. Supp. 346, 351 (S.D.N.Y. 1985).

Therefore, for decades, consistent with North Carolina law requiring broad construction of all risks policies, courts across the country interpreting these policies have found coverage when a property is deemed unfit or unsafe for its intended use:

- **Threat of collapse** that required abandonment of property. *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986); *Hughes v. Potomac Ins. Co.*, 199 Cal. App. 2d 239, 248–49 (1962) (holding that policyholder’s home, which became perched on the edge of a cliff after a sudden landslide, was damaged because it became unsafe to live in and thus useless).
- **Threat of falling rocks**, regardless of whether rocks ever made contact with property. *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 493, 509 S.E.2d 1, 17 (1998).

- A **ransomware attack** that prevented the insured from “accessing” “data contained on the server, and all of its software” and therefore caused “loss of use, loss of reliability, or impaired functionality.” *Nat’l Ink & Stitch, LLC v. State Auto Prop. & Cas. Ins. Co.*, 435 F. Supp. 3d 679, 680, 686 (D. Md. 2020).
- **Asbestos** fibers that were “released into the air” and remained “airborne” for long periods of time. *U.S. Fid. & Guar. Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 74–75, 578 N.E.2d 926, 931 (1991); *see also Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (“physical loss” occurred when “the presence of large quantities of asbestos in the air of a building” made “the structure uninhabitable and unusable”).
- **Sulfuric gas** that rendered a property “uninhabitable,” even though drywall was “physically intact, functional and has no visible damage.” *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708-9 (E.D. Va. 2010), *aff’d*, 504 F. App’x 251 (4th Cir. 2013).
- **Urine odor**, because the term “physical loss” includes “changes” that “exist in the absence of structural damage.” *Mellin v. N. Sec. Ins. Co.*, 167 N.H. 544, 550, 115 A.3d 799, 805 (2015).
- **Gasoline vapor** that rendered rooms of insured building “uninhabitable” and “dangerous” to use. *W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 36–37, 437 P.2d 52, 55 (1968) (en banc).

- **Methamphetamine vapor and odor.** *Farmers Ins. Co. of Or. v. Trutanich*, 123 Or. App. 6, 11, 858 P.2d 1332, 1336 (1993); *see also Graff v. Allstate Ins. Co.*, 113 Wash. App. 799, 806, 54 P.3d 1266, 1270 (2002) (finding coverage under vandalism policy when “methamphetamine lab released hazardous vapors into the house”; “visibility” of damage not required); *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 405–6 (1st Cir. 2009) (odor that affected air and “permeated the building” could cause “physical injury to property”).
- **Ammonia gas** that “physically transformed the air within” insured’s facility and made it “unfit for occupancy until the ammonia could be dissipated.” *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at \*6 (D.N.J. Nov. 25, 2014).
- **Carbon monoxide.** *Matzner v. Seaco Ins. Co.*, 1998 WL 566658, at \*4 (Mass. Super. Aug. 12, 1998).
- **Wildfire smoke** that entered an open-air theater and prevented the insured from holding performances. *Or. Shakespeare Festival Ass’n v. Great Am. Ins. Co.*, 2016 WL 3267247, at \*5 (D. Or. June 7, 2016) (smoke “caused injury or harm to the interior of the theater, which includes the air within the theater”), *vacated by stipulation*, 2017 WL 1034203 (D. Or. Mar. 6, 2017).

The Court of Appeals did not address this case law in reversing partial summary judgment, but that case law informed and reflected insurance industry

customs and practices. *Nationwide Mutual Ins. Co. v. Dempsey*, 128 N.C. App. 641, 643, 495 S.E.2d 914 (1998) (insurance policies “should be interpreted according to their daily usage”).

**B. Insurers Have Conceded That An “All Risks” Policy Is Triggered Absent Structural Alteration of Property.**

In contrast to their current position regarding coverage for policyholders’ losses resulting from the COVID-19 virus, insurers previously agreed that physical “loss” or “damage” to property exists even in the absence of structural alteration. Insurers previously paid claims for losses caused by SARS-CoV-1, the virus that caused a pandemic between 2002 and 2004.<sup>3</sup>

In response to the SARS pandemic, the ISO in 2006 drafted an “Exclusion of Loss Due to Virus or Bacteria” and made it available to its members, recognizing that property and business interruption claims could result from “disease-causing agents [that] ... enable the spread of the disease by their presence on interior building surfaces or the surfaces of personal property.”<sup>4</sup> Explaining that mold infestation is considered “property damage,” the ISO stated that this exclusion was needed because “other known substances (such as rotovirus)” could be “alleged to be

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<sup>3</sup> Todd C. Frankel, *Insurers Knew the Damage a Viral Pandemic Could Wreak on Businesses. So They Excluded Coverage*, Washington Post (Apr. 2, 2020), <https://www.washingtonpost.com/business/2020/04/02/insurers-knew-damage-viral-pandemic-could-wreak-businesses-so-they-excluded-coverage/>.

<sup>4</sup> ISO Circular (July 6, 2006) (attached hereto as App. 1-12).

property damage” and “could be used in an effort to trigger other coverage, such as business income coverage.”<sup>5</sup>

And, mere months before the COVID-19 pandemic, Factory Mutual Insurance Company—one of the most sophisticated property insurers in the world—admitted in litigation that the presence of mold spores on property alone constituted insured “physical loss or damage” because it “rendered” the property “unfit for its intended use.” *Factory Mut. Ins. Co. v. Federal Ins. Co.*, No. 1:17-cv-00760, ECF No. 127 at 3 (D.N.M. Nov. 11, 2019). Pointing to cases cited above (at pp. 5–8), Factory Mutual contended that “loss of functionality” constituted “physical loss or damage.” *Id.* at 3, n.1. At minimum, Factory Mutual contended, the term “‘physical loss or damage,’ which is undefined, is susceptible of more than one reasonable interpretation and is therefore ambiguous.” *Id.* In North Carolina, ambiguous policy terms must be construed against the insurer. *See Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 9, 692 S.E.2d 605, 612 (2010). Factory Mutual’s prior position also accords with the purpose of all risks policies, which is to insure business income losses that result from the insured’s inability to generate normal business revenue due to a physical peril.

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<sup>5</sup> Letter from A. Casillo to S. Cullen, Oct. 2, 2006 (attached hereto as App. 13-14). This document was produced by the ISO—and later publicly filed—in *Hartford Fire Ins. Co. v. Moda LLC, et al.*, No. HHD-CV-20-6127638-S (Sup. Ct., Jud. Dist. of Hartford at Hartford).

**C. Insurers Were Aware of the Broad Interpretation of Physical Loss or Damage Under “All Risks” Policies and Did Nothing to Narrow the Language.**

Given the many decisions that have interpreted physical loss or damage broadly, the insurance industry well knew that the language in policies such as those sold at issue was, at best, ambiguous. Despite this knowledge, insurers did nothing to narrow the language. As the drafter of the policy, the insurer bears the responsibility to make its policies clear and unambiguous. *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). “It is settled that ‘in evaluating the insurer’s claim as to the meaning of the language under study, courts necessarily consider whether alternative or more precise language, if used, would have put the matter beyond reasonable question.’” *Ellmex Const. Co., Inc. v. Republic Ins. Co.*, 494 A.2d 339, 344 (N.J. Super. Ct. App. Div. 1985) (citation omitted).

Cincinnati, like the rest of the insurance industry, was aware of this history and could have revised its policies to narrow the coverage it provided if it did not want to cover such losses. Cincinnati chose not to do so. This Court should not now rewrite Cincinnati’s policies for it. *See, e.g., Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 437–38, 146 S.E.2d 410, 416 (1966) (holding that when an insurer employs a “slippery” word in its policy and “falls into a coverage somewhat more extensive than it contemplated, the fault lies in its own selection of the words by which it chose to be bound.”).



## II. THE VIRUS THAT CAUSES COVID-19 RESULTS IN INSURED “PHYSICAL LOSS” OR “DAMAGE” TO PROPERTY.

Because the trial court granted summary judgment in favor of North State Deli on the basis of the government orders, and the Court of Appeals reversed the trial court’s decision only on that basis, this appeal does not present the question of whether the COVID-19 virus causes physical loss or damage. However, under the policy language and the case law discussed above, the virus causes “physical loss” and “damage” as those terms are understood. Specifically, the virus alters the air and surfaces inside insured property, converting the property from safe to dangerous vectors of transmission, as could be proven in discovery based on the scientific research discussed below.

### A. COVID-19 Physically Affects the Air and Surfaces in Property.

The World Health Organization and researchers funded by the National Institutes of Health have advised that people can become infected with the coronavirus by touching virus-laden objects and surfaces, and then touching their eyes, nose, or mouth.<sup>6</sup> This mode of transmission—indirect transmission via objects and surfaces—is known as “fomite transmission.” One study identified indirect transmission via objects such as elevator buttons and restroom taps as an

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<sup>6</sup> WHO, *Transmission of Sars-CoV-2: Implications for Infection Prevention Precautions* (July 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions>; Alicia N.M. Kraay et al., *Risk for Fomite-Mediated Transmission of SARS-CoV-2 in Child Daycares, Schools, Nursing Homes, and Offices*, CDC, 27(4) *Emerging Infectious Diseases* 1229 (Apr. 2021), [https://wwwnc.cdc.gov/eid/article/27/4/20-3631\\_article](https://wwwnc.cdc.gov/eid/article/27/4/20-3631_article).

important possible cause of a “rapid spread” of the coronavirus in a shopping mall in China.<sup>7</sup> Additional research has shown that the coronavirus remained viable for up to 28 days on a range of common surfaces—such as glass, stainless steel, and money—left at room temperature.<sup>8</sup>

Further, because cleaning of surfaces normally does not fully remove the virus, some physical residue of the virus, and some alteration of the surface caused by the virus, remains after cleaning.<sup>9</sup> Cincinnati *itself* has acknowledged as much, noting in its “tips for sanitation in the age of coronavirus,” that, while cleaning may lower the number of germs on a surface, it will *not* eliminate them.<sup>10</sup> A study found that even after trained hospital personnel used disinfection procedures in COVID-19 patient treatment areas, much of the virus survived.<sup>11</sup>

Peer-reviewed scientific studies inform us that:

- An infected person can generate virus-laden aerosols that linger in

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<sup>7</sup> Jing Cai et al., *Indirect Virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China*, 2020, CDC, 26 (6) Emerging Infectious Diseases 1343 (June 2020), [https://wwwnc.cdc.gov/eid/article/26/6/20-0412\\_article](https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article).

<sup>8</sup> Shane Riddell et al., *The effect of temperature on persistence of SARS-CoV-2 on common surfaces*, 17 Virology J. 145 (Oct. 7, 2020), <https://virologyj.biomedcentral.com/articles/10.1186/s12985-020-01418-7>.

<sup>9</sup> Nicolas Castaño et al., *Fomite transmission and disinfection strategies for SARS-CoV-2 and related viruses*, (May 23, 2020), <https://arxiv.org/ftp/arxiv/papers/2005/2005.11443.pdf>.

<sup>10</sup> John Fisher and Steve Heiden, *Tips for Sanitation in the Age of Coronavirus*, The Cincinnati Insurance Companies, <https://blog.cinfin.com/2020/03/23/pandemic-coronavirus-tips-sanitation-disinfecting/> (the “virus may remain viable for hours to days on surfaces”).

<sup>11</sup> Zarina Brune et al., *Effectiveness of SARS-CoV-2 Decontamination and Containment in a COVID-19 ICU*, 18 Int’l J. Env’t Rsch. & Pub. Health 5, 2479 (Mar. 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7967612/>.

the air well after the person leaves the area.<sup>12</sup>

- The virus can migrate substantial distances through a building's ventilation systems as one study detected SARS-CoV-2 RNA in ceiling vent openings, exhaust filters, and central ducts more than 50 meters from rooms of COVID-19 patients in hospital wards.<sup>13</sup>
- The spread of the coronavirus is “prompted by air-conditioned ventilation,” as demonstrated in a study with persons who sat downstream of an HVAC system's air flow becoming infected.<sup>14</sup>

Courts recognize that parties should have the opportunity to prove, after a full opportunity for discovery, that the virus caused physical loss of or damage to property through mechanisms such as these. *See Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Ins. Co.*, 81 Cal. App. 5th 96, 114 (2022) (“We acknowledge it might be more efficient if trial courts could dismiss lawsuits at the pleading stage based on the judges' common sense and understanding of common experience rather than waiting to actually receive evidence to determine whether the plaintiff's factual allegations can be proved. But that is not how the civil justice system works”); *Novant Health Inc. v. Am. Guarantee and Liab. Ins. Co.*, 2021 WL 4340006,

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<sup>12</sup> CDC, *Scientific Brief: SARS-CoV-2 Transmission* (last updated May 7, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html>.

<sup>13</sup> Karolina Nissen et al., *Long-distance airborne dispersal of SARS-CoV-2 in Covid-19 wards*, 10 *Sci. Rep.* 19589 (Nov. 11, 2020), <https://www.nature.com/articles/s41598-020-76442-2>.

<sup>14</sup> Jianyun Lu et al., *COVID-19 Outbreak Associated with Air Conditioning in Restaurant, Guangzhou, China*, CDC, 26(7) *Emerging Infectious Diseases* 1628, 1629 (July 2020), [https://wwwnc.cdc.gov/eid/article/26/7/20-0764\\_article](https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article).

at \*3 (M.D.N.C. 2021) (denying insurer motion to dismiss because “[w]hether COVID-19 has resulted in direct physical damage or loss to Novant, and if so to what extent, are questions better evaluated on a developed factual record”); *see also*, *e.g.*, *Brown’s Gym, Inc. v. The Cincinnati Ins. Co.*, 2021 WL 3036545, at \*2 (Pa. Com. Pl. July 13, 2021) (also denying insurer motion to dismiss). This Court should not foreclose the opportunity for policyholders in North Carolina to do so.

**B. The “Period of Restoration” Does Not Narrow the Scope of Coverage**

The insurance industry may here argue that the “period of restoration” definition in the policies somehow narrows the broad construction of “physical loss or damage.” This is insurance company sleight of hand, pretending that a section of the policy addressing only *how* certain losses are *valued*, somehow operates to exclude certain categories of loss. The argument does little more than demonstrate that they, the insurers, have no meaningful textual support for their position.

The “period of restoration” does not purport to affect the *trigger* of coverage. Instead, it spells out the *duration* of coverage for a covered loss. The “period of restoration” description also is entirely consistent with the measures a business must take to respond to the coronavirus. If a policyholder restores unsafe physical spaces to a safe and usable condition by, for instance, installing new partitions or ventilation systems, reconfiguring physical space to permit social distancing, or engaging in deep cleaning and sanitizing, it effects a repair, rebuild, or replacement of its property. *See In re Soc’y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, 521 F. Supp. 3d 729, 742 (N.D. Ill. 2021) (if “the coronavirus risk could be

minimized by the installation of partitions and a particular ventilation system, then the restaurants would be expected to ‘repair’ the space by installing those safety features”); *Marina Pacific*, 81 Cal. App. 5th at 111.

Finally, *Harry’s Cadillac-Pontiac-GMC Truck Company v. Motors Insurance Corporation*, 126 N.C. App. 698, 486 S.E.2d 249 (1997), provides no support to the position that the COVID-19 virus does not cause physical loss or damage. In *Harry’s Cadillac*, a car dealership made a claim for business interruption coverage after a snowstorm. *Id.* at 699, 250. The undisputed evidence (following discovery) showed that any loss of business income occurred because of the “inability to gain access to the dealership due to the snowstorm,” and not any “physical loss of or damage to property.” *Id.* at 702, 251.<sup>15</sup> Rather, the only loss of or damage to property claimed by the policyholder was damage to its roof, which admittedly caused no loss of business income. *Id.* at 702, 251–52. This decision, on narrow causation grounds, did nothing to limit coverage where a policyholder *can* prove (after a full opportunity for discovery) that the virus did cause physical loss of or damage to property. Indeed, the Court of Appeals’ conclusory discussion of *Harry’s Cadillac* in no way alters that analysis.

### **CONCLUSION**

For the foregoing reasons, the Court should reverse the Court of Appeals’ decision reversing the trial court’s grant of partial summary judgment and, at

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<sup>15</sup> Though not at issue in *Harry’s Cadillac*, such losses are often covered under “Ingress/Egress” provisions that are triggered when loss or damage to third-party property hinders access to the insured’s business.

minimum, not foreclose the opportunity for policyholders in North Carolina to prove that the virus caused physical loss of or damage to property that resulted in loss of business income.

DATED: January 16, 2024

Respectfully submitted,

ROBINSON, BRADSHAW & HINSON, P.A.

By: /s/ Richard C. Worf, Jr.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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**CERTIFICATE OF SERVICE**

Pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, I hereby certify that the foregoing document has been filed with the Clerk of the North Carolina Supreme Court by electronic submission. I further certify that a copy of this document has been duly served upon the following counsel of record by email:

<p>Gagan Gupta (ggupta@paynterlaw.com) Stuart M. Paynter (stuart@paynterlaw.com) The Paynter Law Firm, PLLC 106 South Churton Street Hillsborough, NC 27278</p> <p><i>Counsel for Plaintiffs-Appellants</i></p>	<p>Jim W. Phillips, Jr. (jphillips@brookspierce.com) Gary S. Parsons (gparson@brookspierce.com) Kimberly M. Marston (kmarston@brookspierce.com) BROOKS PIERCE MCLENDON HUMPHREY &amp; LEONARD, LLP P.O. Box 26000 Greensboro, NC 27420</p> <p><i>Counsel for Defendants-Appellees The Cincinnati Insurance Company and The Cincinnati Casualty Company</i></p>
---	--

This 16th day of January, 2024.

Electronically submitted  
Richard C. Worf, Jr.

CONTENTS OF APPENDIX

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Letter from A. Casilo to S. Cullen, Oct. 2, 2006 ..... App. 13-14





# 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.

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### 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.

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### 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.

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## 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.

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## REFERENCE(S)

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

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## ATTACHMENT(S)

- Multistate Forms Filing CF-2006-OVBEP
- State-specific version of Forms Filing CF-2006-OVBEP (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

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- the content of this circular, please contact:

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# Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

## About This Filing

---

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

## New Form

We are introducing:

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

## Related Filing(s)

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Rules Filing CF-2006- OVBEB

## Introduction

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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

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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.

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## Features Of New Amendatory Endorsement

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

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**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA**

This endorsement modifies insurance provided under the following:

### COMMERCIAL PROPERTY COVERAGE PART STANDARD PROPERTY POLICY

- A.** The exclusion set forth in Paragraph **B.** applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
- B.** We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism 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

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# Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

## About This Filing

---

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

## New Form

We are introducing:

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

## Related Filing(s)

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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.

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**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA**

This endorsement modifies insurance provided under the following:

### COMMERCIAL PROPERTY COVERAGE PART STANDARD PROPERTY POLICY

- A.** The exclusion set forth in Paragraph **B.** applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
- B.** We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism 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 supercedes 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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ANNE M. CASILLO, CPCU, ARP, CPIW  
REGIONAL MANAGER  
GOVERNMENT RELATIONS

October 2, 2006

Sheri Cullen  
Policy Form Reviewer  
Property and Casualty Policy Review Section  
Commonwealth of Massachusetts  
One South Station  
Boston, MA 02110-2208

Re: **Code #99999998**  
**CL 2006 OVBEF (Amendment No. 1)**  
**Amendatory Endorsement – Exclusion**  
**Due to Loss Virus or Bacteria**  
**Commonwealth of Massachusetts**  
**SRB File # 101694**

**Code #99999998**  
**CL 2006 OVBER (Amendment No. 1)**  
**Rules on Amendatory Endorsement-**  
**Exclusion Loss Due To Virus or Bacteria**  
**Due to loss Virus or Bacteria**  
**Commonwealth of Massachusetts**  
**SRB File # 101693**

Dear Ms. Cullen,

We wish to respond to your email of August 17, 2006 on the above filings as follows:

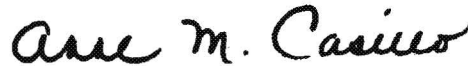
1. Your question appears to focus on whether or not there is an actual exposure other than mold, that is, can property damage be caused by microorganisms other than mold. Mold is visible, it changes the physical appearance of property (and perhaps sometimes its usefulness), and that is typically the basis for characterizing mold infestation as property damage. Various other known substances (such as rotovirus) are not mold, do not become visible, do not alter the physical appearance of property and typically cause no property damage. But their mere presence may be alleged to be property damage (for example, alleged on of property). Our objective is to convey that, even if there were property damage (or alleged property damage) by disease-causing microorganisms, there is no coverage. We would not anticipate remediation of property to be the primary exposure here (although it could be, depending on the specific microorganism involved); rather, an allegation of physical damage could be used in an effort to trigger other coverage, such as business income coverage.
2. The definition of "pollutants" is not being replaced. Paragraph C of OP 05 06 and Paragraph D of BP 06 01 and MS HM 08 have the purpose of conveying that a loss caused by a disease-causing microorganism is to be analyzed in accordance with the provisions of the virus/bacteria exclusion in the respective endorsements, with no need to apply the pollution exclusion.

Sheri Cullen  
Policy Form Reviewer  
Property and Casualty Policy Review Section  
October 2, 2006  
Page 2

In addition to responding to your questions, we are taking this opportunity to amend Filing CL-2006-OVBEF in Massachusetts. Pursuant to recent implementation of state-specific "mold" provisions in this state, we are amending the proposed virus/bacteria endorsements to make reference points in the endorsements more explicit. This amendment simply adds a specific reference to the relevant endorsements, retaining the intended treatment of the mold and virus/bacteria provisions. We are hereby also amending the companion rules in Filing CL-2006-OVBER to refer to the newly introduced endorsements in amendment filing CL-2006-OVBEF.

Please advise if you need any additional information.

Sincerely,



Anne M. Casillo, CPCU, ARP, CPIW  
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Government Relations  
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AMC:np  
Encs.