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S.C. SUPREME COURT

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APPENDIX 1

Allianz Global Corporate & Specialty®

Allianz Insurance Policy



Allianz 



December 16, 2019

Dear: Sullivan Management LLC

Re: Policy Number: USC010408190
Issuing Company: Fireman's Fund Insurance Company (AN ALLIANZ COMPANY)

Thank you for choosing Allianz as your insurance company. We appreciate the trust you've placed in us. A copy of your commercial insurance policy is enclosed. Be sure to keep it in a secure place that you can easily access if you have a question or claim.

As a valued policyholder, you can count on Allianz for:

Trust and financial stability – Rated A+ by A.M. Best and AA by Standard and Poor's, Allianz Global Corporate & Specialty earns one of the highest financial ratings of the leading global property and casualty insurers.

Exceptional claim service – Allianz has a 125-year reputation for outstanding claim service built on our commitment to honesty, integrity, and partnership with our clients. The company is ranked as "One of the world's most admired companies" by *Fortune*® and "One of the top global brands in the world" by Interbrand.

The ability to keep pace as your business evolves – Your business needs are continually changing. Whether you are adopting new technologies or expanding into new geographic markets, Allianz has the expertise and resources to grow with you.

We truly look forward to serving you and supporting your business. In the interim, please know that we deeply appreciate your business.

Best regards,

A handwritten signature in black ink, appearing to read "William Scaldaferrri".

Bill Scaldaferrri

President & CEO
Allianz Global Corporate & Specialty, North America


Fireman's Fund Insurance Company

A Stock Company
225 W. Washington Street, Suite 1800
Chicago, IL 60606-3484

COMMON POLICY DECLARATIONS

Policy No: USC010408190
Previous Policy No: MXX80993040

Policy Period: **From: 12/15/2019**
To: 12/15/2020

Beginning and ending at 12:01 a.m., standard time at the mailing address of the Named Insured shown below.

Named Insured and Mailing Address:

Sullivan Management LLC
710 Lady Street, Ste 101
Columbia, SC 29201
USA
(Refer to Named Insured Schedule)

Producer Name and Mailing Address:

Arthur J. Gallagher & Co.
4700 Homewood Court, Suite 260
Raleigh, NC 27609
USA

In return for the payment of the premium, and subject to all terms of this policy, we agree with you to provide the insurance as stated in this policy.

Premium Summary

Property	\$ 60,876
General Liability	\$ 131,292
Certified Terrorism	\$ 3,653
Surcharges, Taxes & Fees	
TX Volunteer Fire	\$ 2.51
Total Amount Payable by the Insured	\$ 195,823.51



Policy No: USC010408190
 Named Insured: Sullivan Management LLC

Fireman's Fund Insurance Company

Named Insured Schedule

Named Insured	Legal Entity
Sullivan Management LLC	Limited Liability Company
Vista Partners, LLC	Limited Liability Company
CAH Harbison, LLC	Limited Liability Company
Killeen CAH LLC	Limited Liability Company
CAH Summeville LLC	Limited Liability Company
Carolina Ale House Operating Company LLC	Limited Liability Company
CAHOC 2, LLC	Limited Liability Company
CAHOC 3, LLC	Limited Liability Company
CAHOC 4, LLC	Limited Liability Company
CAHOC 5, LLC	Limited Liability Company
CAHOC 6, LLC	Limited Liability Company
CAHOC 7, LLC	Limited Liability Company
Texas Development Fund I, LLC	Limited Liability Company
SULOT, LLC	Limited Liability Company
CAHOC 8, LLC	Limited Liability Company
CAHOC 9, LLC	Limited Liability Company
SUMLOT 2, LLC	Limited Liability Company
CAHOC 10, LLC	Limited Liability Company

Business or Operations of the Named Insured: Restaurant Management

Location Schedule

Location	Address	City	County	State	Zip Code	Description
1	277 Columbiana Dr	Columbia	Lexington	SC	29212	1
2	708 Lady St	Columbia	Richland	SC	29201	2
3	113 S Main St	Greenville	Greenville	SC	29601	3
4	203 Robert C Daniel Jr Pkwy	Augusta	Richmond	GA	30909	4
5	1115 Woodruff Rd	Greenville	Greenville	SC	29607	5
6	3124 E Central Texas Expy	Killeen	Bell	TX	76543	6
7	191 Sigma Dr	Summerville	Berkeley	SC	29486	7
8	145 Calhoun St	Charleston	Charleston	SC	29401	8
9	2915 Hollywood Dr	Myrtle Beach	Horry	SC	29577	9
10	1342 Broadcloth St	Fort Mill	YORK	SC	29715	10



Policy No: USC010408190
 Named Insured: Sullivan Management LLC

Fireman's Fund Insurance Company

Location Schedule, Continued

Location	Address	City	County	State	Zip Code	Description
11	101 Sigma Dr	Summerville	Berkeley	SC	29486	11
12	Corner of Rose & Sigma drive	Summerville	DORCHESTER	SC	29483	12
13	710 Lady St	Columbia	Richland	SC	29201	13



Policy No: USC010408190
 Named Insured: Sullivan Management LLC

Fireman's Fund Insurance Company

Forms Schedule

The following policy forms and endorsements have been attached to and made a part of the policy at Inception:

Form Title	Form Number
Signature Page	145990 08 17
Policyholder Messages	
Reporting a Claim	05GE0002 05 16
Important Disclosure Notice Regarding Terrorism Coverage	386359 01 15
Policyholder Message	386636 08 17
Property	
Policyholder Message	386556 11 07
General Liability	
Policyholder Message - Silica Particles Exclusion	386396 05 04
Property	
Disclosure of Premium and Estimated Premium for Certified Acts of Terrorism Coverage (Pursuant to Terrorism Risk Insurance Act)	145927 01 15
Property Coverage Section - Declarations	
Property-Gard Pinnacle Coverage Form	250000 01 13
Property-Gard Pinnacle - Additional Covered Causes of Loss	250001 01 13
Property-Gard Pinnacle - Employee Theft and Forgery or Alteration Coverage - Limited	250037 01 13
Property-Gard Pinnacle - Restaurant Extension Endorsement	250038 01 13
Property-Gard Pinnacle - Equipment Breakdown Coverage Endorsement	250048 01 13
Property-Gard Pinnacle - Conditional Vacancy Exclusion	250050 01 13
Property-Gard Pinnacle - South Carolina State Exception Endorsement	250112 01 13
General Liability	
Disclosure of Premium and Estimated Premium for Certified Acts of Terrorism Coverage (Pursuant to Terrorism Risk Insurance Act)	145927 01 15
Silica Particles Exclusion	145917 06 04
Economic or Trade Sanctions Compliance	145985 06 14
Calculation of Premium	IL 00 03 09 08
Common Policy Conditions	IL 00 17 11 98
Nuclear Energy Liability Exclusion Endorsement (Broad Form)	IL 00 21 09 08
South Carolina Changes - Cancellation and Nonrenewal	IL 02 49 09 08
General Liability Coverage Section - Declarations	
Commercial General Liability Coverage Form	CG 00 01 04 13
Liquor Liability Coverage Form	CG 00 33 04 13



Policy No: USC010408190
 Named Insured: Sullivan Management LLC

Fireman's Fund Insurance Company

Forms Schedule, *Continued*

Form Title	Form Number
Exclusion - Access or Disclosure of Confidential or Personal Information and Data-Related Liability - With Limited Bodily Injury Exception	CG 21 06 05 14
Exclusion-Coverage C-Medical Payments	CG 21 35 10 01
Employment - Related Practices Exclusion	CG 21 47 12 07
Liquor Liability - Bring Your Own Alcohol Establishments	CG 24 06 04 13
Products/Completed Operations Hazard Redefined	CG 24 07 01 96
Complete Lead Poisoning and Lead Contamination Exclusion	CG 70 92 12 92
Complete Asbestos Exclusion	CG 70 93 12 92
Multicover - Without Medical Payments	CG 71 93 01 14
Amendment - Medical Payments For Restaurants	CG 72 52 12 07
Personal and Advertising Injury Hazard Redefined	CG 72 75 06 07
Fungi or Bacteria Exclusion	CG 72 77 04 08
Emergency First Aid Endorsement	CG 72 86 12 08
Employee Benefits Administration Errors and Omissions Insurance	EB 70 00 12 97



SIGNATURE PAGE

IN WITNESS WHEREOF, the Company indicated on the Declarations Page of the policy has caused the policy to be signed by its President and Secretary.

A handwritten signature in black ink, appearing to read "Julie A. Green", written over a horizontal line.

Secretary

A handwritten signature in black ink, appearing to read "William Sculbafu", written over a horizontal line.

President



Reporting a Claim

Allianz Global Corporate & Specialty is committed to providing insureds and clients with effective claim service.

In the event of an incident which may result in a claim, an actual claim, or your receipt of suit papers, please follow the procedures outlined below.

PROCEDURES FOR REPORTING CLAIMS

NOTICE OF EACH INCIDENT, CLAIM OR SUIT SHOULD IMMEDIATELY BE REPORTED TO:

Allianz Global Corporate & Specialty

Phone Number: 1-888-347-3428

or

Fax Number: 1-800-511-3720

Please fill out the online claim reporting form which is available at www.agcs.allianz.com/usclaims or send an email to CIFNOL@ffic.com. For assistance contact your agent or broker.



Important Disclosure Notice Regarding Terrorism Coverage - 386359 01 15

This notice applies to the type(s) of insurance provided under this policy that are subject to the Terrorism Risk Insurance Act, as amended ("The Act"). You are hereby notified that under The Act, you have a right to purchase insurance coverage for losses arising out of **certified acts of terrorism**, as defined in Section 102(1) of The Act: The term **certified act of terrorism** means any act or acts that are certified by the Secretary of the Treasury, in accordance with the provisions of the federal Terrorism Risk Insurance Act, as amended, to be an act of terrorism; to be a violent act or an act that is dangerous to human life, property; or infrastructure; to have resulted in damage within the United States, or outside the United States in the case of an air carrier or vessel or the premises of a United States mission; and to have been committed by an individual or individuals as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

YOU SHOULD KNOW THAT WHEN COVERAGE IS PROVIDED BY THIS POLICY FOR LOSSES RESULTING FROM **CERTIFIED ACTS OF TERRORISM**, SUCH LOSSES MAY BE PARTIALLY REIMBURSED BY THE UNITED STATES GOVERNMENT UNDER A FORMULA ESTABLISHED BY FEDERAL LAW. HOWEVER, YOUR POLICY MAY CONTAIN OTHER EXCLUSIONS WHICH MIGHT AFFECT YOUR COVERAGE, SUCH AS AN EXCLUSION FOR NUCLEAR EVENTS. UNDER THE FORMULA, THE UNITED STATES GOVERNMENT GENERALLY REIMBURSES 85% THROUGH 2015; 84% BEGINNING ON JANUARY 1, 2016; 83% BEGINNING ON JANUARY 1, 2017; 82% BEGINNING ON JANUARY 1, 2018; 81% BEGINNING ON JANUARY 1, 2019 AND 80% BEGINNING ON JANUARY 1, 2020 OF COVERED TERRORISM LOSSES EXCEEDING THE STATUTORILY ESTABLISHED DEDUCTIBLE PAID BY THE INSURANCE COMPANY PROVIDING THE COVERAGE. THE PREMIUM CHARGED FOR THIS COVERAGE IS PROVIDED BELOW AND DOES NOT INCLUDE ANY CHARGES FOR THE PORTION OF LOSS THAT MAY BE COVERED BY THE FEDERAL GOVERNMENT UNDER THE ACT.

YOU SHOULD ALSO KNOW THAT THE TERRORISM RISK INSURANCE ACT, AS AMENDED, CONTAINS \$100 BILLION CAP THAT LIMITS U.S. GOVERNMENT REIMBURSEMENT AS WELL AS INSURER'S LIABILITY FOR LOSSES RESULTING FROM **CERTIFIED ACTS OF TERRORISM** WHEN THE AMOUNT OF SUCH LOSSES IN ANY ONE CALENDAR YEAR EXCEEDS \$100 BILLION. IF THE AGGREGATE INSURED LOSSES FOR ALL INSURERS EXCEEDS \$100 BILLION, YOUR COVERAGE MAY BE REDUCED.

Our records indicate that you previously accepted our offer of terrorism coverage, which was made at the time we issued our quote. Accordingly, the policy referenced above includes coverage for **certified acts of terrorism**, as defined in The Act. If your policy provides workers compensation coverage, you cannot reject that coverage because applicable workers compensation laws in your state mandate that this coverage be included. No additional action on your part is required at this time.

If you have any questions about this or any other insurance matter, please contact your agent or broker representing the Allianz Global Risks US Companies.

This Form must be attached to Change Endorsement when issued after the policy is written.
One of the **Allianz Global Risks US Companies** as named in the policy.



Policyholder Message

386636 08 17

Important Information for Policyholders

If you have questions about your policy, please contact your independent agent or broker. If you have additional questions, you can contact the company issuing the policy listed on your Declarations page at the following address:

Allianz Global Risks US Insurance Company
225 W. Washington Street, Suite 1800
Chicago, IL 60606-3484

Toll Free Telephone: 1-(888) 466-7883

Toll Free Telephone for Claims: 1-(800) 870-8857

Website: <http://www.agcs.allianz.com/>

Website Address for Support Services: <http://www.agcs.allianz.com/global-offices/united-states/support-services/>

The information above supersedes any other Company contact information you may have received with your policy.



Policyholder Message - 386556 11 07

South Carolina - Potential Eligibility For Windstorm Loss Mitigation Premium Discounts Advisory Notice to Policyholders - 386556

The purpose of this Notice is to advise you that you may be eligible for a reduction in the premium for your Commercial Property insurance if certain steps have been taken to prevent or reduce damage from windstorm. The discounts, if any, would apply only to the portion of the premium attributable to wind coverage.

Contact your producer or insurer for additional information.

This Form must be attached to Change Endorsement when issued after the policy is written.
One of the **Allianz Global Risks US Companies** as named in the policy.

386556 11-07
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Policyholder Message - Silica Particles Exclusion - 386396 05 04

THIS MESSAGE IS INTENDED TO ALERT YOU OF CHANGES TO YOUR POLICY. THIS MESSAGE DOES NOT REPLACE ANY PROVISION OF YOUR POLICY OR ANY ENDORSEMENT TO YOUR POLICY. PLEASE REVIEW YOUR POLICY AND THE ENDORSEMENTS FOR COMPLETE COVERAGE INFORMATION.

Silica Particles Exclusion

Your policy contains a silica particles exclusion.

If you have any questions, please contact your Allianz Global Risks US Companies® insurance representative.



Cross-Product Endorsements

(See Forms Schedule on Common
Declarations for applicability)



Disclosure of Premium and Estimated Premium for Certified Acts of Terrorism Coverage (Pursuant to Terrorism Risk Insurance Act) 145927 01 15

This Endorsement is attached to and made part of your policy in response to the disclosure requirements of the Terrorism Risk Insurance Act.

A. Disclosure of Premium

In accordance with the federal Terrorism Risk Insurance Act, as amended, we are required to provide you with a notice disclosing the portion of your premium, if any, attributable to coverage for terrorist acts certified under the Terrorism Risk Insurance Act, as amended ("**certified acts of terrorism**"). The portion of your premium attributable to such coverage is shown in the policy Declarations. This premium is based on the rates in effect at the time of policy issuance or policy anniversary and was calculated for the full term of the current policy period.

B. Disclosure of Federal Participation in Payment of Terrorism Losses

The United States Government, Department of the Treasury, will pay a share of terrorism losses insured under the federal program. The federal share equals 85% through 2015; 84% beginning on January 1, 2016; 83% beginning on January 1, 2017; 82% beginning on January 1, 2018; 81% beginning on January 1, 2019 and 80% beginning on January 1, 2020 of that portion of the amount of such insured losses that exceeds the applicable insurer retention. However, if aggregate insured losses attributable to terrorist acts certified under the Terrorism Risk Insurance Act, as amended, exceed \$100 billion in a calendar year, the Treasury shall not make any payment for any portion of the amount of such losses that exceed \$100 billion.

C. Cap on Insurer Participation in Payment of Terrorism Losses

If aggregate insured losses attributable to terrorist acts certified under the Terrorism Risk Insurance Act, as amended, exceed \$100 billion in a calendar year and we have met our insurer deductible under the Terrorism Risk Insurance Act, as amended, then we shall not be liable for the payment of any portion of the amount of such losses that exceeds \$100 billion, and in such case insured losses up to that amount are subject to pro rata allocation in accordance with procedures established by the Secretary of the Treasury.

D. Possibility of Additional or Return Premium

The premium for **certified acts of terrorism** coverage is calculated based in part on the federal participation in payment of terrorism losses as set forth in the Terrorism Risk Insurance Act, as amended. If the federal program terminates or if the level or terms of federal participation change, the premium charge for acts of terrorism as shown in the Declarations of this policy may also change. If this policy contains a Conditional Exclusion, continuation of coverage for **certified acts of terrorism**, or termination of such coverage, will be determined upon disposition of the federal program, subject to the terms and conditions of the Conditional Exclusion. If this policy does not contain a Conditional Exclusion, coverage for **certified acts of terrorism** will continue. In either case, when disposition of the federal program is determined, we will recalculate the premium charge made for those acts of terrorism covered by the Terrorism Risk Insurance Act, as amended, that remain covered by this policy after the disposition of the federal program. We will calculate the premium charge as follows:

1. We will calculate the pro-rated premium shown in the Declarations for **certified acts of terrorism** from the effective date of your policy to the date of expiration or change of the federal program.
2. We will calculate the pro-rated premium charge for acts of terrorism that remain covered for the policy period that remains in effect from the expiration or change of the federal Program to the anniversary or expiration date of your policy.



3. We will add the amount determined in D.1. above to the amount determined in D.2. above. Such premium will be your revised annual premium for coverage for acts of terrorism.
 - a. If the revised annual premium determined above is an additional premium, this additional premium may be waived by us for the remainder of the policy term.
 - b. If the revised annual premium determined above is a return premium, we will refund this amount to you.

All other terms and conditions of the policy remain unchanged.



PROPERTY



PROPERTY COVERAGE SECTION - DECLARATIONS

- These Declarations, together with the Common Policy Declarations and Policy Conditions, Coverage Form(s) and any Endorsement(s), complete this policy.
- If a coverage shown in the Declarations does not show a corresponding Limit of Insurance, then no insurance is provided for such coverage.
- If "0", "N/A", or "not covered" appears as a Limit of Insurance in the Declarations for a described coverage, then no insurance is provided for such described coverage.
- If the term "included" appears as a Limit of Insurance in the Declarations for a described coverage, then the Limit of Insurance for such coverage is included within, not in addition to, the applicable Limit of Insurance shown in the Declarations for Business Real Property, Business Personal Property, or Business Income and Extra Expense.
- If one or more numbers are shown in the Location(s) column of these Declarations, then each number represents that specific location(s) as displayed on the Common Policy Declarations. If the word **"ALL"** is shown in the Location(s) column shown in these Declarations, then such word means **Locations 1-13** as displayed on the Common Policy Declarations

Property–Gard Pinnacle Coverage Form (250000 01 13)

Limits of Insurance

Location(s)	Subject(s) of Insurance	Limit of Insurance	Limit Type	Actual Cash Value
1-5, 7-10	Business Personal Property	\$ 6,663,000	Blanket	No
1-7, 9-11	Business Real Property	\$ 15,449,457	Blanket	No
1-5, 7-10	Business Income, Extra Expense	\$ 12,715,000	Blanket	No

Business Income and Extra Expense Coverage Includes Ordinary Payroll unless limited or excluded below:

Business Personal Property Subject to Sublimits of Insurance

Subject of Insurance	Location(s)	Sublimits
Accounts Receivable	ALL	\$ 1,000,000
Data, Media, Software	ALL	\$ 1,000,000
Personal Effects	ALL	\$ 500,000
Personal Property of Others	ALL	\$ 500,000
Prototypes	ALL	\$ 250,000
Research and Development Documentation	ALL	\$ 250,000
Valuable Papers and Records	ALL	\$ 250,000

Deductibles

Schedule

Location(s)	Subjects of Insurance	Deductible
1-5, 7, 9-10	Business Real Property	\$ 5,000



Deductibles, Continued

Location(s)	Subjects of Insurance	Deductible
1-5, 7, 9-10	Business Personal Property	\$ 5,000
6, 11	Business Real Property	\$ 5,000
8	Business Personal Property	\$ 5,000
1-5, 7, 9-10	Time Element	\$ 5,000
8	Time Element	\$ 5,000

Extensions of Coverage

Property Damage	Location(s)	Limit of Insurance	Deductible
Consequential Loss Assumption Coverage	ALL	\$ 100,000	Policy Deductible
Contract Penalty Clause Coverage	ALL	\$ 100,000	Policy Deductible
Debris Removal Coverage			
Debris of Property Insured	ALL	\$ 5,000,000	No Deductible
Debris of Property Owned by Others	ALL	\$ 100,000	Policy Deductible
Extended Warranty Coverage	ALL	\$ 100,000	Policy Deductible
Fine Arts Coverage			
Miscellaneous Unscheduled Fine Arts			
Any One Item, Pair or Set	ALL	\$ 10,000	Policy Deductible
Per Occurrence or Loss Event	ALL	\$ 250,000	Policy Deductible
Fine Arts while at an Exhibition, Exposition, Fair, or Trade Show	ALL	\$ 25,000	Policy Deductible
Fire Department Service Charge Coverage	ALL	\$ 100,000	Policy Deductible
Fire Equipment Protection Coverage	ALL	\$ 100,000	No Deductible
Installation Coverage	ALL	\$ 100,000	Policy Deductible
Loss Avoidance or Mitigation Coverage	ALL	\$ 100,000	No Deductible
Mobile Communication Equipment Coverage	ALL	\$ 100,000	Policy Deductible
Money and Securities Coverage	ALL	\$ 100,000	Policy Deductible
Money Orders and Counterfeit Currency Coverage	ALL	\$ 100,000	Policy Deductible
Realty Tax Coverage	ALL	\$ 100,000	Policy Deductible
Removal of Property Coverage	ALL	\$ 100,000	No Deductible
Reward Coverage			
Any One Person	ALL	\$ 10,000	No Deductible
Per Occurrence or Loss Event	ALL	\$ 50,000	No Deductible
Salesperson's Samples Coverage	ALL	\$ 100,000	Policy Deductible
Tenant's Lease Agreement Coverage	ALL	\$ 100,000	Policy Deductible
Theft of Precious Commodities Coverage	ALL	\$ 25,000	Policy Deductible



Extensions of Coverage, Continued

Business Income and Extra Expenses	Location(s)	Limit of Insurance	Deductible	Miles or Days
Business Access Coverage	ALL	\$ 500,000	24 Hour(s)	1 Mile(s)
Civil Authority Coverage	ALL	\$ 500,000	24 Hour(s)	1 Mile(s)
Delayed Occupancy Coverage	ALL	\$ 100,000	Policy Deductible	
Expediting Expense Coverage	ALL	\$ 100,000	No Deductible	
Extended Business Income and Extra Expense Coverage				
Business Income Coverage	ALL		No Deductible	180 Day(s)
Extra Expense Coverage	ALL		No Deductible	180 Day(s)
Leasehold Interest Coverage	ALL	\$ 250,000	Policy Deductible	
Research and Development Operations Coverage	ALL	\$ 250,000	Policy Deductible	
Tenant Moving Coverage	ALL	\$ 250,000	Policy Deductible	
Dependent Property Coverage		See Below	See Below	

Property, Business Income and Extra Expenses	Location(s)	Limit of Insurance	Deductible
Communicable Disease Coverage			
Per Occurrence or Loss Event	ALL	\$ 250,000	Policy Deductible
Annual Aggregate	ALL	\$ 250,000	
Fungus Remediation Coverage	ALL	\$ 100,000	Policy Deductible
Loss Adjustment Expense Coverage	ALL	\$ 100,000	Policy Deductible
Newly Acquired Location Coverage	ALL	\$ 1,000,000	Policy Deductible
Ordinance or Law Coverage - Coverage A through E		See Below	See Below
Outdoor Trees, Shrubs, Plants, and Lawn Coverage			
Any One Tree, Shrub, Plant, or Lawn	ALL	\$ 1,000	No Deductible
Per Occurrence or Loss Event	ALL	\$ 100,000	Policy Deductible
Pollutant Cleanup Coverage			
Per Occurrence or Loss Event	ALL	\$ 100,000	Policy Deductible
Annual Aggregate	ALL	\$ 100,000	
Trade Show Coverage	ALL	\$ 250,000	Policy Deductible
Transit Coverage			
Your Vehicles	ALL	\$ 100,000	Policy Deductible
Carriers for Hire	ALL	\$ 100,000	Policy Deductible
International Air Shipments	ALL	\$ 100,000	Policy Deductible
Unintentional Property Errors and Omissions Coverage	ALL	\$ 1,000,000	Policy Deductible
Unnamed Location Coverage	ALL	\$ 1,000,000	Policy Deductible



Extensions of Coverage, Continued

Property, Business Income and Extra Expenses	Location(s)	Limit of Insurance	Deductible
Utility Services Coverage	ALL	\$ 500,000	
Business Income Deductible			24 Hours
Overhead Transmission Lines and Equipment: Excluded			

Ordinance or Law Coverage

Location(s)	Coverage A	Coverage B & C Blanket	Coverage D	Coverage E
ALL	Included	\$ 1,000,000	\$ 1,000,000	\$ 1,000,000

Dependent Property

Unscheduled Dependent Property

Dependent Property Address	Blanket Per Occurrence Limit(s) of Insurance	Time Element Deductible	Time Element Minimum Deductible
Unscheduled	\$ 1,000,000	24 Hour(s)	\$ 2,500

Endorsements

Property-Gard Pinnacle - Additional Covered Causes of Loss (250001 01 13)

Earth Movement

Location(s)	Limit Type	Per Loss Event	Annual Aggregate
ALL	Blanket	\$ 3,000,000	\$ 3,000,000

Location(s)	Property Damage Deductible	Time Element Deductible
ALL	\$ 25,000	

Flood

Location(s)	Limit Type	Per Loss Event	Annual Aggregate
ALL	Blanket	\$ 3,000,000	\$ 3,000,000

Location(s)	Property Damage Deductible	Time Element Deductible
ALL	\$ 25,000	


Property-Gard Pinnacle - Employee Theft and Forgery or Alteration Coverage - Limited (250037 01 13)

Limits of Insurance Employee Theft and Forgery or Alteration - Limited		
Coverage Description	Limits of Insurance	Deductible
Employee Theft and Forgery or Alteration - Limited		
Property of Your Client - Inside the Premises of a Client	\$ 10,000	Policy Deductible
Per Occurrence	\$ 50,000	
Annual Aggregate	\$ 50,000	Policy Deductible

Property-Gard Pinnacle - Restaurant Extension Endorsement (250038 01 13)

Extensions of Coverage Applicable only to Business Income and Extra Expense Coverage			
Coverage Description	Limit of Insurance	Deductible Time Element Loss	Minimum Time Element Deductible
Off Premises Special Event Cancellation Coverage	\$ 50,000	24 Hours	\$ 5,000

Extensions of Coverage Applicable to Property, Business Income and Extra Expense Coverage				
Coverage Description	Limit of Insurance	Deductible Property Damage Loss	Deductible Time Element Loss	Minimum Time Element Deductible
Contaminated Food Coverage				
Per Occurrence or Loss Event	\$ 50,000		24 Hours	\$ 5,000
Annual Aggregate	\$ 50,000			
Refrigerant Contamination Coverage	\$ 0		24 Hours	\$ 5,000

Property-Gard Pinnacle - Equipment Breakdown Coverage Endorsement (250048 01 13)

Equipment Breakdown Coverage is subject to the Limits of Insurance shown in the Property-Gard Pinnacle - Equipment Breakdown Coverage Endorsement - 250048, except as specifically shown below. If no limit is shown below, then the limit shown in the Property-Gard Pinnacle - Equipment Breakdown Coverage Endorsement - 250048 will apply.

Equipment Breakdown Coverage Limits of Insurance	
Coverage Description	Limit of Insurance Per Accident
Property Insured	Follows Applicable Limit
Business Income Coverage	Follows Applicable Limit


Property-Gard Pinnacle - Equipment Breakdown Coverage Endorsement (250048 01 13), Continued

Equipment Breakdown Coverage Limits of Insurance	
Coverage Description	Limit of Insurance Per Accident
Extra Expense Coverage	Follows Applicable Limit
Expediting Expense Coverage	\$ 250,000
Hazardous Substance Coverage	\$ 250,000
Perishable Stock Coverage	\$ 250,000
Data Restoration Coverage	\$ 250,000
Service Interruption Coverage	\$ 50,000
Fungus Remediation Coverage	\$ 50,000

Equipment Breakdown Coverage Deductibles	
Deductible Description	Deductible Per Accident
Property Insured	Follows Applicable Deductible
Time Element Loss	Follows Applicable Deductible



Property-Gard - Pinnacle® Coverage Form - 250000 01 13

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Property-Gard Pinnacle® Coverage Form - 250000 01 13

Commercial Property Coverage Section

This Property-Gard Pinnacle Coverage Form - 250000 (hereinafter referred to as "Coverage Form"), together with its Declarations and endorsements, complete the coverage provided under the Commercial Property Coverage Section of this Policy.

- Insurance is provided only for those coverages for which an entry is shown by an X on the applicable line and for which Limits of Insurance are shown in the place provided in the Declarations attached to this Policy. Such Declarations are issued with and are a part of this Coverage Form.
- If the Declarations do not show a Limit of Insurance providing a specific Coverage or Coverage Extension, then such Coverage or Coverage Extension is not provided by this Policy even though the language for such Coverage or Coverage Extension may appear within the Policy.
- Various provisions in this Coverage Form restrict coverage, such as but not limited to the following sections: Property Not Insured, Exclusions, Limitations of Coverage, and Limits of Insurance.
- Section XII. Loss Conditions describe your duties in the event of a loss and other provisions which apply to loss settlement under the Commercial Property Coverage Section.
- Section XIII. General Conditions describe the conditions that apply in common to all coverage provided within the Commercial Property Coverage Section.
- Endorsements describe enhancements in coverage or restrictions in coverage which may amend this Coverage Form or the Declarations.
- State Exception or State Amendatory Endorsements alter coverage provided under the Commercial Property Coverage Section in accordance with state law.

The titles of paragraphs contained in this Coverage Form and the subsequent endorsements that make up the Commercial Property Coverage Section are inserted solely for the convenience of reference and shall not be deemed in any way to limit or affect the provisions to which they relate.

Throughout the Commercial Property Coverage Section the words you and your refer to the Named Insured shown on the Declarations. The words we, us and our, refer to the Company providing this insurance.

Other words and phrases that appear in **bold face** have special meaning. Refer to the Definitions Section of this Coverage Form or the Additional Definitions Section located within any endorsements that may be attached which make up the Commercial Property Coverage Section.

Read the entire Policy carefully to determine rights, duties and what is and is not covered.

This Form must be attached to Change Endorsement when issued after the policy is written.
One of the **Allianz Global Risks US Companies** as named in the policy.

Secretary

President



I. Property Coverage

A. If a Limit of Insurance for Business Real Property or Business Personal Property is shown in the Declarations, then we will pay for direct physical loss or damage to **Property Insured** while at a **location**, including such property in the open (or in a **vehicle** in the open) within 1,000 feet of such **location**, caused by or resulting from a **covered cause of loss** during the Policy Period.

B. We insure **Property Insured**:

1. Which you own;
2. In which you have an insurable interest; or
3. Which you lease or rent from others under a written agreement.

For coverage to apply to property leased or rented from others, you must be legally or contractually required to provide property insurance covering such property.

C. The following types of **business personal property** are subject to Sublimits of Insurance shown in the Declarations:

1. **Accounts receivable**;
2. **Data, media, and software**;
3. **Personal effects**;
4. **Personal property of others**;
5. **Prototypes**;
6. **Research and development documentation**; and
7. **Valuable papers and records**.

The Sublimits of Insurance applicable to the types of **business personal property** shown above are the most we will pay for loss or damage to such property. If more than one Sublimit of Insurance applies to the lost or damaged property shown above, then the Sublimit of Insurance most specifically applicable to such property will apply.

II. Business Income and Extra Expense Coverage

A. If a Limit of Insurance for Business Income and Extra Expense is shown in the Declarations, then we will pay for the actual loss of **business income** and necessary **extra expense** you sustain due to the necessary **suspension** of your **operations** during the **period of restoration** arising from direct physical loss or damage to property at a **location**, or within 1,000 feet of such **location**, caused by or resulting from a **covered cause of loss**.

B. If a Sublimit of Insurance is shown in the Declarations applicable to a type of **business personal property** listed in Item I.C. above, then any payments under Business Income and Extra Expense, made necessary due to the loss or damage of such types of **business personal property**, are included within and not in addition to such Sublimit of Insurance.

III. Property Not Insured

This Coverage Form does not insure any of the following property:

- A. Land or land values; destabilization of land; or the cost of stabilizing, restoring, or remediating of land; air; or water; except **processing water**.
- B. Digging, excavating, backfilling, filling, compaction, or grading of land not directly related to the repair, rebuilding, or replacement of **business real property**.
- C. Growing crops; standing timber; or outdoor trees, shrubs, plants, or lawns; except to the extent such coverage may be specifically provided by Item V.F.6. Outdoor Trees, Shrubs, Plants, and Lawn Coverage in this Coverage Form, if the Declarations show that you have such coverage.



- D. Live eggs, embryos, or animals; except animals owned by others while in your care, custody, or control; or animals you sell as **stock**.
- E. Bullion; accounts, notes, bills, evidences of debt or title, letters of credit, or deeds; except to the extent such coverage may be specifically provided by **business personal property** for **valuable papers and records** in this Coverage Form, if the Declarations show that you have such coverage
- F. **Fine arts, money, securities, or salesperson's samples** except to the extent such coverage may be specifically provided by:
 - 1. Item V.D.5. Fine Arts Coverage;
 - 2. Item V.D.11. Money and Securities Coverage; or
 - 3. Item V.D.16. Salespersons Samples Coverage;
 in this Coverage Form, if the Declarations show that you have such coverage(s).
- G. Aircraft, spacecraft, satellites, watercraft while afloat, and any property contained therein.
- H. **Vehicles** including **vehicles** held for sale.
- I. Dams, dikes, tunnels, trestles, air-supported structures, underground mines, mine shafts, caverns, caves, and any property contained therein.
- J. Property which you have sold under conditional sale, trust agreement, installment payment or other deferred payment plan, or property which you have retained a security interest after delivery to customers.
- K. Contraband or property in the course of illegal transportation or trade.
- L. Confidential information of another person or entity which is held by you including, financial information, medical information, personal information, credit card information, or other similar non-public information.
- M. Property which is more specifically described and covered under another Coverage Section of this Policy or under any other Policy.

IV. Exclusions

- A. Exclusions Applicable to all Coverages: We will not pay under Property Coverage, Business Income and Extra Expense Coverage, or any Extensions of Coverage, for any loss, damage, or expense caused directly or indirectly by or resulting from any of the following excluded causes of loss; such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss:
 - 1. Regardless of how the cause of loss occurs, we will not pay for direct physical loss, damage, or expense caused by or resulting from the following causes of loss:
 - a. Boiler Explosion

Explosion, implosion, bursting, burning, bulging, or cracking of boilers, turbines, engines, or any unfired vessel normally subject to vacuum or internal pressure, including piping, or apparatus attached to and forming a part thereof; or any other internal condition or event occurring inside such equipment. This exclusion does not apply to explosion of gases or fuel within the furnace of any fired vessel, or within the flues or passages through which the gases of combustion pass.
 - b. Collapse

Collapse. This Collapse exclusion only applies if **collapse** is caused by or results from **flood or earth movement**.
 - c. Consequential Loss, Loss of Market, and Other Indirect Losses
 - (1) Delay, loss of use, loss of market, loss of occupancy;
 - (2) Suspension, lapse, or cancellation of any contract;
 - (3) Delay in completion of contract terms or noncompliance with contract terms or conditions;



- (4) Any guarantee or warranty (express or implied);
 - (5) Loss of bonuses, fines, penalties, or liquidated damages; or
 - (6) Any other consequential, indirect, or remote loss of any kind.
- d. Detrimental Code

Detrimental Code. This Detrimental Code exclusion applies regardless of how the **Detrimental Code** was introduced or acquired.
- e. Disappearance or Shortages
 - (1) The disappearance of covered property ("covered property" here and hereinafter refers to property not excluded or limited from coverage in this Coverage Form) where there is no physical evidence to show what happened to such property; or the only evidence of loss is an audit, an inventory computation, or a profit and loss computation; or any combination thereof.
 - (2) Where you have independently established that you have sustained an otherwise insurable loss under this Coverage Form, then you may offer your audit, inventory computation, profit and loss computation, or any combination thereof in support of the amount of loss claimed.
- f. Dishonesty
 - (1) Dishonest, fraudulent, or criminal acts or omissions by you, any of your partners, **members, managers**, officers, directors, trustees, employees (including leased employees), authorized representatives, or anyone to whom you entrust property for any purpose:
 - (a) Acting alone or in collusion with others; or
 - (b) Whether or not occurring during the hours of employment.
 - (2) This Dishonesty exclusion does not apply to:
 - (a) Covered property that is entrusted to others who are bailees or carriers for hire; or
 - (b) Acts of vandalism or destruction by any of your employees (including leased employees), but theft by any of your employees (including leased employees) is not covered.
- g. Fungus

Fungus. This Fungus exclusion does not apply to **fungus** caused by or resulting from fire, explosion, or lightning, provided that such causes of loss are **covered causes of loss** under this Coverage Form.
- h. Mortality and Disease

Mortality, death by natural causes, disease, sickness, any condition of health, bacteria, or virus.
- i. Ordinance or Law

The enforcement of any **ordinance or law**, except to the extent such coverage may be specifically provided by Item V.F.5. Ordinance or Law Coverage in this Coverage Form, if the Declarations show that you have such coverage.
- j. Testing
 - (1) Hydrostatic, pneumatic, or gas pressure testing; or
 - (2) Electrical insulation breakdown testing of any type of electrical equipment.
- k. Voluntary Parting

Voluntary parting with any property by you or anyone else to whom you have entrusted the property if induced to do so by any fraudulent scheme, trick, device, or false pretense; or unauthorized instructions to transfer property to any person or any place.
- l. War and Military Action



- (1) War, including undeclared or civil war;
 - (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign, or other authority using military personnel or other agents; or
 - (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority or military authority, whether de jure or de facto, in hindering or defending against any of these.
2. If a cause of loss which is excluded below causes or results in a **covered cause of loss**, then we will pay for the direct physical loss or damage caused by or resulting from such **covered cause of loss** up to the Limits of Insurance stated in the Declarations:
 - a. Computer Fraud

Theft of any property, regardless of ownership, arising from the use of any computer.
 - b. Errors, Omissions, Acts, or Decisions

Errors or omissions in, or faulty, inadequate, or defective:

 - (1) Manufacturing, processing, installation, research or development, or testing operations;
 - (2) Accounting, bookkeeping, calibrating, copying, developing, distributing, math, record-keeping, billing, erasure, or the alteration of such errors or omissions;
 - (3) Development of, programming of, or instructions to: **Data, media, or software; electronic data processing equipment; mobile communication equipment; voice communications systems;** or any other machinery or equipment;
 - (4) Specifications; design; planning; zoning; development; surveying; siting; grading; compaction; maintenance; workmanship; repair; or materials used in repair, construction, renovation, or remodeling except if **collapse** is caused by or results from this cause of loss, but only if such cause of loss is hidden or is not known by you prior to such **collapse**; or
 - (5) Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body other than you;

which results in loss or damage to **Property Insured** under this Coverage Form.
 - c. Mechanical Breakdown

Mechanical breakdown however caused, including any malfunction of machinery or equipment caused by or resulting from any:

 - (1) Rupture or bursting caused by centrifugal force; or
 - (2) Condition or event within machinery or equipment.
 - d. Insects, Animals, or Other Vermin

Insects, animals, or other vermin including any:

 - (1) Nesting or infestation; or
 - (2) Discharge or release of any secretions or waste products.

This exclusion does not apply if **collapse** is caused by or results from this cause of loss, but only if such cause of loss is hidden or is not known by you prior to such **collapse**.
 - e. Pollution
 - (1) The actual, alleged, or threatened discharge, dispersal, seepage, migration, release, or escape of **pollutants**.
 - (2) If the discharge, dispersal, seepage, migration, release, or escape of **pollutants** is caused by or results from a **covered cause of loss**, then we will pay for the direct physical loss or



damage caused by the actual contact of the **pollutant** with covered property up to the Limits of Insurance stated in the Declarations.

f. Theft of Precious Commodities

Theft of jewelry comprised of precious or semi-precious stones, metals, or alloys; precious or semi-precious stones, metals or alloys; watches or watch movements; furs, fur garments, or garments trimmed with fur.

g. Utility Supply Failure

The reduction, interruption, or failure of **utility services**, however caused.

h. Wear and Tear, Deterioration, Latent Defect, or Other Developing Losses

The action or effects of:

- (1) Smog, smoke, fumes, vapors, dust, or other developing losses such as **pollutants** from agricultural smudging or industrial operations;
 - (2) Wear and tear, deterioration, decomposition, inherent vice, hidden or latent defect, any quality in property that causes it to damage or destroy itself, erosion, rust, oxidation, corrosion, decay, wet or dry rot, except if **collapse** is caused by or results from this cause of loss, but only if such cause of loss is hidden or is not known by you prior to such **collapse**;
 - (3) Depletion, leakage of contents, or spillage;
 - (4) Cracking, settling, sagging, bending, bulging, shifting, or leaning;
 - (5) The pressure or impact of ice forming under floors or foundations;
 - (6) Water, ice, or impact of watercraft on retaining walls, bulkheads, docks, piers, pilings, wharves and property located thereon;
 - (7) Spoilage or contamination;
 - (8) Exposure to light;
 - (9) Change in color, flavor, texture, or finish;
 - (10) Evaporation or dissipation;
 - (11) Shrinkage or expansion;
 - (12) Any refrigerant including ammonia; or
 - (13) Condensation, vapor, moisture, humidity, changes in humidity, dampness or dryness of atmosphere, changes in or extremes of temperature, all whether atmospheric or not.
3. If fire or explosion is a **covered cause of loss** under this Coverage Form, and fire or explosion results from the causes of loss excluded below, then we will pay for the direct physical loss or damage caused by such fire or explosion up to the Limits of Insurance stated in the Declarations:
- a. Earth Movement

Any **earth movement**. This Earth Movement exclusion does not apply to Transit Coverage.
 - b. Flood

Flood. This Flood exclusion does not apply to Transit Coverage.
4. If fire is a **covered cause of loss** under this Coverage Form, and fire results from the cause of loss excluded below, then we will pay for the direct physical loss or damage caused by such fire up to the Limits of Insurance stated in the Declarations:
- Electrical Arcing



- a. Artificially generated electrical, magnetic, or electromagnetic energy that damages, disturbs, disrupts, or otherwise interferes with any:
 - (1) Electrical or electronic wire, device, appliance, system, or network; or
 - (2) Device, appliance, system, or network utilizing cellular or satellite technology.
- b. For the purpose of this exclusion, electrical, magnetic, or electromagnetic energy includes but is not limited to:
 - (1) Electrical current, including arcing;
 - (2) Electrical charge produced or conducted by a magnetic or electromagnetic field;
 - (3) Pulse of electromagnetic energy; or
 - (4) Electromagnetic waves or microwaves.

5. Nuclear Hazard

Nuclear reaction, nuclear radiation, or radioactive contamination, however caused. If nuclear reaction, nuclear radiation, or radioactive contamination results in fire, then we will pay for the direct physical loss or damage caused by or resulting from such fire up to the Limits of Insurance stated in the Declarations but only if there is a statute in effect in the jurisdiction where the loss or damage occurs that expressly prohibits us from excluding such ensuing loss or damage caused by fire.

6. Government Action

Actions or orders of any governmental agency or military authority, whether de jure or de facto, that result in:

- a. You incurring expenses you would not otherwise have incurred;
- b. You paying taxes, fines, or penalties; or
- c. Seizure or destruction of covered property.

If fire is a **covered cause of loss** under this Coverage Form, and acts of destruction are ordered by a governmental or military authority in order to prevent the spread of a fire, then we will pay for the direct physical loss or damage to covered property caused by or resulting from such acts of destruction up to the applicable Limits of Insurance stated in the Declarations.

B. Exclusions Applicable to Business Income and Extra Expense Coverage: We will not pay for any loss or expense under Business Income and Extra Expense Coverage or any Extensions of Coverage, caused by or resulting from:

- 1. Damage to or destruction of **finished stock** or the time required to reproduce **finished stock**. This exclusion does not apply to **extra expense**.
- 2. Any increase in loss caused by or resulting from:
 - a. Delay in rebuilding, repairing, or replacing property or resuming **operations** due to interference at the location of loss by strikers or other persons.
 - b.
 - (1) Suspension, lapse, or cancellation of any license, lease, rental agreement, or contract.
 - (2) However, if the suspension, lapse, or cancellation is directly caused by a **suspension of operations** which is caused by or resulting from a covered loss, then we will cover your loss of **business income** and **extra expense** incurred during the **period of restoration**. If Extended Business Income and Extra Expense Coverage applies, then we will also cover the **period of restoration** in accordance with the terms of such coverage provided below under Item V.E.6.
 - c. The **extra expense** you incur for the demolition or removal of debris.



- d. Any period of time during which your **operations** could not have been conducted or were not expected to have been conducted had no loss or damage occurred.

V. Extensions of Coverage

- A. The Extensions of Coverage are subject to the terms and conditions of this Coverage Form and the Policy to which it is attached. If the Declarations do not show a Limit of Insurance providing a specific Coverage Extension, then such Coverage Extension is not provided by this Policy even though the language for such Coverage Extension may appear within the Policy.
- B. We will not pay under Business Income and Extra Expense Coverage or consequential loss of any kind or nature following a covered loss sustained under the Extensions of Coverage unless specifically provided within an Extension of Coverage. If an Extension of Coverage does grant Business Income and Extra Expense Coverage, then such coverage will be governed by the terms and conditions of Business Income and Extra Expense Coverage provided under this Coverage Form.
- C. Unless otherwise specifically stated, the Limits of Insurance or Sublimits of Insurance provided under the Extensions of Coverage are in addition to any Limit of Insurance stated in the Declarations applicable to **Property Insured** or Business Income and Extra Expense Coverage.
- D. Extensions of Coverage Applicable only to Property Coverage:
 - 1. Consequential Loss Assumption Coverage
 - a. We will pay the reduction in **fair market value** of the undamaged parts of **stock**, which are part of a pair or set, when the reduction in **fair market value** is caused by direct physical loss or damage by a **covered cause of loss** to other parts of the pair or set at a location and the undamaged parts cannot be used in conjunction with other **stock**.
 - b. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Consequential Loss Assumption Coverage.
 - 2. Contract Penalty Clause Coverage
 - a.
 - (1) We will pay the contractual penalties you are required to pay to your customers, as a result of any clause in contracts you enter into prior to a loss, for failure to timely deliver your product according to the contract terms.
 - (2) Such penalties must solely result from direct physical loss or damage to **Property Insured** caused by or resulting from a **covered cause of loss** at a location.
 - b. The most we will pay under this Extension of Coverage in any one occurrence or **loss event**, regardless of the number of contracts affected, is the Limit of Insurance shown in the Declarations applicable to Contract Penalty Clause Coverage.
 - 3. Debris Removal Coverage
 - a. Debris of Property Insured

If direct physical loss or damage occurs to **Property Insured** caused by or resulting from a **covered cause of loss** at a location, then we will pay the necessary expense you incur to remove the debris from such location. Necessary debris removal expense includes:

 - (1) Planning, testing, monitoring, and debris classification related to the process of debris removal;
 - (2) Demolition of damaged property; and
 - (3) Clean up, removal, and disposal of debris.
 - b. Debris of Property Owned by Others



We will also pay the necessary expense you incur at a location to remove the debris of property owned by others, not covered under this Policy, but only if such debris is caused by or resulting from a **covered cause of loss**.

- c. We will not pay under Debris Removal Coverage for:
 - (1) Any expense to:
 - (a) Demolish and clear the site of the undamaged portion of **Property Insured**;
 - (b) Extract **pollutants** from land, water or air;
 - (c) Remove, restore, or replace polluted land, water, or air; or
 - (d) Otherwise test for, monitor, mitigate, clean up, remove, contain, treat, remediate, detoxify, neutralize, or in any way respond to or assess the effects of **pollutants**.
 - (2) A claim that has been reported to us in writing after one hundred eighty (180) consecutive calendar days from the date that covered loss or damage occurred.
- d. Subject to the applicable Limit of Insurance shown in the Declarations for **Property Insured**, the most we will pay under this Extension of Coverage in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations for Debris Removal Coverage - Debris of Property Insured, or Debris Removal Coverage - Debris of Property Owned by Others, or both, as may be applicable.

4. Extended Warranty Coverage

- a. If a **covered cause of loss** results in a direct total physical loss to an item of **Property Insured** at a location, then we will pay the unused pro-rata portion of the non-refundable purchase price for extended warranties or service contracts which you purchased for such destroyed property. An extended warranty does not include the basic warranty that is provided by the manufacturer of the destroyed property.
- b. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Extended Warranty Coverage.

5. Fine Arts Coverage

- a. We will pay for direct physical loss or damage to **fine arts** caused by or resulting from a **covered cause of loss**, but only while located within the interior portion of a **premises** at a **location**.
- b. We will also pay for direct physical loss or damage to **fine arts** caused by or resulting from a **covered cause of loss** while such property is away from a **location** and:
 - (1) In transit to;
 - (2) Situated at; and
 - (3) In transit back from;
 an exhibition, exposition, fair, or trade show, but only while within the Coverage Territory.
- c. We will not pay under Fine Arts Coverage for any loss, damage, or expense caused by or resulting from:
 - (1) Any **fine arts** while leased, rented, or loaned to others.
 - (2) Any **fine arts** while in the possession of others under an agreement of sale.
 - (3) Any repairing, restoration, refinishing, or retouching processes.
 - (4) Any waterborne shipments except when **fine arts** are being transported on a **vehicle** aboard a licensed ferry on an inland waterway. If property covered under Fine Arts Coverage suffers loss or damage while being transported on such **vehicle**, then we will pay for general average and salvage charges that may be assessed against such **vehicle**.
 - (5) Shipments covered by ocean marine or cargo insurance.



- d. Miscellaneous Unscheduled Fine Arts
 - (1) The most we will pay under this Extension of Coverage for any one item, pair of items, or set of related items, in any one occurrence or **loss event**, is the Limit of Insurance shown in the Declarations applicable to Miscellaneous Unscheduled Fine Arts under Fine Arts Coverage.
 - (2) The most we will pay under this Extension of Coverage in any one occurrence or **loss event**, regardless of the number of **fine arts** lost or damaged, is the Per Occurrence Limit of Insurance shown in the Declarations applicable to Miscellaneous Unscheduled Fine Arts under Fine Arts Coverage.
- e. Individually Scheduled Fine Arts

The most we will pay under this Extension of Coverage for each individually scheduled item of **fine art** in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to such item of **fine art**.
- f. Fine Arts at an Exhibition, Exposition, Fair, or Trade Show

The most we will pay under Item 5.b. of this Extension of Coverage for **fine art**, whether individually scheduled or not, in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Fine Arts at an Exhibition, Exposition, Fair, or Trade Show.
- 6. Fire Department Service Charge Coverage
 - a. If a fire department or other government agency charged with preserving public safety is called to save or protect **Property Insured** against direct physical loss or damage from a **covered cause of loss** at a location, then we will pay the fire department service charges you incur and are legally required to pay.
 - b. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Fire Department Service Charge Coverage.
- 7. Fire Protection Equipment Coverage
 - a. (1) We will pay the necessary costs to recharge or refill **fire protection equipment**, and clean up and remove the fire extinguishing agent, caused by or resulting from the discharge of a fire extinguishing agent from **fire protection equipment** at a location.
 - (2) No deductible applies to Fire Protection Equipment Coverage
 - b. We will not pay under Fire Protection Equipment Coverage for any loss, damage, or expense caused by or resulting from your failure to use reasonable care to maintain the **fire protection equipment** in proper operating condition prior to the loss.
 - c. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Fire Protection Equipment Coverage.
- 8. Installation Coverage
 - a. (1) We will pay for direct physical loss or damage to **business personal property** destined to become a permanent part of an installation or erection that you have contracted to perform at a location not specifically described in the Declarations caused by or resulting from a **covered cause of loss**:
 - (a) While awaiting installation at a temporary warehouse;
 - (b) During installation or testing at a job site; or
 - (c) While awaiting acceptance by the buyer.
 - b. (2) Installation Coverage terminates the earlier of the following events:



- (a) Your interest in the property that you have contracted to install or erect ceases;
 - (b) The installation or erection of the property is completed and accepted by the buyer;
 - (c) The property you have contracted to install or erect is put to use for its intended purpose; or
 - (d) This Policy expires or is cancelled.
 - b. We will not pay under Installation Coverage for any loss, damage, or expense caused by or resulting from:
 - (1) **Business personal property** destined to become a permanent part of the installation or erection while at a location that you own, lease, or operate;
 - (2) **Business personal property** while at the location of a manufacturer or supplier, whether or not such property is designated for a specific installation covered under Installation Coverage; or
 - (3) Interest on money loaned, advances for installation projects, or **soft costs**.
 - c. The most we will pay under this Extension of Coverage in any one occurrence or **loss event**, regardless of the number of locations involved, is the Limit of Insurance shown in the Declarations applicable to Installation Coverage.
9. Loss Avoidance or Mitigation Coverage
- a. We will pay the necessary expense you incur to protect, avoid, or significantly mitigate potential covered loss or damage that is actually and imminently threatening **Property Insured**, including:
 - (1) Removal of ice or snow from the roof or balconies of **business real property** that has accumulated during and due to a **storm**;
 - (2) Pumping of standing water away from **business real property** that has accumulated during and due to a **flood, hurricane, named storm, or storm**;
 - (3) Application of fire retardant foam or similar fire suppression or extinguishing material to **business real property** as protection against an approaching fire; and
 - (4) Boarding up or sandbagging of doors, windows, or other external openings in **business real property** as protection against an approaching **flood, hurricane, named storm, or storm**.

However, we will not pay for any loss, damage, or expense caused by or resulting from such loss prevention actions.
 - b. No Deductible applies to Loss Avoidance or Mitigation Coverage.
 - c. To the extent possible, you must promptly notify us that you intend to incur necessary loss prevention expense.
 - d. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Loss Avoidance or Mitigation Coverage.
10. Mobile Communication Equipment Coverage
- a. We will pay for direct physical loss or damage to your **mobile communication equipment** caused by or resulting from a **covered cause of loss** while away from a location and situated in anywhere the world.
 - b. We will not pay under Mobile Communications Equipment Coverage for any loss or damage to **data, research and development documentation, or valuable records and papers**.
 - c. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Mobile Communication Equipment Coverage.
11. Money and Securities Coverage



- a. We will pay for direct physical loss or damage to **money, securities**, or both as shown by your records, caused by or resulting from a **covered cause of loss** while:
 - (1) Located within the interior portions of a **premises**; or
 - (2) Being carried to or from such **premises** while in the care, custody, or control of a **messenger** or an armored motor vehicle company.
 - b. We will not pay under Money and Securities Coverage for any loss, damage, or expense caused by or resulting from **forgery**, alterations, or the giving or surrendering of **money, securities**, or both in exchange or purchase.
 - c. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Money and Securities Coverage.
12. Money Orders and Counterfeit Currency Coverage
- a. We will pay for your loss which directly results from you accepting:
 - (1) **Counterfeit** United States or Canadian currency not accepted upon presentation; or
 - (2) **Counterfeit** money orders purporting to have been issued by any United States or Canadian post office, express company, or bank not paid upon presentation;
 in good faith and in exchange for merchandise, **money**, or services.
 - b. The most we will pay under this Extension of Coverage in any one occurrence, regardless of the number of items contributing to the loss, is the Limit of Insurance shown in the Declarations applicable to Money Orders and Counterfeit Currency Coverage.
13. Realty Tax Coverage
- a. If direct physical loss or damage to **Property Insured** is caused by or results from a **covered cause of loss** at a location, then we will reimburse you for the increased realty tax liability attributable to the repair or rebuilding of such damaged property.
 - b. We will pay for such increased realty tax liability if it is assessed within two (2) years of a covered loss. However, we will only pay the first such increased assessment following any realty tax assessment increase that is insured under this Extension of Coverage.
 - c. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Realty Tax Coverage.
14. Removal of Property Coverage
- a. (1) If you must move **Property Insured** from a location in order to protect such property from imminent or further direct physical loss or damage caused by or resulting from a **covered cause of loss**, then we will pay for direct physical loss or damage caused by a **covered cause of loss** to **Property Insured** while such property is:
 - (a) Being moved to a safe temporary storage location;
 - (b) Situated at a safe temporary storage location;
 - (c) Being returned from a safe temporary storage location to its original **location**; or
 - (d) In the due course of **transit** between such locations.
 - (2) We will also pay the necessary expense associated with moving **Property Insured** to a safe temporary storage location in order to avoid loss or damage. Such expense includes transportation and renting storage space at a safe temporary storage location.
 - (3) Removal of Property Coverage applies for one hundred and twenty (120) consecutive calendar days from the date **Property Insured** is removed from a **location**.
 - (4) No Deductible applies to Removal of Property Coverage.



- b. We will not pay under Removal of Property Coverage for any loss, damage, or expense while **Property Insured** is removed from a **location** for normal storage.
- c. The most we will pay under this Extension of Coverage in any one occurrence or **loss event**, including any **Property Insured** while in the due course of **transit**, is the Limit of Insurance shown in the Declarations applicable to Removal of Property Coverage.

15. Reward Coverage

- a. (1) We will reimburse you the rewards you pay for information leading to the arrest and subsequent conviction of the person or persons responsible for a covered loss under this Coverage Form caused by or resulting from an unlawful act.
(2) No deductible applies to Reward Coverage.
- b. (1) The most we will pay under this Extension of Coverage in any one occurrence or **loss event** for any one person is the Any One Person Limit of Insurance shown in the Declarations applicable to Reward Coverage.
(2) The most we will pay under this Extension of Coverage in any one occurrence or **loss event**, regardless of the number of people being rewarded, is the Per Occurrence or Loss Event Limit of Insurance shown in the Declarations applicable to Reward Coverage.

16. Salesperson's Samples Coverage

- a. We will pay for direct physical loss or damage to **salesperson's samples** caused by or resulting from a **covered cause of loss** while located anywhere within the Coverage Territory.
- b. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Salesperson's Samples Coverage.

17. Tenant's Lease Agreement Coverage

- a. If a Limit of Insurance for Business Real Property is not shown in the Declarations, then we cover **business real property** at a **location** you have leased or rented and is occupied by you, if your lease or rental agreement specifically requires you to insure such property or makes you responsible for loss or damage to such property. We cover such **business real property** against direct physical loss or damage caused by or resulting from a **covered cause of loss**.
- b. Item XIII.P. Other Insurance does not apply to Tenant's Lease Agreement Coverage if your lease or rental agreement specifically requires you to provide primary insurance on the property described above in Item V.D.17.a. or makes you responsible for loss or damage to such property.
- c. The most we will pay under this Extension of Coverage in any one occurrence or **loss event**, regardless of the number of property items lost or damaged, is the Limit of Insurance shown in the Declarations applicable to Tenant's Lease Agreement Coverage.

18. Theft of Precious Commodities Coverage

- a. We will pay for direct physical loss or damage to the following property at a **location** caused by or resulting from **theft**: Jewelry comprised of precious or semi-precious stones, metals, or alloys; precious or semi-precious stones, metals or alloys; watches or watch movements; furs, fur garments, or garments trimmed with fur.
- b. The most we will pay under this Extension of Coverage in any one occurrence or **loss event**, regardless of the number of items lost or damaged, is the Limit of Insurance shown in the Declarations applicable to Theft of Precious Commodities Coverage.

E. Extensions of Coverage Applicable only to Business Income and Extra Expense Coverage:

If the Declarations show a Limit of Insurance for Business Income and Extra Expense Coverage, then the following Extensions of Coverage apply, but only if the Declarations also show that you have such Extensions of Coverage:



1. Business Access Coverage

- a. We will pay for the actual loss of **business income** and necessary **extra expense** you sustain due to the necessary **suspension** of **operations** at a **location** if access to such **location** is impaired or obstructed. Such impairment or obstruction must:
 - (1) Arise from direct physical loss or damage to property other than at such **location**; and
 - (2) Be caused by or result from a **covered cause of loss**; and
 - (3) Occur within the number of miles stated in the Declarations from such **location**.
- b. We will not pay under Business Access Coverage for **business income** loss or **extra expense** incurred caused by or resulting from action of civil authority or military authority.
- c. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Business Access Coverage.

2. Civil Authority Coverage

- a. We will pay for the actual loss of **business income** and necessary **extra expense** you sustain due to the necessary **suspension** of your **operations** caused by action of civil authority that prohibits access to a **location**. Such prohibition of access to such **location** by a civil authority must:
 - (1) Arise from direct physical loss or damage to property other than at such **location**; and
 - (2) Be caused by or result from a **covered cause of loss**; and
 - (3) Occur within the number of miles stated in the Declarations from such **location**.
- b. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Civil Authority Coverage.
- c. Actions of civil authority do not include actions of military authority.

3. Delayed Occupancy Coverage

- a. We will pay for the actual loss of **business income** and necessary **extra expense** you sustain due to the necessary delay in starting **operations** during the **period of restoration** arising from direct physical loss or damage to property at a **location** caused by or resulting from a **covered cause of loss**. The **period of restoration** begins immediately after the time that **operations** would have begun if the covered loss or damage had not occurred.
- b. If a covered loss occurs under Delayed Occupancy Coverage, then we will also pay for the necessary **soft costs** you incur which are over and above such expense that you would have incurred during the **period of restoration** had there been no loss.
- c. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Delayed Occupancy Coverage.

4. Dependent Property Coverage

- a. Dependent Property Coverage
 - (1) We will pay for the actual loss of **business income** and necessary **extra expense** you sustain due to the necessary **suspension** of **operations** during the **period of restoration** at a **location**.
 - (2) The **suspension** must be due to direct physical loss or damage at the **location** of a **dependent property**, situated inside or outside of the Coverage Territory, caused by or resulting from a **covered cause of loss**.
- b. Dependent Property Coverage does not insure any loss or damage caused by or resulting from **earth movement, fire protection equipment leakage from earth movement, flood, hurricane, named storm, or storm** causes of loss unless:



- (1) Such causes of loss are included as **covered causes of loss** in this Coverage Form or an endorsement attached to this Coverage Form which comprises a part of the Commercial Property Coverage Section; and
 - (2) Such causes of loss are also shown as included in the Declarations applicable to Dependent Property Coverage.
 - c. We will reduce the amount of your:
 - (1) **Business income loss**, other than **extra expense**, to the extent you can resume **operations**, in whole or in part, by using any other available source of materials, or outlet for your products; and
 - (2) **Extra expense** loss to the extent you can return **operations** to normal and discontinue such **extra expense**.
 - d. With respect to Dependent Property Coverage the **period of restoration** begins immediately after the time that direct physical loss or damage occurs at the **location** of the **dependent property** caused by or resulting from a **covered cause of loss**.
 - e. The most we will pay under this Extension of Coverage in any one occurrence or **loss event**, regardless of the number of **locations** or **dependent properties** involved, is the Limit of Insurance shown in the Declarations applicable to Dependent Property Coverage.
5. Expediting Expense Coverage
- a. (1) We will pay the necessary **expediting expense** you sustain due to direct physical loss or damage to property at a **location** caused by or resulting from a **covered cause of loss**.
 - (2) No Deductible applies to Expediting Expense Coverage.
 - b. We will not pay under Expediting Expense Coverage for:
 - (1) Expenses recoverable elsewhere under this Coverage Form or the Commercial Property Coverage Section of this Policy, such as but not limited to Extra Expense Coverage; or
 - (2) Your costs incurred for the temporary rental of property or temporary replacement of damaged property.
 - c. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Expediting Expense Coverage.
6. Extended Business Income and Extra Expense Coverage
- a. If a **business income** and **extra expense** loss is covered under this Coverage Form, then subject to the Limit of Insurance for Business Income and Extra Expense Coverage:
 - (1) We will pay for the actual loss of **business income** you sustain during the period that begins on the date property (except **finished stock**) is actually repaired, rebuilt, or replaced, and **operations** are resumed and ends on the earlier of:
 - (a) The date you could restore your **operations** with reasonable speed, to the level which would generate the **business income** amount that would have existed if no direct physical loss or damage occurred; or
 - (b) The number of consecutive calendar days, stated in the Declarations, after the date **operations** are resumed.
 - (2) We will pay the necessary **extra expense** you incur for advertising, direct mail, discount coupons, or other promotional expense you incur to attract customers back to **your business** during the period that begins on the date property (except **finished stock**) is actually repaired, rebuilt, or replaced, and **operations** are resumed and ends on the earlier of:



- (a) The date you could restore your **operations** with reasonable speed, to the level which would generate the **business income** amount that would have existed if no direct physical loss or damage occurred; or
 - (b) The number of consecutive calendar days, stated in the Declarations, after the date **operations** are resumed.
 - b. We will not pay for the loss of **business income** or **extra expense** sustained as a result of unfavorable business conditions caused by the impact of the **covered cause of loss** in the area where the **location** is situated.
7. Leasehold Interest Coverage
- a. We will pay for the actual loss of the following Leasehold Interest Coverages you sustain due to the cancellation of your lease which results from direct physical loss or damage to property at a location caused by or resulting from a **covered cause of loss**:
 - (1) Lessee's Leasehold Interest Coverage
 - (a) If you are a lessee and your lease or rental agreement is cancelled pursuant to the terms of the lease agreement due to a covered loss, then we will pay you for your Gross Lessee's Leasehold Interest for the first twelve (12) months following covered loss and for your **net leasehold interest** for the remaining unexpired term of the lease or rental agreement.
 - (b) Gross Lessee's Leasehold Interest means the difference between the actual rent you currently pay for the same or similar replacement property and the rent you would have otherwise paid at the location had there been no covered loss for each month during the unexpired term of your lease or rental agreement.
 - (c) Rent means the actual monthly rent including taxes, insurance, janitorial, or other services that you pay for as part of the rent and does not change whether you occupy all or part of the location or if you sublet the location.
 - (2) Lessor's Leasehold Interest Coverage
 - (a) If you are a lessor and your lease or rental agreement is cancelled pursuant to the terms of the lease agreement due to a covered loss, then we will pay you for your Gross Lessor's Leasehold Interest for the first twelve (12) months following covered loss and for your **net leasehold interest** for the remaining unexpired term of the lease or rental agreement.
 - (b) Gross Lessor's Leasehold Interest means the difference between the actual rent paid by a tenant for your property and the rent you would have otherwise received at the location had there been no covered loss for each month during the unexpired term of your lease or rental agreement.
 - (c) Rent means the actual monthly rent including taxes, insurance, janitorial, or other services that you charge as part of the rent for the location.
 - (3) Bonus Payments Coverage

We will pay you for the unamortized portion of a bonus payment that will not be refunded to you due to a covered loss. A bonus payment is a sum of money you paid to acquire your lease. Bonus payments do not include rent, whether or not prepaid, or security deposits.
 - (4) Prepaid Rent Coverage

We will pay you for the unamortized portion of prepaid rent that will not be refunded to you due to a covered loss. Prepaid rent is a sum of money you paid as advance rent. Prepaid rent does not include the customary rent due at the beginning of each month or any other rental period.
 - (5) Tenant's Improvements and Betterments Coverage

We will pay you for the unamortized portion of payments made by you for **tenant's improvements and betterments** that will not be refunded to you due to a covered loss.



Tenant's Improvements and Betterments Coverage does not include the value of such improvements and betterments recoverable under any other insurance, but only to the extent of such other insurance.

- b. If you suffer a loss under this Additional Coverage, then you must use any suitable property or service owned or controlled by you or obtainable from another source in order to reduce any loss sustained under Leasehold Interest Coverage.
 - c. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Leasehold Interest Coverage.
8. Research and Development Operations Coverage
- a. We will pay for the actual loss of **business income** and necessary **extra expense** you sustain during the **period of restoration**, due to a necessary **suspension** of your **research and development operations**, which in turn causes a delay in the introduction of a new product or the enhancement of an existing product.
 - b. The **suspension** must be caused by direct physical loss or damage by a **covered cause of loss** to property directly related to your **research and development operations** at a **location**.
 - c. Payment will be made only:
 - (1) After the new product or the enhanced product is made available in the marketplace; and
 - (2) If you discover the **business income** loss within two years after the date of loss or damage.
 - d. If a competitor introduces a similar product prior to the date you scheduled the introduction of your new or enhanced product, then we will reduce the amount of such actual **business income** loss to the extent attributable to the competitor's product.
 - e. We will not pay under this Extension of Coverage for the loss of **business income** or **extra expense** you incur solely due to loss or damage to **research and development documentation**.
 - f. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Research and Development Operations Coverage.
9. Tenant Moving Coverage
- a. We will pay the necessary **tenant moving costs** incurred by tenants who temporarily vacate a portion of your **premises** that is rendered untenable due to direct physical loss or damage to property at such location caused by or resulting from a **covered cause of loss**.
 - b. The tenant who has moved out of the **premises** must move back to such **premises** within 60 days after the damaged portion of the covered **business real property** rented by the tenant has been repaired or rebuilt and is ready for occupancy or we will not pay the **tenant moving costs** related to such tenant move-back.
 - c. We will pay for **tenant moving costs** related to moving out of and moving back to the **premises** whether or not the tenants have moved back before the expiration date of this Policy.
 - d. The most we will pay under this Extension of Coverage in any one occurrence or **loss event**, regardless of the number of tenants requiring relocation, is the Limit of Insurance shown in the Declarations applicable to Tenant Moving Coverage.
- F. Extensions of Coverage Applicable to Property, Business Income, and Extra Expense Coverages:
1. Communicable Disease Coverage
- a. (1) We will pay for direct physical loss or damage to **Property Insured** caused by or resulting from a covered **communicable disease event** at a location including the following necessary costs incurred to:



- (a) Tear out and replace any part of **Property Insured** in order to gain access to the **communicable disease**;
 - (b) Repair or rebuild **Property Insured** which has been damaged or destroyed by the **communicable disease**; and
 - (c) Mitigate, contain, remediate, treat, clean, detoxify, disinfect, neutralize, cleanup, remove, dispose of, test for, monitor, and assess the effects the **communicable disease**.
- (2) If the Declarations show a Limit of Insurance for Business Income and Extra Expense Coverage, then we will pay for the actual loss of **business income** and necessary **extra expense** you sustain due to the necessary **suspension of operations** during the **period of restoration**. The **suspension** must be due to direct physical loss or damage to property at a location caused by or resulting from a covered **communicable disease event**.
- b. (1) We will not pay under Communicable Disease Coverage for any loss, damage, or expense caused by or resulting from:
 - (a) A loss incurred prior to the Policy Period shown in the Declarations;
 - (b) Testing or monitoring to assess the existence, concentration, or effects of a **communicable disease** or **pollutants** beyond ninety (90) consecutive calendar days following the date when damaged property is remediated, repaired, rebuilt, or any combination thereof; or
 - (c) A claim that has been reported to us in writing after thirty (30) consecutive calendar days from the date the **public health authority** ordered the location to be evacuated, decontaminated, or disinfected due to the **communicable disease event**.
 - (d) A covered loss under Communicable Disease Coverage does not create, nor will it invoke coverage for Debris Removal Coverage, as described above under Item V.D.3. of this Coverage Form, except as provided by Communicable Disease Coverage.
- c. (1) The most we will pay under this Extension of Coverage in any one occurrence or **loss event** including **business income**, **extra expense**, and debris removal, is the Per Occurrence or Loss Event Limit of Insurance shown in the Declarations applicable to Communicable Disease Coverage.
- (2) The most we will pay under this Extension of Coverage in all occurrences or **loss events** during any one Policy Period is the **Annual Aggregate** Limit of Insurance shown in the Declarations applicable to Communicable Disease Coverage.
- 2. Fungus Remediation Coverage
 - a. (1) If **fungus** is caused by or results from a **covered cause of loss** other than fire, explosion, or lightning at a location, then we will pay for the necessary expense incurred to:
 - (a) Tear out and replace any part of **Property Insured** in order to gain access to **fungus**;
 - (b) Repair or rebuild **Property Insured** which has been damaged or destroyed by **fungus**; and
 - (c) Mitigate, contain, remediate, treat, clean, detoxify, disinfect, neutralize, cleanup, remove, dispose of, test for, monitor, and assess the effects of **fungus**.
 - (2) (a) If the Declarations show a Limit of Insurance for Business Income and Extra Expense Coverage, then we will pay for the actual loss of **business income** and necessary **extra expense** you sustain during the increased **period of restoration** due to the presence of **fungus**.
 - (b) Such increased **period of restoration** caused by the presence of **fungus** includes any increased period of time beyond the **period of restoration** required to remediate **fungus**.



- (c) The expiration date of this Policy will not cut short the increased **period of restoration**
 - b. (1) We will not pay under Fungus Remediation Coverage for any loss, damage, or expense caused by or resulting from:
 - (a) A loss incurred prior to the Policy Period shown in the Declarations;
 - (b) Testing or monitoring to assess the existence, concentration, or effects of **fungus** beyond ninety (90) consecutive calendar days following the date when damaged property is remediated, repaired, rebuilt, or any combination thereof; or
 - (c) A claim that has been reported to us in writing after thirty (30) consecutive calendar days from the date that covered loss or damage occurred.
 - (2) A covered loss under Fungus Remediation Coverage does not create, nor will it invoke coverage for Debris Removal Coverage, as described above under Item V.D.3. of this Coverage Form, except as provided by Fungus Remediation Coverage.
 - c. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** including **business income, extra expense**, and debris removal, is the Limit of Insurance shown in the Declarations applicable to Fungus Remediation Coverage.
3. Loss Adjustment Expense Coverage
- a. If covered loss or damage occurs under this Coverage Form, then we will pay the necessary loss adjustment expenses you incur that would not have been incurred had there not been a covered loss. Loss adjustment expenses include but are not limited to:
 - (1) Extra wages paid to your employees for preparing inventories;
 - (2) Expenses incurred to document your **business income** loss or **extra expense** sustained;
 - (3) Public Accountant or Certified Public Accountant fees;
 - (4) The cost of appraisals; or
 - (5) Other expenses incurred to obtain loss data in support your claim or to complete your proof of loss.
 - b. We will not pay under Loss Adjustment Expense for:
 - (1) Any expenses or fees paid to legal counsel, public adjusters, insurance agents or brokers, property managers, consultants, or any of their employees, representatives or consultants; any of your subsidiaries or affiliates; or
 - (2) Costs you incur to prove if a loss is a covered loss under this Policy.
 - c. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Loss Adjustment Expense.
4. Newly Acquired Location Coverage
- a. (1) We will pay for direct physical loss or damage to **Property Insured** caused by or resulting from a **covered cause of loss** occurring at a newly acquired location not specifically described in the Declarations.
 - (2) If the Declarations show a Limit of Insurance for Business Income and Extra Expense Coverage, then we will pay for the actual loss of **business income** and necessary **extra expense** you sustain due to the necessary **suspension of operations** during the **period of restoration**. The **suspension** must be due to direct physical loss or damage to property at a newly acquired location not specifically described in the Declarations caused by or resulting from a **covered cause of loss**.



- b. (1) For each newly acquired location, Newly Acquired Location Coverage ends one hundred and twenty (120) consecutive calendar days from the date you acquire the location, on the date you report the values of the property to us, or on the date this Policy expires, whichever occurs first..
 - (2) When you report the values of the property to us, you will owe us additional premium from the date of acquisition or the date construction begins.
 - c. We will not pay under Newly Acquired Location Coverage for:
 - (1) Any loss or damage to:
 - (a) **Property Insured** while in **transit**;
 - (b) **Buildings while in the course of construction** for which separate insurance coverage has been obtained and such separate insurance covers your interest;
 - (c) Property acquired through any foreclosure process that you have initiated; or
 - (2) Any loss, damage, or expense caused by or resulting from **earth movement** or **flood**, even if such causes of loss are insured by endorsement to this Policy.
 - d. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** including **business income** and **extra expense** is the Limit of Insurance shown in the Declarations applicable to Newly Acquired Location Coverage.
5. Ordinance or Law Coverage
- a. We will pay under Ordinance or Law Coverage A through E described below if:
 - (1) **Property Insured** at a **location** sustains direct physical loss or damage caused by or resulting from a **covered cause of loss**; and
 - (2) Such covered loss or damage results in the enforcement of a covered **ordinance or law**.
 - b. Coverage A - Loss of Value
 - (1) Loss in Value to the Undamaged Portion of Property Insured

We will pay under Coverage A for the loss in **value** to the undamaged portion of **Property Insured** that is a consequence of the enforcement of an **ordinance or law** which requires the demolition of undamaged parts of such **Property Insured**.
 - (2) Loss in Value of Non-conforming Property
 - (a) We will pay under Coverage A for the loss in value of **non-conforming property**, a portion of which is not repaired or rebuilt as a consequence of the enforcement of any **ordinance or law** that does not permit the repair or rebuilding of **non-conforming property**.
 - (b) If the enforcement of an **ordinance or law** does not permit you to repair or rebuild **Property Insured** to the same height, floor area, number of units, leasable square footage, occupancy, or style that existed immediately preceding covered loss, then Replacement Cost Item VI.A.2.b.(2) will not prohibit coverage for the loss in **value** of the portion of **Property Insured** that is not rebuilt which is provided by Ordinance or Law Coverage A.
 - c. Coverage B - Demolition Cost: We will pay under Coverage B for the amount you actually spend to demolish and clear the site of undamaged parts of **Property Insured** caused by the enforcement of an **ordinance or law** at a **location**.
 - d. Coverage C - Increased Cost of Construction: We will pay the necessary increased costs to repair or rebuild **Property Insured** caused by the enforcement of an **ordinance or law**.
 - e. Coverage D - Increased Period of Restoration:



- (1) If the Declarations show a Limit of Insurance for Business Income and Extra Expense Coverage, then we will pay under Coverage D for the actual loss of **business income** and necessary **extra expense** you sustain during the increased **period of restoration**.
 - (2) With respect only to insurance provided under Coverage D, the **period of restoration** includes any increased period of time beyond the **period of restoration** required to demolish, repair, or rebuild **Property Insured** in order to comply with the minimum standards of any **ordinance or law** in force at the time of loss. The expiration date of this Policy will not cut short the increased **period of restoration**.
- f. Coverage E - Loss of Business Income from Non-Conforming Property
- (1) If the Declarations show a Limit of Insurance for Business Income and Extra Expense Coverage, then we will pay under Coverage E for the actual loss of **business income** and necessary **extra expense** you sustain beyond the **period of restoration** due to the reduction in leasable square footage caused by or resulting from the inability to repair or rebuild a portion of **non-conforming property** at a **location** due to the enforcement of an **ordinance or law**.
 - (2) We will not pay under Coverage E for the same **business income** loss or **extra expense** incurred that is payable under Coverage D - Increased Period of Restoration.
 - (3) The expiration date of this Policy will not cut short the duration of the coverage provided by this Extension of Coverage.
- g. We will not pay under Ordinance or Law Coverage A through E for any loss, damage, or expense caused by or resulting from:
- (1) Compliance with any recommended actions or standards that exceed the actual minimum requirements of a covered **ordinance or law**.
 - (2) The enforcement of any **ordinance or law** which requires:
 - (a) The demolition, repair, rebuilding or remediation of any property due to contamination by **pollutants**; or
 - (b) Any insured or others to test for, monitor, mitigate, clean up, remove, contain, treat, remediate, detoxify, neutralize, or in any way respond to, or assess the effects of **pollutants**.
 - (3) (a) The enforcement of any **ordinance or law** that is attributable to an excluded cause of loss. However, if **Property Insured**:
 - 1) Sustains loss or damage that is covered under this Coverage Form; and
 - 2) Sustains loss or damage that is excluded under this Coverage Form; and
 - 3) Such loss or damage results in the enforcement an **ordinance or law**;
 then we will pay that portion of such loss under Ordinance or Law Coverage equal to the proportion that the covered loss or damage bears to the total loss or damage sustained, not including costs that are a consequence of the enforcement of any **ordinance or law**.
 - (b) If the covered loss or damage, alone, would have resulted in enforcement of the covered ordinance or law, then we will pay the full amount of Ordinance or Law Coverage payable under this Extension of Coverage.
 - (4) Any **ordinance or law** that you were required to comply with before the loss but you failed to comply.
 - (5) The enforcement of any **ordinance or law** which requires alteration, remediation, repair, or rebuilding of any **Property Insured** which has not sustained direct physical loss or damage caused by or resulting from a **covered cause of loss**.



- h. We will not pay under Ordinance or Law Coverage C for any loss, damage, or expense caused by or resulting from increased cost of construction:
 - (1) If the **actual cash value** method of valuation applies to **Property Insured**;
 - (2) If the repair or rebuilding is not intended for similar height, floor area, number of units, leasable square footage, occupancy, style, and like kind and quality of the original **Property Insured** which existed immediately preceding the covered loss or damage, unless such construction characteristic or occupancy is not permitted by an **ordinance or law**;
 - (3) Until the property is actually repaired or rebuilt at the same **location** or another site; or
 - (4) Unless the damaged property is repaired or rebuilt as soon as reasonably possible after the loss or damage, not to exceed two years.
- i.
 - (1) Coverage A through E: The most we will pay under this Extension of Coverage in any one occurrence or **loss event**, regardless of the number of **locations** involved, is the Blanket Limit of Insurance shown in the Declarations applicable to Ordinance or Law Coverage. However, the most we will pay under this Extension of Coverage in any one occurrence or **loss event** with respect to a **location** that has been assigned a Sublimit of Insurance applicable to Ordinance or Law Coverage is the applicable Sublimit of Insurance shown in the Declarations.
 - (2) If the Declarations applicable to Ordinance or Law Coverage show a Blanket Limit of Insurance in conjunction with a Sublimit of Insurance, then such sublimit is included within, not in addition to, the corresponding Blanket Limit of Insurance.
 - (3) Coverage A: If the Limit of Insurance for Coverage A is shown as "included" or a dollar amount is shown in the Declarations, then Coverage A is included within, not in addition to, the Limit of Insurance shown in the Declarations for **Property Insured**.
 - (4) Coverage B - Demolition Cost Coverage: Unless Item V.F.5.i.(6) applies, the most we will pay in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Coverage B.
 - (5) Coverage C - Increased Cost of Construction Coverage: Unless Item V.F.5.i.(6) applies, the most we will pay in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Coverage C.
 - (6) Coverage B and C Blanket:
 - (a) If a Limit of Insurance is shown in the Declarations for Coverage B and C Blanket, then Items V.F.5.i.(4) and (5) described above do not apply. Instead, the most we will pay in any one occurrence or **loss event** under Coverage B and C Blanket is the least of:
 - 1) Any combination of covered losses under Coverage B or Coverage C; or
 - 2) The Limit of Insurance shown in the Declarations applicable to Coverage B and C Blanket.
 - (b) If the Declarations show a Limit of Insurance for Coverage B and C Blanket, in addition to a Limit of Insurance for Coverage B or Coverage C, then only the Coverage B and C Blanket applies.
 - (7) Coverage D - Increased Period of Restoration: The most we will pay in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Coverage D - Increased Period of Restoration.
 - (8) Coverage E - Loss of Business Income from Non-Conforming Property: The most we will pay in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Coverage E - Loss of Business Income from Non-Conforming Property.

6. Outdoor Trees, Shrubs, Plants, and Lawn Coverage



- a. (1) We will pay for direct physical loss or damage to your trees, shrubs, plants, and lawns growing and situated outside of covered **business real property** at a location caused by or resulting from any of the following causes of loss: Aircraft; explosion; fire; lightning; riot or civil commotion; smoke; vandalism or malicious mischief; or **vehicles**.
- (2) Outdoor Trees, Shrubs, Plants, and Lawn Coverage includes the necessary expense incurred to:
 - (a) Trim, remove, replace, replant, or reposition trees, shrubs, plants, or lawns; and
 - (b) Cleanup, remove, and dispose of the debris of covered trees, shrubs, plants, and lawns; anywhere at your location which have suffered covered loss or damage.
- (3) If the Declarations show a Limit of Insurance for Business Income and Extra Expense Coverage, then we will pay for the actual loss of **business income** and necessary **extra expense** you sustain due to the necessary **suspension of operations** during the **period of restoration**. The **suspension** must be due to direct physical loss or damage to your trees, shrubs, plants, and lawns growing and situated at a location caused by or resulting from a **covered cause of loss** described above in Item V.F.6.a.(1).
- b. We will not pay under Outdoor Trees, Shrubs, Plants, and Lawn Coverage:
 - (1) To replace or repair trees, shrubs, plants, or lawns under this Extension of Coverage until such property has been repaired or replaced. However, this restriction does not apply to the cost to remove such property from a location; or
 - (2) For any loss, damage, or expense caused by or resulting from:
 - (a) Outdoor trees, shrubs, plants, or lawn that you hold for sale; or
 - (b) Growing crops.
- c. A covered loss under this Extension of Coverage does not create, nor will it invoke coverage for Debris Removal Coverage, as described above under Section V.D.3. of this Coverage Form, except as provided by Outdoor Trees, Shrubs, Plants, and Lawn Coverage.
- d. (1) The most we will pay under this Extension of Coverage for any one tree, shrub, plant, or lawn, in any one occurrence or **loss event**, is the Limit of Insurance shown in the Declarations applicable to Any One Tree, Shrub, Plant, or Lawn shown under Outdoor Trees, Shrubs, Plants, and Lawn Coverage.
- (2) The most we will pay under this Extension of Coverage in any one occurrence or **loss event**, including **business income**, **extra expense**, and debris removal, is the Per Occurrence or Loss Event Limit of Insurance shown in the Declarations applicable to Outdoor Trees, Shrubs, Plants, and Lawn Coverage.
- 7. Pollutant Cleanup Coverage
 - a. (1) We will pay the necessary expense you incur to cleanup, remove, extract, and dispose of **pollutants** from land, water, or air, at a **location**, if the discharge, dispersal, seepage, migration, release, or escape of such **pollutants** is the result of direct physical loss or damage to **Property Insured** caused by or resulting from a **covered cause of loss** during the Policy Period at a **location**.
 - (2) If the Declarations show a Limit of Insurance for Business Income and Extra Expense Coverage, then we will pay for the actual loss of **business income** and necessary **extra expense** you sustain during the increased **period of restoration** due to the cleanup, removal, extraction, and disposal of **pollutants**
 - (a) Such increased **period of restoration** caused by a covered loss under Pollutant Cleanup Coverage includes any increased period of time beyond the **period of restoration** required to cleanup, remove, extract, and dispose of **pollutants**.



- (b) The expiration date of this Policy will not cut short the increased **period of restoration**.
- b. We will not pay under Pollutant Cleanup Coverage for:
- (1) Any expense caused by or resulting from testing or monitoring to assess the existence, concentration, or effects of **pollutants** beyond ninety (90) consecutive calendar days following the date that **pollutants** have been cleaned up, removed, and extracted from land, water, or air; or
 - (2) A claim that has been reported to us in writing after one hundred and eighty (180) consecutive calendar days from the date that an actual discharge, dispersal, seepage, migration, release, or escape of **pollutants** has occurred.
- c. (1) Suspension, lapse, or cancellation of any license, lease, rental The most we will pay under this Extension of Coverage in any one occurrence or **loss event**, including **business income** and **extra expense**, is the Per Occurrence or Loss Event Limit of Insurance shown in the Declarations applicable to Pollutant Cleanup Coverage.
- (2) The most we will pay under this Extension of Coverage in all occurrences or **loss events** during any one Policy Period is the **Annual Aggregate** Limit of Insurance shown in the Declarations applicable to Pollutant Cleanup Coverage.
8. Trade Show Coverage
- a. (1) We will pay for direct physical loss or damage to **Property Insured** caused by or resulting from a **covered cause of loss** while such property is away from a location within the Coverage Territory and located at an exhibition, exposition, fair, or trade show.
- (2) Trade Show Coverage includes the necessary expense incurred to cleanup, remove, and dispose of the debris of **Property Insured** which is caused by a covered loss.
- b. If the Declarations show a Limit of Insurance for Business Income and Extra Expense Coverage, then we will pay for the actual loss of **business income** and necessary **extra expense** you sustain due to the necessary **suspension of operations** during the **period of restoration**. The **suspension** must be due to direct physical loss or damage to **Property Insured** while located at an exhibition, exposition, fair, or trade show not specifically described in the Declarations caused by or resulting from a **covered cause of loss**.
- c. We will not pay under Trade Show Coverage for any:
- (1) Loss or damage to **fine arts** or **mobile communication equipment**; or
 - (2) Loss, damage, or expense caused by or resulting from **earth movement** or **flood**, even if such causes of loss are insured by endorsement to this Policy.
- d. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** including **business income**, **extra expense**, and debris removal, is the Limit of Insurance shown in the Declarations applicable to Trade Show Coverage.
9. Transit Coverage
- a. (1) Domestic Shipments
- We will pay for direct physical loss or damage to **Property Insured** caused by or resulting from a **covered cause of loss** while in the due course of **transit** by the following modes of transportation anywhere within the Coverage Territory:
- (a) Your Vehicles: This mode of transportation covers **Property Insured** while being transported by a **vehicle** which you own, lease, rent, or operate; and



(b) Carriers for Hire: This mode of transportation covers **Property Insured** while in the care, custody, or control of a carrier for hire including any **vehicle**, rail, or licensed air transportation delivery service.

(2) International Air Shipments

We will pay for direct physical loss or damage to **Property Insured** caused by or resulting from a **covered cause of loss** while in the care, custody, or control of a licensed air transportation delivery service and being shipped:

- (a) By you from any location within the Coverage Territory to anywhere in the world; and
- (b) To you from anywhere in the world to any location within the Coverage Territory.

Coverage applies from the delivery of **Property Insured** at the point of origin shown in the air waybill until it is discharged at the destination shown in the air waybill.

(3) Transit Coverage includes loss or damage to such property caused by or resulting from:

- (a) **Loading and unloading of Property Insured** from a transporting conveyance provided such loss or damage is caused by or results from a **covered cause of loss**;
- (b) Your interest in property shipped Free on Board (F.O.B.) after the title of a shipment passes to the consignee;
- (c) Your interest in property shipments which have been refused by the consignee, ending the earlier of:
 - 1) Fifteen (15) consecutive calendar days after such property has been refused; or
 - 2) The time that the returned shipment of property arrives at a location that you own, lease, or operate;
- (d) Fraud or deceit perpetrated by any person or persons who may represent themselves to be the proper party or parties to receive or accept goods for shipment; or
- (e) The necessary additional expense you incur to inspect, repackage and reship **Property Insured** which has been damaged by a **covered cause of loss**.

(4) If the Declarations show a Limit of Insurance for Business Income and Extra Expense Coverage, then we will pay for the actual loss of **business income** and necessary **extra expense** you sustain due to the necessary **suspension of operations** during the **period of restoration**. The **suspension** must be due to direct physical loss or damage to **Property Insured** while in the due course of **transit** caused by or resulting from a **covered cause of loss**.

b. We will not pay under Transit Coverage for any loss, damage, or expense caused by or resulting from:

- (1) Shipments by mail from the time **Property Insured** passes into the custody of a public or private mail delivery service.
- (2) Any waterborne shipments except when on a **vehicle** aboard a licensed ferry on an inland waterway. If property covered under Transit Coverage suffers loss or damage while on such **vehicle**, then we will pay for general average and salvage charges that may be assessed against such **vehicle**.
- (3) Shipments covered by ocean marine or cargo insurance.
- (4) Property owned by others while you are acting as a carrier for hire, such as but not limited to a common carrier, contract carrier, broker, or freight forwarder.



- (5) Jewelry comprised of precious or semi-precious stones, metals, or alloys; precious or semi-precious stones, metals or alloys; watches or watch movements; furs, fur garments, or garments trimmed with fur; **fine arts; money; securities; or salespersons samples.**
 - (6) Concealed damage to **Property Insured** or expenses you incur to recalibrate or adjust **Property Insured**, unless there are visible marks on the container or packing material surrounding the damaged item, evidencing that direct physical loss or damage was caused by or resulting from an external **covered cause of loss.**
 - c. Expiration or cancellation of this Policy will not interrupt the insurance provided by Transit Coverage until the property being shipped:
 - (1) Is accepted by or on behalf of the consignee or receiver at the intended destination; or
 - (2) Arrives at a location that you own, lease, or operate;
 but for no longer than 30 days after the date of shipment from the point of origination.
 - d. The most we will pay under this Extension of Coverage in any one occurrence or **loss event**, including **business income** and **extra expense**, regardless of the number of **vehicles**, railroad cars, or aircraft involved, are the Limits of Insurance shown in the Declarations applicable to Transit Coverage.
10. Unintentional Property Errors and Omissions Coverage
- a. We will pay for:
 - (1) Direct physical loss or damage to property; and
 - (2) If the Declarations show a Limit of Insurance for Business Income and Extra Expense Coverage, then we will pay for the resulting actual loss of **business income** and necessary **extra expense** you sustain due to the necessary **suspension of operations** during the **period of restoration.**
 - b. We will only pay under Item V.F.10.a. described above if the loss or damage is caused by or results from a **covered cause of loss** which is not payable under this Policy because of an unintentional error or omission at the time of Policy inception in:
 - (1) Determining or reporting values; or
 - (2) Describing or including the address of a location to be included as **Property Insured.**
 Such error or omission shall not void or impair coverage by this Coverage Form to the extent we would have provided coverage had the unintentional error or omission not been made.
 - c. You must report such errors or omissions to us in writing as soon as you discover them and you will pay such additional premium as may be appropriate.
 - d. We will not pay under Unintentional Property Errors and Omissions Coverage for any loss, damage, or expense caused by or resulting from **earth movement** or **flood**, even if such causes of loss are insured by endorsement to this Policy.
 - e. This coverage does not apply if there is coverage available under Newly Acquired Location Coverage, Unnamed Location Coverage, or any other provision in this Policy.
 - f. The most we will pay under this Extension of Coverage in any one occurrence or **loss event**, including **business income** and **extra expense**, is the Limit of Insurance shown in the Declarations applicable to Unintentional Property Errors and Omissions Coverage.
11. Unnamed Location Coverage
- a. (1) If the Declarations show a Limit of Insurance for Business Real Property or Business Personal Property, then we will pay for direct physical loss or damage to such property for which a limit



of insurance is shown and is insured under this Coverage Form while situated at a location not specifically described in the Declarations caused by or resulting from a **covered cause of loss**

- (2) If the Declarations show a Limit of Insurance for Business Income and Extra Expense Coverage, then we will pay for the actual loss of **business income** and necessary **extra expense** you sustain due to the necessary **suspension of operations** during the **period of restoration**. The **suspension** must be due to direct physical loss or damage to property at a location not specifically described in the Declarations caused by or resulting from a **covered cause of loss**.
- b. We will not pay under Unnamed Location Coverage for:
 - (1) Any loss or damage to **Property Insured**:
 - (a) Insured under Newly Acquired Location Coverage;
 - (b) While at an exhibition, exposition, fair, or trade show;
 - (c) While in **transit**;
 - (d) Insured under Installation Coverage;
 - (e) Insured under Mobile Communication Equipment Coverage;
 - (f) That is **mobile equipment**;
 - (g) Acquired through any foreclosure process that you have initiated; or
 - (2) Any loss, damage, or expense caused by or resulting from **earth movement** or **flood**, even if such causes of loss are insured by endorsement to this Policy.
- c. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** including **business income** and **extra expense** is the Limit of Insurance shown in the Declarations applicable to Unnamed Location Coverage.

12. Utility Services Coverage

- a. (1) We will pay for direct physical loss or damage to **Property Insured** at a **location** caused by the interruption of **utility services**. The interruption of **utility services** must result from direct physical loss or damage by a **covered cause of loss** to **utility services** property not owned by you
- (2) If the Declarations show a Limit of Insurance for Business Income and Extra Expense Coverage, then we will pay for the actual loss of **business income** and necessary **extra expense** you sustain due to the necessary **suspension of operations** during the **period of restoration** caused by the interruption of **utility services**. The interruption of **utility services** and subsequent **suspension of operations** must be due to direct physical loss or damage to **utility services** property not owned by you and be caused by or result from a **covered cause of loss**.
- b. We will not pay under Utility Services Coverage for any loss, damage, or expense caused by or resulting from:
 - (1) An interruption of **utility services** due to direct physical loss or damage to:
 - (a) Satellites; or
 - (b) Any type of **overhead transmission lines and equipment**, unless shown as included in the Declarations; or
 - (2) An interruption of **cloud computing** services.



- c. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** including **business income** and **extra expense** is the Limit of Insurance shown in the Declarations applicable to Utility Services Coverage.

VI. Valuation

- A. The valuation provisions described below apply to **property damage loss** insured under this Coverage Form:

1. a. Subject to the applicable Limit of Insurance and the valuation provisions described below, if covered loss or damage occurs, then we will either:
 - (1) Pay the **value** of covered property which has sustained loss or damage in exchange for such property; or
 - (2) Repair, rebuild, or replace covered property which has sustained loss or damage with other such property of like kind and quality for the same use or occupancy.
- b. The cost of repair or replacement under any of the valuation provisions described below does not include the increased cost attributable to the enforcement of any **ordinance or law**.
2. Replacement Cost
 - a. If covered loss or damage occurs, then we will determine the **value** of covered property which has sustained loss or damage on a **replacement cost** basis at the time of loss or damage unless:
 - (1) A different valuation basis is shown in the Declarations; or
 - (2) A different valuation method applies under Section VI. Valuation.
 - b. We will not pay more for covered property which has sustained loss or damage than the least of the following dollar amounts:
 - (1) The **replacement cost** of the covered property;
 - (2) The amount you actually spend to repair or replace the covered property; or
 - (3) The Limit of Insurance shown in the Declarations applicable to covered property.
 - c. You may make a claim for loss or damage covered by this insurance on an **actual cash value** basis instead of a **replacement cost** basis. In the event you elect to have loss or damage settled on an **actual cash value** basis, you may still make a claim for the additional coverage which **replacement cost** provides if you notify us of your intent to do so within 180 days after the loss or damage and you comply with Item VI.A.2.d. described below.
 - d. We will not pay on a **replacement cost** basis until you actually repair or replace the lost or damaged property. The repair or replacement of damaged property must be made as soon as reasonably possible, but in no event later than two years after the date that you sustained covered loss or damage.
 - e. Until the lost or damaged property is actually repaired or replaced, we will only pay the **value** of such property on an **actual cash value** basis as of the time of the loss or damage.
 - f. If there is a total loss to a building that is **business real property**, then you may voluntarily elect to purchase another existing building or rebuild on another site but we will not pay more than the amount of loss or damage that we would have otherwise paid to rebuild at the current location.
 - g. With respect to **tenant's improvements and betterments**:
 - (1) If **tenant's improvements and betterments** have not been repaired or replaced within two years of the covered loss or damage, then we will pay the unamortized portion of your original cost of **tenant's improvements and betterments**. We will determine the unamortized portion of such cost as follows:



- (a) Multiply the original cost of **tenant's improvements and betterments** by the number of days from the loss or damage to the expiration of the lease or rental agreement; and
 - (b) Divide the amount determined above in Item VI.A.2.g.(1)(a) by the number of days from the installation of **tenant's improvements and betterments** to the expiration of the lease or rental agreement.
 - (2) If your lease or rental agreement contains a renewal option, then the expiration of the renewal option period will replace the expiration of the lease or rental agreement in this procedure.
 - (3) We will deduct from the total amount of covered loss or damage insured under **tenant's improvements and betterments** any dollar amounts that are paid by others, or covered elsewhere under any other insurance Policy, whether collectible or not.
3. Actual Cash Value
- a. If covered loss or damage occurs and the valuation basis for covered property shown in the Declarations is designated as **actual cash value**, then we will determine the **value** of such property which has sustained loss or damage on an **actual cash value** basis at the time of loss or damage.
 - b. We will not pay more for covered property which has sustained loss or damage than the least of the following dollar amounts:
 - (1) The **actual cash value** of the covered property;
 - (2) The amount you actually spend to repair or replace the covered property; or
 - (3) The Limit of Insurance shown in the Declarations applicable to covered property.
 - c. **Actual cash value** valuation applies to covered property regardless of whether such property has sustained partial or total loss or damage and may be significantly less than its **value** on a **replacement cost** basis.
4. Accounts Receivable
- Subject to the applicable Limit of Insurance shown in the Declarations, if covered loss or damage occurs to **accounts receivable**, then we will determine the **value** of such property at the time of loss or damage as follows:
- a. We will **value** accounts receivable at:
 - (1) The necessary expenses that you incur to re-establish your records of **accounts receivable**;
 - (2) All amounts due from your customers on current accounts that you are unable to collect;
 - (3) Interest charges on any loan required to offset amounts you are unable to collect; and
 - (4) Collection expenses in excess of your normal collection expenses that directly result from the loss.
 - b. When a covered loss has occurred but you cannot accurately establish the amount of **accounts receivable** outstanding at the time of the loss, the following method will be used:
 - (1) Determine the total of the average monthly amounts of **accounts receivable** for the 12 months immediately preceding the month in which the loss occurs; and
 - (2) Adjust that total for any normal fluctuations in the amount of **accounts receivable** for the month(s) in which the loss occurred or for any demonstrated variance from the average for that month.
 - c. The following will be deducted from the total amount of **accounts receivable**, however that amount is established:
 - (1) The amount of any accounts from which there is no loss;
 - (2) The amount of any accounts that you are able to establish or collect;



- (3) The amount normally allowed for probable bad debts that you are unable to collect; and
- (4) All unearned interest and service charges.
- d. You will pay us the amount of all recoveries you receive for a loss paid by us. Any recoveries in excess of the amount we have paid belong to you.

5. Animals

If covered loss or damage occurs to an animal, then we will determine the **value** of such animal at the time of loss or damage as follows:

- a. We will not pay more for a covered animal which has sustained loss or damage than the least of the following dollar amounts:
 - (1) The cost to purchase a replacement animal of comparable species, age, and quality;
 - (2) The amount you actually spend to replace the animal; or
 - (3) The applicable Limit of Insurance shown in the Declarations.
- b. We will not pay the cost to replace an animal until you actually replace such animal. The replacement of the animal must be made as soon as reasonably possible, but in no event later than two years after the date that you sustained covered loss or damage.

6. Brands, Labels, and Trademarks

- a. (1) If covered loss or damage occurs to your **stock** or similar **personal property of others** and such damaged property has a brand, label, trademark, or other similar identification, then at your option, we will pay for the cost of removing brands, labels, trademarks, or other similar identification from your **stock**. You may:
 - (a) Remove the brand, label, trademark, or other similar identification from the damaged property;
 - (b) Re-label or stamp the damaged property as salvage; or
 - (c) Dispose of the damaged property in a manner you deem appropriate.
- (2) Under any option described above, the re-labeling or disposal of damaged property must be accomplished in accordance with applicable law or regulations and we will not pay for any further loss or damage during the process of removing, re-labeling, or stamping damaged property.
- b. We will deduct from the amount of loss otherwise payable, the **fair market value** of the salvage which could have been obtained by the sale or other disposition of damaged property through customary insurance industry salvage practices. The salvage value of damaged property will be determined after the removal or relabeling of brands, labels, trademarks, or other similar identification.
- c. Payments under Brand, Label, and Trademark Coverage are included within, not in addition to, the Limits of Insurance for **business personal property** shown in the Declarations.

7. Fine Arts

If covered loss or damage occurs to **fine arts**, then we will determine the **value** of such property which has sustained loss or damage at the time of loss or damage in the following manner:

- a. Subject to the applicable Limit(s) of Insurance shown in the Declarations, for partial losses we will pay:
 - (1) The cost to restore the article to its condition immediately before the loss or damage; or
 - (2) If we agree that such restoration cannot fully restore the article to its condition immediately before the loss or damage, then we will pay the difference between the article's **fair market**



value immediately before and after the loss or damage. We will pay this amount in addition to the cost incurred in attempting to restore the article.

- b. Subject to the applicable Limit(s) of Insurance shown in the Declarations, for total losses, we will pay:
 - (1) The **fair market value** of each article of **fine art** that would have applied immediately before the loss or damage if the article of **fine art** is not specifically declared and individually described in the Declarations under the Schedule of Individual **Fine Arts**.
 - (2) The Limit of Insurance applicable to the article of **fine art** which is lost or damaged if such article is specifically declared and individually described in the Declarations under the Schedule of Individual **Fine Arts**.

8. Gold, Silver, and Platinum Commodities

Subject to the applicable Limit of Insurance shown in the Declarations, if covered loss or damage occurs to the following metals or metal salts held as **stock** that are not already incorporated into other **business personal property**, then we will determine the **value** of such property which has sustained loss or damage based upon the applicable closing price at the Chicago Board of Trade on the day the covered loss occurred, less all applicable discounts and un-incurred expenses:

- a. Gold;
- b. Silver; and
- c. Platinum.

9. Information Restoration Cost

- a. If covered loss or damage occurs to the following covered property, then we will determine the **value** of such property which has sustained loss or damage on an **information restoration cost** basis at the time of loss or damage:
 - (1) **Data or software;**
 - (2) **Research and development documentation;** and
 - (3) **Valuable papers and records.**
- b. We will not pay more for covered property described above in Item VI.A.9.a. than the applicable Limit of Insurance shown in the Declarations for:
 - (1) **Data, media or software;**
 - (2) **Research and development documentation;** or
 - (3) **Valuable papers and records.**
- c. We will only pay under Information Restoration Cost if you actually research, repair, restore, recreate, and replace the covered property described above in Item VI.A.9.a. as soon as reasonably possible, but in no event later than two years after the date such covered loss or damage occurs.

10. Installation Coverage

If covered loss or damage occurs to **business personal property** that you have contracted to install or erect, then we will determine the **value** of such property which has sustained loss or damage at the time of loss or damage as follows:

- a. We will not pay more for covered property which has sustained loss or damage than the least of the following dollar amounts:
 - (1) The **replacement cost** of covered property plus your interest in labor, materials, or services furnished or arranged by you and other expenses accrued; or
 - (2) The amount you actually spend to repair or replace the covered property; or



- (3) The Limit of Insurance shown in the Declarations applicable to Installation Coverage.
- b. You may make a claim for loss or damage covered by this insurance on an **actual cash value** basis instead of a **replacement cost** basis. In the event you elect to have loss or damage settled on an **actual cash value** basis, you may still make a claim for the additional coverage which **replacement cost** provides if you notify us of your intent to do so within 180 days after the occurrence of covered loss or damage and you comply with Item VI.A.10.c. below.
 - c. We will not pay under Installation Coverage until you actually repair or replace the lost or damaged property. The repair or replacement of damaged property must be made as soon as reasonably possible, but in no event later than two years after the date that you sustained covered loss or damage.
 - d. Until the lost or damaged property is actually repaired or replaced, we will only pay the **value** of such property on an **actual cash value** basis as of the time of the loss or damage.
11. Operational Replacement Cost
- a. If covered loss or damage occurs to the following covered property, then we will determine the **value** of such property which has sustained loss or damage on an **operational replacement cost** basis at the time of loss or damage:
 - (1) **Electronic Data Processing Equipment;**
 - (2) Keys, Locks, and Security Systems; and
 - (3) **Media.**
 - b. We will not pay more for covered property described above in Item VI.A.11.a. which has sustained loss or damage than the least of the following dollar amounts:
 - (1) The **operational replacement cost** of covered property;
 - (2) The amount you actually spend to repair or replace covered property; or
 - (3) The Limit of Insurance shown in the Declarations applicable to covered property.
 - c. You may make a claim for loss or damage covered by this insurance on an **actual cash value** basis instead of a **operational replacement cost** basis. In the event you elect to have loss or damage settled on an **actual cash value** basis, you may still make a claim for the additional coverage which **operational replacement cost** provides if you notify us of your intent to do so within 180 days after the loss or damage and you comply with Item VI.A.11.d. below.
 - d. We will not pay on an **operational replacement cost** basis until you actually repair or replace the lost or damaged property. The repair or replacement of damaged property must be made as soon as reasonably possible, but in no event later than two years after the date that you sustained covered loss or damage.
 - e. Until the lost or damaged property is actually repaired or replaced, we will only pay the **value** of such property on an **actual cash value** basis as of the time of the loss or damage.
12. Ordinance or Law Coverage
- a. Coverage A: The **value** of Coverage A will be determined at the least of the following dollar amounts described in (1) through (3) below:
 - (1) (a) If the **replacement cost** valuation applies and the property is repaired or rebuilt at the same **location** or another site, then we will pay the **replacement cost** amount it would actually cost you to rebuild:
 - 1) The undamaged portion of **Property Insured** that the **ordinance or law** requires you to demolish; or



- 2) The portion of **nonconforming property** that the **ordinance or law** does not permit you to repair or rebuild.
 - (b) If the **replacement cost** valuation applies and the property is not repaired or rebuilt, or if the **replacement cost** valuation does not apply, then the **actual cash value** provisions of this Coverage Form apply and we will pay the **actual cash value** of:
 - 1) The undamaged portion of **Property Insured** that the **ordinance or law** requires you to demolish; or
 - 2) The portion of **nonconforming property** that the **ordinance or law** does not permit you to repair or rebuild.
 - (c) In determining either the **replacement cost** or the **actual cash value** amount, the **value** of Ordinance or Law Coverage A will be determined at the **location** and will be based upon the same height, floor area, number of units, leasable square footage, occupancy, style, and like kind and quality of the original **Property Insured** which existed immediately preceding the covered loss.
 - (2) The remaining applicable Limit of Insurance for **Property Insured** shown in the Declarations, after payment of the covered direct physical loss or damage using the valuation method indicated in the Declarations.
 - (3) The Limit of Insurance or Sublimit of Insurance, whichever is less, shown in the Declarations applicable to Ordinance or Law - Coverage A.
 - b. Coverage B: The **value** of Coverage B will be determined at the least of the following dollar amounts described below:
 - (1) The amount you actually spend to demolish and clear the **location** of undamaged parts of **Property Insured** caused by the enforcement of an **ordinance or law**.
 - (2) The Limit of Insurance or Sublimit of Insurance, whichever is less, shown in the Declarations applicable to Ordinance or Law Coverage B.
 - c. Coverage C: The **value** of Coverage C will be determined at the least of the following dollar amounts described below:
 - (1) (a) The **replacement cost** amount to repair or rebuild damaged or undamaged portions of **Property Insured**, whether or not demolition is required, at the same **location** if:
 - 1) **Property Insured** is repaired or rebuilt at the same **location**; or
 - 2) The **ordinance or law** allows you to repair or rebuild at the same **location**, but you elect to rebuild **Property Insured** at another site or move **Property Insured** to another site.
 - (b) The **replacement cost** amount to repair or rebuild at a new site, but only if the **ordinance or law** will not allow you to repair or rebuild at the same **location**.
 - (2) The amount you actually spend to repair or rebuild **Property Insured** which has sustained loss or damage.
 - (3) The Limit of Insurance or Sublimit of Insurance, whichever is less, shown in the Declarations applicable to Ordinance or Law - Coverage C.
13. Personal Property of Others
- If covered loss or damage occurs to **personal property of others**, then we will determine the **value** of such property which has sustained loss or damage using the applicable valuation provisions, but we will not pay more than the amount for which you are legally liable, or the applicable Limit of Insurance, whichever is less.
14. Stock



Subject to the applicable Limit of Insurance shown in the Declarations, if covered loss or damage occurs to **stock**, then we will determine the **value** of such property which has sustained loss or damage at the time of loss or damage as follows:

- a. The **value** of the following types of **stock** will be determined on a **replacement cost** basis:
 - (1) Supplies or raw materials; and
 - (2) **Stock** that you have purchased from others for resale.
- b. The **value** of **stock** that is work-in-process will be determined at the cost of raw materials, supplies, labor, and overhead incurred.
- c. The **value** of **finished stock** will be determined at your selling price less all applicable discounts and un-incurred expenses.
- d. The **value** of **stock** that has been sold but not delivered will be determined at your selling price less all applicable discounts and un-incurred expenses.
- e. The **value** of **stock** that is economically or technologically obsolete or used will be determined at its wholesale **fair market value** at the time of the loss or damage.

15. Transit Coverage

Subject to the applicable Limit of Insurance shown in the Declarations, if covered loss or damage occurs to **Property Insured** which is in **transit**, then we will determine the **value** of such property which has sustained loss or damage at the time of the loss or damage as follows:

- a. The **value** of **Property Insured** which is in **transit** will be determined at the dollar amount stated on the invoice plus any additional expenses that have accrued and been incurred, less all applicable discounts and un-incurred expenses.
- b. The **value** of **Property Insured** which is in **transit** but not under invoice will be determined in accordance with the applicable valuation method for the type of property described under Section VI. Valuation plus any additional expenses that have accrued and been incurred, less all applicable discounts and un-incurred expenses.

B. The valuation provisions described below apply to **time element loss** insured under this Coverage Form:

1. In making any determination of **business income** loss or the amount of **extra expense** incurred, we may utilize any relevant sources of information, including your:
 - a. Balance sheets, income statements, general ledgers, payroll records, and other financial records which have been prepared in accordance with generally acceptable accounting principles;
 - b. Bank statements;
 - c. Accounting procedures;
 - d. Budgeting, forecasting, and marketing records;
 - e. Bills, invoices, bill of materials, and other vouchers;
 - f. Deeds, liens, or contracts, including contracts with customers (verified through confirmations).

If your financial records are not prepared in accordance with generally acceptable accounting principles, then additional accounting procedures may be required.

2. Business Income Coverage:

- a. The amount of covered **business income** loss will be determined based on:
 - (1) The net profit or loss before income taxes of your **operations** before covered loss or damage occurred;
 - (2) The likely net profit or loss before income taxes of your **operations** if no covered loss or damage occurred, not including any **business income** that would likely have been earned as



a result of an increase in the volume of business due to favorable business conditions caused by the impact of the **covered cause of loss** on customers or on other businesses; and

- (3) The continuing normal operating expenses, including your continuing normal payroll expenses, necessary to resume your **operations** with the same quality of service that existed just before the covered direct physical loss or damage. Continuing expenses will be calculated based on the:

- (a) **Period of restoration**; or

- (b) Period of time provided for **business income** as described above under Extension of Coverage - Item V.E.6.a.(1);

whichever is applicable.

- b. The amount of payroll expense covered when determining the amount of a **business income** loss will be determined based on the following:

- (1) If your **ordinary payroll expense** is not shown in the Declarations as limited or excluded, then your **ordinary payroll expense** is covered and your **ordinary payroll expense** will be included when determining your **business income** loss.

- (2) (a) If your **ordinary payroll expense** is shown in the Declarations as limited, then **business income** includes your **ordinary payroll expense** but for only the number of days stated in the Declarations when determining your **business income** loss. The number of days need not be consecutive but must fall within:

- 1) The **period of restoration**; or,

- 2) The period of time provided for **business income** as described above under Extension of Coverage - Item V.E.6.a.(1);

- (b) In determining the annual operating expenses for Coinsurance purposes, payroll expenses will only include the **ordinary payroll expense** incurred during the number of days shown in the Declarations. If the **ordinary payroll expense** varies during the Policy year, then the period of greatest **ordinary payroll expense** will be used.

- (3) If your **ordinary payroll expense** is shown in the Declarations as excluded, then your entire **ordinary payroll expense** will be deducted when determining your **business income** loss.

- c. If you are operating at a net loss, then continuing normal operating expenses will be offset by the net loss.

3. Extra Expense Coverage:

The amount of covered **extra expense** incurred will be determined based on necessary expenses that:

- a. Exceed your normal operating expenses that would have been incurred by your **operations**, had no covered loss or damage occurred, during the following periods of time:

- (1) The **period of restoration**; or

- (2) The period of time provided for **extra expense** as described above under Extension of Coverage - Item V.E.6.a.(2).

- b. Reduce the **business income** loss that otherwise would have been incurred.

- c. We will deduct from the total of such expenses:

- (1) The salvage value that remains of any property bought for temporary use during the **period of restoration** once your **operations** are resumed; and

- (2) Any **extra expense** that is paid for by other insurance.



4. Resumption of Your Business Operations

- a. We will reduce the amount of your **business income** loss, other than **extra expense**, to the extent you can resume your **operations**, in whole or in part, by using damaged or undamaged property (including merchandise or **stock**) at the **location** or elsewhere.
 - b. We will reduce the amount of your **extra expense** to the extent you can return your **operations** to normal and discontinue such **extra expense**.
 - c. If you do not resume all or part of your **operations**, or do not resume all or part of your **operations** as quickly as possible, then we will pay based on the length of time it would have taken to resume your **operations** as quickly as possible.
5. In no event or circumstance will the loss computation result in payments greater than the actual loss sustained or the applicable Limit of Insurance, whichever is less.

VII. Mortgage Holders or Loss Payee Provisions

A. Lender's Loss Payable Provisions

1. The Loss Payee shown in the Declarations is a creditor, mortgage holder, trustee, or receiver whose interest in covered property is established by the following written instruments:
 - a. Warehouse receipts;
 - b. A contract for deed;
 - c. Bills of lading;
 - d. Financing statements;
 - e. Mortgages, deeds of trust, or security agreements; or
 - f. Court order.
2. If a covered loss occurs to covered property in which both you and a Loss Payee have an insurable interest, and such Loss Payee is described in the Declarations as a Lenders Loss Payable prior to such covered loss, then:
 - a. We will pay for covered loss or damage to each Loss Payee shown in the Declarations in their order of precedence, as interests may appear.
 - b. The Loss Payee has the right to receive loss payment even if the Loss Payee has started foreclosure or similar action on the covered property.
 - c. If we deny your claim because of your acts or because you have failed to comply with the terms of this Policy, then the Loss Payee will still have the right to receive loss payment if the Loss Payee:
 - (1) Pays any premium due under this Policy at our request if you have failed to do so;
 - (2) Submits a signed, sworn proof of loss within 60 days after receiving notice from us of your failure to do so; and
 - (3) Has notified us of any change in ownership, occupancy, or substantial change in risk known to the Loss Payee.

All of the terms of this Policy will then apply directly to the Loss Payee.
 - d. If we pay the Loss Payee for any loss or damage and deny payment to you because of your acts or because you have failed to comply with the terms of this Policy, then:
 - (1) The Loss Payee's rights will be transferred to us to the extent of the amount we pay; and
 - (2) The Loss Payee's rights to recover the full amount of the Loss Payee's claim will not be impaired.



At our option, we may pay to the Loss Payee the whole principal on the debt plus any accrued interest. In this event, you will pay your remaining debt to us.

3. If we cancel or elect not to renew this Policy, then we will give the Loss Payee the same written notice that we give you.

B. Loss Payable Provisions

If a covered loss occurs to covered property which both you and a Loss Payee have an insurable interest and such Loss Payee is described in the Declarations as a Loss Payable prior to such covered loss, then we will:

1. Adjust losses with you; and
2. Pay any claim for loss or damage jointly to you and the Loss Payee, as interests may appear.

C. Contract of Sale Provisions

1. The Loss Payee is described in the Declarations as a Contract of Sale and is a person or organization you have entered a contract with for the sale of covered property.
2. If a covered loss occurs to covered property in which both you and the Loss Payee have an insurable interest, and such Loss Payee is described in the Declarations prior to such covered loss, then we will:
 - a. Adjust losses with you; and
 - b. Pay any claim for loss or damage jointly to you and the Loss Payee, as interests may appear.
3. The following is added to the Other Insurance Clause contained in Section XIII. General Conditions:
For covered property that is the subject of a contract of sale, the word you includes such Loss Payee.

VIII. Coverage Options

Val-U-Gard Coverage

If the Declarations indicate that Val-U-Gard Coverage applies to **Property Insured**, then at the time of covered loss or damage, the Limit of Insurance for such **Property Insured** will automatically increase by the percentage shown in the Declarations applicable to Val-U-Gard Coverage. The amount of increase will be determined as follows:

Step 1: Multiply the Limit of Insurance that applied at the time of covered loss or damage by the Val-U-Gard percentage shown in the Declarations, expressed as a decimal (Example: 5% = .05).

Step 2: Multiply the result of Step 1 by the number of days since such Limit of Insurance most recently became effective.

Step 3: Divide the result of Step 2 by 365 to determine the amount of inflationary increase in the Limit of Insurance applicable to **Property Insured**.

IX. Limitations of Coverage

A. Coverage for Animals

1. a. We will pay for direct physical loss or damage to the following covered animals caused by or resulting from a **covered cause of loss**:
 - (1) Owned by others while in your care, custody, or control; or
 - (2) You sell as **stock**;
- b. Coverage includes the following necessary expenses you incur which are directly attributable to a covered loss under Coverage for Animals:
 - (1) The expense of transporting the covered animal to a licensed veterinarian;



- (2) The expense of veterinarian services in order to provide medical treatment to an injured animal; and
 - (3) The humane destruction of covered animals if necessary. Humane destruction means the necessary euthanasia of an animal by a licensed veterinarian when such animal suffers an injury that is so excessive that immediate destruction is necessary for humane reasons.
2. We will not pay under Coverage for Animals for any loss, damage, or expense caused by or resulting from any treatment or process, or the rendering or failure to render any professional services.

B. Damage From Water or Other Liquid - Tear Out and Repair

If a covered loss is caused by or results from the escape of water or other liquid, including molten material, we will not pay for the cost to repair or replace the defective system or appliance from which such substances escaped. However, subject to the applicable limit of insurance, we will pay for the cost to:

1. Tear out and replace parts of **Property Insured**, whether or not such property is damaged, in order to repair covered loss or damage; and
2. Repair or replace damaged parts of **fire protection equipment** if such covered loss is caused by or results from the discharge of any substance from such **fire protection equipment**.

C. Expenses to Reduce a Business Income Loss

If a covered **business income** loss is sustained under this Coverage Form, then we will pay the necessary expenses you incur, except the cost of extinguishing a fire, to reduce or avoid further **business income** loss, but only to the extent they do not exceed the amount of **business income** loss that would otherwise have been paid.

X. Deductibles

A. Property Damage Loss

We will not pay for a **property damage loss** in any one occurrence or **loss event** until the amount of such **property damage loss** exceeds the Dollar Deductible Amount shown in the Declarations. Subject to Section XI. Limits of Insurance, we will then pay the amount of such **property damage loss** in excess of the deductible.

B. Time Element Loss

1. We will not pay for a **time element loss** in any one occurrence or **loss event** until the amount of such **time element loss** exceeds the deductible shown in the Declarations. Subject to Section XI. Limits of Insurance, we will then pay the amount of such **time element loss** in excess of the deductible.
2. How Your Business Income Deductible(s) will be Determined
 - a. If the deductible stated in the Declarations is a Dollar Deductible Amount, then the stated dollar amount is the sum we will subtract from a **time element loss** in any one occurrence or **loss event**.
 - b. If the deductible stated in the Declarations is an Hour Deductible, then we will not pay for any **time element loss** you sustain during the specified number of consecutive hours immediately following the occurrence of covered loss or damage. However, if a Minimum Deductible Amount is stated in the Declarations, then we will subtract at least the Minimum Deductible Amount from the **time element loss** you sustain in any one occurrence or **loss event**.

C. The following deductible provisions apply to Section V. Extensions of Coverage:

1. If the Declarations specify that a single deductible applies to **business real property** and **business personal property**, then such deductible applies to all **property damage loss** insured under Section V. Extensions of Coverage unless a specific deductible is shown in the Declarations.
2. If the Declarations specify that different deductibles apply to **business real property** and **business personal property** then:



- a. The deductible described in the Declarations for **business real property** applies to all **property damage loss** insured under Newly Acquired Property Coverage and Unnamed Location Coverage; and
- b. The deductible described in the Declarations for **business personal property** applies to all **property damage loss** insured under other Extensions of Coverage; unless a specific deductible is shown in the Declarations applicable to a specified Extension of Coverage.
- 3. If the Declarations specify that a deductible applies to **time element loss**, then such deductible applies to a **time element loss** insured under Section V. Extensions of Coverage, unless a specific deductible is shown in the Declarations applicable to a specified Extension of Coverage.
- 4. If the Declarations specify that different deductibles apply to a **property damage loss** and a **time element loss**, and a **property damage loss** and a **time element loss** are insured under a single coverage provided under Section V. Extensions of Coverage, then deductibles will be applied as described below under Item X.D. of this Coverage Form.
- D. When Multiple Deductibles Apply
If more than one deductible is applicable to a covered loss insured under this Coverage Form or the Commercial Property Coverage Section, then we will only apply the single highest deductible that is applicable. However, if deductibles are shown in the Declarations for a **property damage loss** and a **time element loss**, then each deductible will be subtracted from the applicable **property damage loss** and the applicable **time element loss** in any one occurrence or **loss event**.
- E. Extra Expense or Expediting Expense Coverage
The deductibles stated in the Declarations do not apply to Extra Expense Coverage or Expediting Expense Coverage.

XI. Limits of Insurance

- A. The most we will pay for covered loss, damage, or expense in any one occurrence or **loss event** is the applicable Limit of Insurance or Sublimit of Insurance, whichever is less, shown in:
 - 1. The Declarations of this Coverage Form;
 - 2. The provisions within this Coverage Form; or
 - 3. Any endorsement attached to this Coverage Form which comprises a part of the Commercial Property Coverage Section.
- B. Payments under any Sublimit of Insurance shown in the Declarations are included within, not in addition to, any Limit of Insurance provided by this Coverage Form.
- C. Insurance is only provided for those coverages for which:
 - 1. An entry is shown by an X on the applicable line in the Declarations; and
 - 2. A dollar amount is shown as a Limit of Insurance or Sublimit of Insurance in the Declarations.
- D. If a coverage shown in the Declarations does not show a corresponding Limit of Insurance, then no insurance is provided for such coverage.
- E. If "0", "N/A", or "not covered" appears as a Limit of Insurance in the Declarations for a described coverage, then no insurance is provided for such described coverage.
- F. If the term "included" appears as a Limit of Insurance in the Declarations for a described coverage, then the Limit of Insurance for such coverage is included within, not in addition to, the applicable Limit of Insurance shown in the Declarations for Business Real Property, Business Personal Property, or Business Income and Extra Expense.



XII. Loss Conditions

A. Abandonment

There can be no abandonment of any property to us.

B. Appraisal

1. If we and you disagree on the **value** of the property, the amount of net income (net profit or loss before income taxes), the amount of operating expenses, or the amount of loss, then either party may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, then either party may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the applicable **value** of such property, the amount of such net income (net profit or loss before income taxes), the amount of such operating expenses, or the amount of such loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two parties will be binding. Each party will:

- a. Pay its chosen appraiser; and
- b. Bear the other expenses of the appraisal and umpire equally.

2. If there is an appraisal, we will still retain our right to deny the claim.

C. Duties In The Event Of Loss Or Damage

1. In the event of covered loss or damage you must see that the following are done:
 - a. Notify the police if a law may have been broken.
 - b. Give us prompt notice of the loss or damage. Include a description of the property involved.
 - c. Give us a description of how, when, and where loss or damage occurred as soon as possible.
 - d. Take all reasonable steps to protect the covered property from further damage and, if feasible, set the damaged property aside and in the best possible order for examination. We will not pay for any subsequent loss or damage that is caused by or results from your failure to take such steps.
 - e. Keep a record of your necessary expenses that you incurred:
 - (1) To protect covered property from further damage; and
 - (2) For emergency and temporary repairs;
 for consideration in the settlement of the claim. Such expenses incurred, if covered, will not increase the Limit of Insurance.
 - f. At our request, give us complete inventory of the damaged and undamaged property. Include quantities, costs, values, and amount of loss claimed.
 - g. As often as may be reasonably be required, permit us to:
 - (1) Inspect your property in order to prove the loss or damage;
 - (2) Take samples of damaged and undamaged property for inspection, testing, and analysis; and
 - (3) Examine your books and records and make copies of such books and records.
 - h. Send us a signed, sworn statement of loss containing the information we request to investigate the claim. We will supply the necessary forms. You must complete such forms within ninety (90) consecutive calendar days of our request.
 - i. Cooperate with us in the investigation or settlement of the claim.
2. We may examine under oath:
 - a. You, your partners, or **members**;



- b. **Managers**, officers, directors, trustees, or employees (including leased employees);
- c. Authorized representatives, or anyone to whom you entrust property for any purpose; while not in the presence of other such persons (other than your legal counsel), and at such times as may reasonably be required, about any matter relating to this Policy or a claim under this Policy, including your books and records. In the event of an examination under oath, the person being examined must verify that their answers are accurately recorded.

3. The failure of any person, other than:

- a. You, your partners, or **member of your business**;
- b. A person employed by **your business** as a **manager**, officer, director, or member of your management level staff; or
- c. A trustee or other person with legal authority over **your business**;

to notify us of any loss or damage that may be covered under this Coverage Form, shall not invalidate the insurance afforded by this Policy.

D. Loss Payment

- 1. Within 30 days of receiving the properly executed, sworn statement of loss, we will give you notice that:
 - a. Your claim is denied;
 - b. Your claim will be paid; or
 - c. We need more time to determine whether your claim will be denied or paid; in whole or in part.
- 2. If your claim is denied, then such notice will be in writing and will state any applicable Policy provision, condition, or exclusion used as the basis for the denial.
- 3. For that portion of the loss or damage that is covered under this Coverage Form, we will pay your claim within 30 days of receiving the properly executed sworn statement of loss, if:
 - a. You have complied with all of the terms and conditions of the Policy; and
 - b. We have reached agreement with you on the amount of loss or an appraisal award has been made. However, we will not pay you more than your financial interest in lost or damaged property.
- 4. If more time is needed to determine whether your claim should be denied or paid, then we will notify you in writing and state why more time is needed.
- 5. We may adjust losses with the owners of lost or damaged property if other than you. If we pay the owners, then such payments will satisfy your claims against us for the owners' property.

E. Pair or Set

If a covered loss occurs to your covered property that is part of a pair or set, then we will only pay for a reasonable and fair proportion of the total value of the pair or set. We will not pay on the basis of a loss to the entire pair or set.

F. Recovered Property

- 1. If either you or we recover any property after loss settlement, that party must give the other prompt notice. At your option, the property will be returned to you. If the recovered property is returned to you, then you must return to us the amount of the claim we paid to you for the property.
- 2. Subject to the Limit of Insurance described in the Declarations:
 - a. We will pay recovery expenses and the expenses to repair the recovered property; and



- b. If the recovered property is damaged and we agree that it cannot be restored, but you wish to keep the damaged property, then you will pay us the property's **fair market value** immediately after the recovery, but not more than the amount of the claim we paid you for the property.

XIII. General Conditions

A. Authorization and Notices

You agree that the first Named Insured shown in the Declarations shall act on behalf of all other Named Insureds. All correspondence concerning the Commercial Property Coverage Section of this Policy will take place between the first Named Insured and us. Notice sent to the first Named Insured at the address of such first Named Insured stated in the Declarations shall also constitute notice to all Named Insureds.

B. Calculation of Premium

The premium shown in the Declarations was computed based on rates in effect at the time the Policy was issued. On each renewal, continuation, or anniversary of the effective date of this Policy, we will compute the premium in accordance with our rates and rules then in effect.

C. Cancellation and Nonrenewal

1. Cancellation

- a. The first Named Insured in the Declarations may cancel this Policy by mailing or delivering to us advance written notice of cancellation. The Policy will end on the effective date requested.
- b. We may cancel this Policy by mailing by first class mail or delivering to the first Named Insured and to the agent or broker of record, at the address shown in the Declarations, written notice of cancellation stating the reason for cancellation at least:
 - (1) Ten (10) consecutive calendar days before the effective date of cancellation if we cancel for nonpayment of premium; or
 - (2) Thirty (30) consecutive calendar days before the effective date of cancellation if we cancel for any other reason.
- c. Notice of cancellation will state the effective date of cancellation. The Policy Period will end on that date.
- d. If this Policy is canceled, then we will send the first Named Insured any premium refund due. If we cancel, then the refund will be pro rata. If the first Named Insured cancels, then the refund may be less than pro rata but no less than the amount determined by our rules in effect at the time. The cancellation will be effective even if we have not made or offered a refund.
- e. If notice is mailed, then proof of mailing will be sufficient proof of notice.

2. Nonrenewal

- a. We are not required to renew this Policy when it expires.
- b. If we elect not to renew this Policy, then we will mail by first class or deliver to the first Named Insured and the agent or broker of record, at their address shown in the Declarations, written notice stating the reason for nonrenewal, at least sixty (60) consecutive calendar days but not more than one hundred and twenty (120) consecutive calendar days before the effective date of nonrenewal.
- c. Notice of nonrenewal will state the effective date of nonrenewal. The Policy Period will end on the date of nonrenewal.
- d. If the notice is mailed, then proof of mailing will be sufficient proof of notice.

D. Changes

The Policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this Policy with



our consent. This Policy's terms can be amended or waived only by endorsement issued by us and made a part of this Policy.

E. Concealment, Misrepresentation, or Fraud

This Policy is void in any case of fraud by you. It is also void if you or any other insured, at any time, intentionally conceal or misrepresent a material fact concerning this Policy, covered property within this Policy, your interest in such covered property, or a claim under this Policy.

F. Conformity to Statute

Terms of the Coverage Form which are in conflict with the statutes of the state where such Policy is issued are amended to conform to such statutes.

G. Control of Property

Any act or neglect of any person other than you beyond your direction or control will not affect this insurance. The breach of any condition of this Policy at any one or more locations will not affect coverage at any one location where, at the time of loss or damage, the breach of condition does not exist.

H. Coverage Territory

Except as more specifically provided in this Coverage Form or the Commercial Property Coverage Section of this Policy, the coverage provided this Coverage Form and by the Commercial Property Coverage Section of this Policy applies as follows:

1. Other Than Transit Coverage

The Coverage Territory, other than for Transit Coverage, is the 48 contiguous States of the United States of America, the State of Alaska, the State of Hawaii, the District of Columbia, Puerto Rico, territories and possessions of the United States of America, and Canada.

2. Transit Coverage

The Coverage Territory for Transit Coverage is within and between the 48 contiguous States of the United States of America, the State of Alaska, the State of Hawaii, the District of Columbia, Puerto Rico, territories and possessions of the United States of America, and Canada.

I. Defense Costs

1. We may elect to defend any suit against you alleging direct physical loss or damage resulting from a **covered cause of loss to personal property of others**, if such **personal property of others** is insured under this Policy. However, we will not defend you against any suit, or that portion of a suit, for direct physical loss or damage to which this insurance does not apply.
2. If we elect to defend you, then we will do so at our expense to the extent of your liability, even if such suit is groundless, false, or fraudulent. We may, without prejudice, make such investigation, negotiation, or settlement of any such claim or suit as we deem expedient. But:
 - a. The most we will pay for a covered loss to **personal property of others** is the applicable Limit of Insurance shown in the Declarations;
 - b. Payments for our defense costs are in addition to the applicable Limit of Insurance; and
 - c. Our defense of the suit will end when we have used up the applicable Limit of Insurance in the payment of judgments or settlements.

J. Examination of Your Books and Records

We may examine and audit your books and records as they relate to this Policy at any time during the Policy Period and up to three years afterward.

K. Inspections and Surveys



1. We have the right but are not obligated to make inspections and surveys at any time, give you reports on the conditions we find, and recommend changes.
2. Any such inspections, surveys, reports, or recommendations relate only to insurability and the premiums to be charged. We do not make safety inspections and we do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. We do not warrant that conditions are safe, healthful, or comply with laws, regulations, codes, or standards.
3. Items XIII.K.1. and 2. of this condition apply not only to us, but also to any rating, advisory, rate service, or similar organization which makes insurance inspections, surveys, reports, or recommendations.
4. Item XIII.K.2. of this condition does not apply to any inspections, surveys, reports or recommendations we make, or any other inspection service or other similar organization may make, relative to certification, under state or municipal statutes, ordinances or regulations, of boilers, pressure vessels, or elevators.

L. Insurance Under Two or More Coverages

1. If two or more of this Policy's coverages apply to the same loss, damage, or expense, then we will not pay more than the actual amount of such loss, damage, or expense.
2. If two or more coverages apply to the same item of property which suffers covered loss or damage under:
 - a. This Coverage Form;
 - b. An Endorsement to this Coverage Form; or
 - c. This Policy;

then the most we will pay for any loss, damage, or expense is the largest single Limit of Insurance shown in the Declarations applicable to such covered property.

3. The applicable Limit of Insurance shown in the Declarations is the most we will pay for loss, damage, or expense under any coverage in this Coverage Form or the Commercial Property Coverage Section regardless of the number of Named Insureds or other interests that have suffered such loss, damage, or expense. Payments made under this Policy will not exceed the actual amount of covered loss, damage, or expense.

M. Legal Action Against Us

No one may bring a legal action against us under this Policy unless:

1. There has been full compliance with all of the terms of this Policy; and
2. The legal action is brought within 2 years after the date upon which the direct physical loss or damage occurred.

N. Liberalization Clause

If we adopt any revision that would broaden the coverage under this Policy without additional premium within 45 days prior to or during the Policy Period, then such broadened coverage will immediately apply to this Policy.

O. No Benefit to Bailee

No person or organization, other than you, having custody of covered property will benefit from this insurance.

P. Other Insurance

1. If you have other insurance subject to the same plan, terms, conditions, and provisions as the insurance provided under this Policy, then we will pay our share of the covered loss or damage. Our share is the proportion that the applicable Limit of Insurance under this Policy bears to the total Limits of Insurance for all insurance covering such loss or damage on the same basis.



2. If there is other insurance covering the same covered loss or damage, other than that described above in XIII.P.1., then subject to the deductible shown in the Declarations, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. Our payment for any covered loss or damage is subject to the terms and conditions of this Policy and the applicable Limit of Insurance shown in the Declarations.

Q. Policy Period

Under this Policy we insure covered loss or damage commencing during the Policy Period shown in the Declarations.

R. Premiums

The first Named Insured shown in the Declarations is responsible for the payment of all premiums and will be the payee for any return premiums we pay.

S. Reinstatement of Limits After a Loss

Covered loss or damage sustained under this Coverage Form shall not reduce the Limits of Insurance shown in the Declarations, except where an **Annual Aggregate** Limit of Insurance applies. The reinstatement of any exhausted **Annual Aggregate** Limit of Insurance is not permitted unless authorized by us in writing.

T. Subrogation

1. Other Than Transit Coverage

If any person or organization to or for whom we make payment under this Coverage Form has rights to recover damages from another, then those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing:

- a. Prior to loss to your covered property or covered income.
- b. After a loss to your covered property or covered income only if, at the time of loss, that party is one of the following:
 - (1) Someone insured by this insurance;
 - (2) A business firm owned or controlled by you or that owns or controls you; or
 - (3) Your tenant.

This will not restrict your insurance.

2. Transit Coverage

With respect to covered property under Transit Coverage, you are permitted to accept released value bills of lading from carriers for hire. You are not permitted to enter into any special agreements with carriers or bailees releasing them from their common law or statutory liability. We will not be liable for any loss or damage which, without our written consent, has been settled or compromised by you.

U. Trade or Economic Sanctions

Whenever coverage under this Policy would be in violation of any U.S. trade or economic sanctions such as, but not limited to, those sanctions administered and enforced by the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC"), such coverage shall be null and void.

V. Transfer of Your Rights and Duties Under This Policy

1. Your rights and duties under this Policy may not be transferred without our written consent except in the case of death of an individual named insured.
2. If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed,



anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

XIV. Definitions

A. Words and phrases contained within this Coverage Form that appear in **bold face** have special meaning. When words or phrases that appear below in **bold face** do not appear in **bold face** in this Coverage Form, then those words or phrases are to be interpreted using their common meaning. The section below defines the following terms appearing in **bold face** which are used in this Coverage Form or in the Declarations applicable to this Coverage Form:

1. **Accounts receivable** means all records of amounts due from your customers on current accounts.
2. a. **Actual cash value** means the cost to repair or replace covered property which has sustained loss or damage with other property:
 - (1) Of like kind, quality, usefulness, size, and capacity, as that with which it was originally constructed; and
 - (2) Used for the same occupancy and purpose;
 subject to a deduction for deterioration, depreciation, depletion, obsolescence, or a combination thereof.
- b. **Actual cash value** includes your interest in labor, materials, or services furnished or arranged by you and other expenses accrued, but only with respect to **buildings while in the course of construction**.
3. **Annual aggregate** means the most we will pay for all loss, damage, or expense arising from all occurrences, **loss events**, or both (as applicable), during any one Policy Period. **Annual Aggregate** Limits of Insurance are reduced by the amount of any paid loss.

If the Policy is written for a term of more than one year, then we will apply the **Annual Aggregate** Limit of Insurance separately to each consecutive year of the Policy Period. If the Policy is extended for a period of time that is less than a year, then the remaining **annual aggregate** from the prior term applies to the extended period of time.
4. a. **Buildings while in the course of construction** means **business real property** while in the course of initially being constructed or while undergoing alterations, remodeling, or renovations, including the following types of property:
 - (1) Any property used in the course of construction, alteration, remodeling, or renovation activities that is destined to become a permanent part of the building or realty surrounding such building; and
 - (2) Temporary structures built or assembled on the site which support such construction, alteration, remodeling, or renovation activities including cribbing, scaffolding, or construction forms.
- b. **Buildings while in the course of construction** does not mean:
 - (1) Outdoor trees, shrubs, plants or lawns;
 - (2) **Buildings while in the course of construction** for which separate insurance coverage has been obtained and such separate insurance covers your interest; or
 - (3) **Soft costs**.
5. a. **Business income** means:
 - (1) The net profit or loss before income taxes from your **operations** including:
 - (a) The sales of merchandise or services;
 - (b) The net sales value of manufacturing production;



- (c) Previously documented grants, research contracts, fund raising, or donations likely to reoccur;
 - (d) The lease or rental of tenant occupancies at a location, as furnished and equipped by you;
- (2) Continuing normal operating expenses incurred, including your continuing normal payroll expenses;
- (3) Charges which are the legal obligation of your tenants but would otherwise be your obligations; and
- (4) The fair rental value of any portion of a location occupied by you; that would have been earned or incurred by you had there been no covered loss or damage.
- b. If **ordinary payroll expense** is covered under this Coverage Form, then **business income** includes tip income of your employees as reported by you to the Internal Revenue Service.
- c. **Business income** does not mean bank interest or investment income.
- 6. **Business personal property** means the following types of property:
 - a. **Accounts receivable;**
 - b. Animals owned by others while in your care, custody, or control, or animals you sell as **stock;**
 - c. **Data, media, and software;**
 - d. Furniture, fixtures, machinery, equipment, **mobile equipment**, materials, and supplies;
 - e. **Electronic data processing equipment;**
 - f. **Mobile communication equipment;**
 - g. Patterns, molds and dies;
 - h. **Personal effects;**
 - i. **Personal property of others;**
 - j. **Processing water;**
 - k. **Prototypes;**
 - l. **Research and development documentation;**
 - m. **Stock;**
 - n. **Tenant's improvements and betterments;**
 - o. Trees, shrubs and plants used inside the building as decoration; and
 - p. **Valuable papers and records.**

Business personal property does not mean outdoor trees, shrubs, plants, or lawns; **fine arts; money; securities; or salesperson's samples.**

- 7. **Business real property** means the following types of property:
 - a. Buildings or structures, foundations, completed alterations, repairs, and additions to such buildings or structures; fixtures, permanently installed machinery and equipment; awnings; or glass forming a part of the structure, including lettering and ornamentation, whether located on the exterior or interior of such building or structure;
 - b. Underground pipes, flues, or drains necessary for the service of **business real property;**
 - c. Radio or television towers, antennas, and satellite dishes, including attachments;



- d. Personal property used to maintain or service the building including fire extinguishing equipment; outdoor furniture; floor coverings; and appliances used for refrigerating, ventilating, cooking, dishwashing, or laundering;
- e. Outdoor fixtures and structures, including light standards, fences, signs, well-housings; and artificial trees, shrubs, plants, and lawns; and

f. **Buildings while in the course of construction.**

Business real property does not mean trees, shrubs, plants, or growing outdoors; any item which meets the definition of **fine arts**; or any item that is insured under Fine Arts Coverage contained in this Coverage Form.

- 8. **Cloud computing** means computer or information technology capabilities hosted by others and accessed through the internet or other means, including storage, software, applications, computing power, specially crafted development environments, and other computer or information technology related capabilities that are provided as a service.
- 9. **Collapse** means the actual abrupt falling down or caving in of a building or part of a building with the result that the building or part of the building cannot be occupied for its intended purpose. **Collapse** does not mean:
 - a. The threat of **collapse**, even if **collapse** is imminent; or
 - b. Impairment whether or not substantial; or
 - c. A condition of a building still standing including cracking, bulging, sagging, bending, shifting, leaning, settling, shrinkage, or expansion that could lead to or contribute to its actual abrupt falling down; or

As used in the definition of **collapse**, the term "building" does not include retaining walls or other structures that do not provide structural support to such building.

- 10. **Communicable disease** means any disease, bacteria, or virus that may be transmitted directly or indirectly from human or animal to a human.
- 11. **Communicable disease event** means an event in which a **public health authority** has ordered that a location be evacuated, decontaminated, or disinfected due to the outbreak of a **communicable disease** at such location.
- 12. **Counterfeit** means an imitation of an actual valid original intended to deceive and to be taken as the original.
- 13. **Covered cause of loss** means risks of direct physical loss or damage not excluded or limited in this Coverage Form.
- 14. **Data, media, and software:**
 - a. The Definitions described below in XIV.A.14.b. apply separately to **data**, **media**, and **software** which
 - (1) You own; or
 - (2) Is owned by others and is in your care, custody, or control.
 - b. (1) **Data** means information other than **software**, which has been recorded, installed, or stored on media and is usable in your **electronic data processing equipment** or **mobile communication equipment**. **Data** also means the original source **data** installed or included within **electronic data processing equipment** or **mobile communications equipment**.
 - (2) **Media** means the physical materials upon which **data** or **software** are recorded, installed, or stored; and **media** originally installed or included within **electronic data processing equipment** or **mobile communication equipment**.



- (3) **Software** means instructions, programs, or routines that are recorded, installed, or stored on **media** which are used to control or direct processes, computing, or other functions in your **electronic data processing equipment** or **mobile communication equipment**. **Software** also means the original **software** installed or included within **electronic data processing equipment** or **mobile communication equipment** used to program or control the functions and processes of such equipment.
- (4) **Data, media, or software** does not mean **data, media, or software**:
 - (a) Held for sale; or
 - (b) No longer used in your **operations**.
- 15. **Dependent property** means property operated by others upon whom you depend to:
 - a. Deliver materials or services to you or to others for your account other than **utility services** (Contributing Locations);
 - b. Accept your products or services (Recipient Locations);
 - c. Manufacture products for delivery to your customers under contract of sale (Manufacturing Locations); and
 - d. Attract customers to your business (Leader Locations).
- 16. **Detrimental code** means any computer virus, malware, program, routine, sub-routine, trojan horse, worm, script, or other code string that damages, destroys, alters, or corrupts **Property Insured** or **personal property of others**.
- 17. **Earth movement** means any natural or man-made earth movement, including **earthquake**; landslide; avalanche; **volcanic action**; the sinking, rising, shifting, subsidence, settling, erosion, expansion, or contraction of earth; or **mine subsidence**. **Earth movement** includes:
 - a. Tsunami or tidal waves caused by or resulting from **earth movement**; and
 - b. **Fire protection equipment leakage from earth movement**.

Earth movement does not include **sinkhole collapse**.
- 18. **Earthquake means**, tremors or vibrations within and upon the earth's crust caused by seismic displacement, rupture or creation of faults within the earth's crust that are associated with natural tectonic processes.
- 19. a. **Electronic data processing equipment** means:
 - (1) Computer hardware;
 - (2) Machinery or equipment; and
 - (3) **Voice communication systems**;

which uses **software** for the input, output, processing, or storage of **data**; or to control or direct processes.

- b. **Electronic data processing equipment** does not mean:
 - (1) **Electronic data processing equipment** held for sale; or
 - (2) **Mobile communication equipment**.
- 20. **Expediting expense** means the following necessary extra costs, including overtime wages and express freight or other rapid means of transportation, in order to expedite:
 - a. Emergency or temporary repairs of damaged covered property; or
 - b. Permanent repair or replacement of such damaged property.



21. **Extra expense** means the necessary expenses you incur during the **period of restoration**, over and above the expenses you would have normally incurred had there been no covered loss, in order to:
 - a. Avoid or minimize the **suspension** of business and to continue **operations** at the location or at replacement or temporary locations, including relocation expenses and costs to equip and operate such replacement or temporary locations;
 - b. Minimize the **suspension** of business if you cannot continue **operations**; or
 - c. Repair or replace covered property, but only to the extent it reduces the amount of loss that otherwise would have been payable under Business Income and Extra Expense Coverage.
22. **Fair market value** means the price that a willing buyer would pay to a willing seller in an open market if the property had been offered for sale on the date of the loss.
23. **Fine arts** means the following types of property that are bona fide works of art which:
 1. You own; or
 2. Are owned by others and are in your care, custody, or control;
 including items that are part of a pair or set: Paintings; rare books; etchings; pictures; prints; drawings; tapestries; rugs; sculptures; statuary; pottery; marbles; bronzes; antique furniture; antique silver; manuscripts; porcelains; rare glass; stained glass, whether a part of **business real property** or not; and items of rarity, historical value, or artistic merit, including trophies, scientific instruments or experiments, or musical instruments.
24. **Finished stock** means **stock** you have manufactured including whiskey and alcoholic products being aged, but does not include **stock** you have manufactured which is in its completed state and held for sale at the **location** of any distribution warehouse, wholesale outlet, or retail outlet.
25. **Fire protection equipment** means wet, dry, chemical, or gaseous fire suppression systems including sprinklers or discharge nozzles; supply lines, ducts, or piping; fire suppression supply tanks; pumps; water mains or hydrants; standpipes or outlets; and their component parts or supports; which you own, lease, or rent from others.
26. **Fire protection equipment leakage from earth movement** means leakage or discharge of any substance from **fire protection equipment** caused by or resulting from **earth movement**.
27. **Flood** means a general and temporary condition of partial or complete inundation of normally dry land areas from the following, regardless of how caused, whether driven by wind or not:
 - a. Waves, tides, tidal waves, tsunami, or storm surge;
 - b. The unusual and rapid accumulation or run-off of surface waters from any source;
 - c. Mud flow or mudslides caused or precipitated by accumulation of water on or under the ground;
 - d. The overflow or expansion beyond normal boundaries of inland or tidal waters, including natural or man-made lakes, reservoirs, ponds, brooks, rivers, streams, harbors, seas, oceans, or any other body of water or watercourse; or
 - e. Any material, object, or debris that is carried, propelled, or in any manner moved by a **flood**.

Flood is not any weather condition as referenced in the definitions of **hurricane, named storm, or storm**.
28. **Forgery** means the signing of the name of another person or organization with intent to deceive. **Forgery** does not mean a signature which consists in whole or in part of one's own name signed with or without authority, in any capacity, for any purpose.
29. **Fungus** means all types of fungus, such as mildew and mold, and all of their resulting spores and byproducts, including mycotoxins and allergens. **Fungus** does not mean **fungus** for human ingestion.



30. a. **Hurricane** means a hurricane, typhoon, or tropical cyclone that, as reported or recorded by the National Weather Service:
- (1) Has sustained wind speed of 74 miles per hour or greater; or
 - (2) Has been declared to be a hurricane.
- b. **Hurricane** includes loss or damage to the interior of any covered building or structure or to covered property located inside any building or structure which is caused by or resulting from:
- (1) An opening in such building or structure created by the force of a **hurricane**;
 - (2) One or more tornados that are the result of a **hurricane**;
 - (3) Any hail, rain, material, object, or debris that is carried, propelled, or in any manner moved by a **hurricane**; and
 - (4) Any weather condition other than a **hurricane**, if such loss or damage would not have occurred but for the occurrence of a **hurricane**.
31. **Information restoration cost** means the least of the following dollar amounts:
- a. The cost to reproduce covered property from back-up files or original source documents;
 - b. The cost to purchase covered property of comparable kind, functionality, and quality, intended to be used for the same purpose that existed immediately before loss or damage;
 - c. The necessary cost to research, repair, restore, recreate, or replace covered property, used for the same purpose and to the same condition that existed immediately before loss or damage; or
 - d. The amount you actually spend to research, repair, restore, recreate, or replace covered property used for the same purpose and to the same condition that existed immediately before loss or damage;
- without a deduction for physical deterioration, depreciation, depletion, or obsolescence.
32. **Loading** means the act of moving **Property Insured** from the ground or a platform immediately adjacent to the transporting conveyance onto the transporting conveyance. **Loading** begins when the slings or other devices used to move **Property Insured** have been attached, or the act of lifting or moving such property onto the transporting conveyance has begun. **Loading** ends when **Property Insured** has been placed on the transporting conveyance and any slings or other devices used to move such property have been released.
33. **Location** means the legal boundaries of a parcel of property at the address described in the Declarations. If the word "location" is not shown in **bold face**, then such reference includes all of the following:
- a. **Location(s)**; and
 - b. The legal boundaries of a parcel of property insured by Newly Acquired Location Coverage, or Unnamed Location Coverage, or both.
34. **Loss event** means:
- a. With respect to a single **hurricane**, all elements of loss, regardless of the number of locations involved, caused by or resulting from a **hurricane** and includes the period of time:
 - (1) When a **hurricane** watch or warning with respect to such **hurricane** is declared; and
 - (2) The entire duration of the **hurricane**; and
 - (3) 72 hours immediately following the reclassification of a **hurricane** to a lesser **storm** or **named storm**;

as reported or recorded by the National Weather Service (NWS). A single **hurricane** will constitute a single **loss event**.



- b. With respect to subsequent **hurricanes** that cause loss or damage after a **hurricane** begins as described in Item XIV.A.34.a.(1) above, all elements of loss, regardless of the number of locations involved, caused by or resulting from such subsequent **hurricanes** that:
- (1) Cause loss or damage at your location(s) subsequent to the initial **hurricane** affecting such location(s); and
 - (2) Are declared a **hurricane** before, with respect to the initial **hurricane**, the expiration of the time period described in Item XIV.A.34.a(3) above; and
 - (3) Occur within the interval of time described in Item XIV.A.34.a. above, such that assignment of loss or damage to a specific **hurricane** is not possible.

Multiple **hurricanes** that originate within this defined period of time will constitute a single **loss event**.

- c. With respect to a single **named storm**, all elements of loss, regardless of the number of locations involved, caused by or resulting from a **named storm** and includes the period of time:
- (1) When the NWS issues a watch or warning with respect to such **named storm**; and
 - (2) The entire duration of the **named storm**; and
 - (3) Ends when such watch or warning is terminated by the NWS with respect to such **named storm**.
- d. With respect to subsequent **named storms** that cause loss or damage after a **named storm** begins as described in Item XIV.A.34.c.(1) above, all elements of loss, regardless of the number of locations involved, caused by or resulting from such subsequent **named storms** that:
- (1) Cause loss or damage at your location(s) subsequent to the initial **named storm** affecting such location(s); and
 - (2) Are declared a **named storm** before, with respect to the initial **named storm**, the expiration of the time period described in Item XIV.A.34.c(3) above; and
 - (3) Occur within the interval of time described in Item XIV.A.34.c. above, such that assignment of loss or damage to a specific **named storm** is not possible.

Multiple **named storms** that originate within this defined period of time will constitute a single **loss event**.

- e. With respect to a single **storm**, all elements of loss, regardless of the number of locations involved, caused by or resulting from such **storm** as reported or recorded by the NWS or other similar weather reporting agency. A single **storm** will constitute a single **loss event**.
- f. With respect to multiple **storms** all elements of loss, regardless of the number of locations involved, caused by or resulting from such multiple **storms** where assignment of the loss to a specific **storm**, as reported or recorded by the NWS or other similar weather reporting agency, is not possible because the **storms** occur within an interval of time that makes assignment to a specific storm impossible. Multiple **storms** that originate within this defined period of time will constitute a single **loss event**.
- g. The expiration of this Policy will not reduce the time periods described above in Item XIV.A.34.a., b., c., d., e., and f.

35. **Manager** means a person or entity responsible for managing a limited liability company.
36. **Member** means an owner of a limited liability company represented by its membership interest, who also may serve as a **manager**.
37. **Messenger** means you, your partners, **members**, officers, **managers**, directors, trustees, or employees (including leased employees) while having care, custody, or control of **money**, **securities**, or both outside the **premises**.



38. **Mine subsidence** means a failure or subsidence initiated at the mine level of a man-made underground mine, including coal, clay, limestone, or fluorspar mines, whether or not mining activity has ceased.
39. a. **Mobile communication equipment** means handheld communication devices which:
- (1) You own; or
 - (2) Are owned by others and are in your care, custody, or control;
- including portable laptop computers, cellular telephones, computer tablets, pagers, personal digital assistants (PDAs), global positioning devices, and their accessories.
- b. **Mobile communication equipment** does not mean **mobile communication equipment** held for sale.
40. a. **Mobile equipment** means mobile machinery and equipment which:
- (1) You own; or
 - (2) Is owned by others and is in your care, custody, or control;
- whether or not such property is permanently mounted on a **vehicle**. If **mobile equipment** is permanently mounted on a **vehicle**, then such **vehicle** will also be considered **mobile equipment**. **Mobile equipment** includes cranes; backhoes; bulldozers; tractors; graders; hand tools; and accessories, repair parts, or spare parts, intended for use in the operation or maintenance of such **mobile equipment**.
- b. **Mobile equipment** does not mean:
- (1) A **vehicle**;
 - (2) **Mobile equipment** held for sale; or
 - (3) **Mobile equipment** covered under any other insurance.
41. **Money** means:
- a. Currency, coins, and bank notes in current use and having a face value; and
 - b. Unused money orders, food stamps, travelers checks, register checks, tokens, lottery and other tickets; but only when held by you in storage or for sale to the public.
42. a. **Named storm** means a specific storm system, including **hurricane**, that has been named by the National Weather Service.:
- b. **Named storm** includes loss or damage to the interior of any covered building or structure or to covered property located inside any building or structure which is caused by or resulting from:
- (1) An opening in such building or structure created by the force of a **named storm**;
 - (2) One or more tornados that are the result of a **named storm**;
 - (3) Any hail, rain, material, object, or debris that is carried, propelled, or in any manner moved by a **named storm**; and
 - (4) Any weather condition other than a **named storm**, if such loss or damage would not have occurred but for the occurrence of a **named storm**.
43. **Net leasehold interest** means the present value of your Gross Lessee's Leasehold Interest or Gross Lessor's Leasehold Interest for each remaining month, or portion thereof, of the unexpired term of the lease or rental agreement computed at the prime rate of interest in effect at the time of loss.
44. **Non-conforming property** means **Property Insured** whose height, floor area, number of units, leasable square footage, occupancy, or style was permitted at the time of original construction, but whose height, floor area, number of units, leasable square footage, occupancy, or style is not permitted by an **ordinance or law** in force at the time of the covered loss.



45. **Operational replacement cost** means:
- (a) The cost to repair covered property which has sustained loss or damage to the same functionality and purpose that existed immediately before such loss or damage without deduction for physical deterioration, depreciation, depletion, or obsolescence; or
 - (b) If repair of covered property which has sustained loss or damage is not possible due to the extent of loss or damage, or as a result of obsolescence, then the cost to replace such property, including delivery and setup costs, with similar new property to be used for the same purpose and which provides the same functionality that such property provided immediately before such loss or damage, even if the capacity of the replaced property is improved, without deduction for physical deterioration, depreciation, depletion, or obsolescence.
46. **Operations** means the usual and customary business activities in the conduct of **your business** occurring at the **location**, including the tenability of the **premises**.
47. **Ordinance or law** means any ordinance, law, regulation, or rule that is in force at the time of the covered loss or damage and:
- a. Regulates the construction, use, occupancy, operation, improvement, replacement, modification, installation, zoning, or repair of any property; or
 - b. Requires the demolition or tearing down of any property, including the cost of removing its debris.
48. **Ordinary payroll expense** means payroll expenses for all your employees except: Officers; executives; department managers; employees under contract; and any Additional Exemptions From Ordinary Payroll as described in the Declarations under the heading Job Classifications or Employees.
- Ordinary payroll expense** includes payroll; employee benefits, if directly related to payroll; FICA payments you pay; union dues you pay; and workers compensation premiums.
49. **Overhead transmission lines and equipment** means:
- a. Overhead transmission or distribution lines supplying electricity, telephone, radio, internet, television, or other services to a **location**; and
 - b. Overhead transformers or other overhead equipment which assist in supplying electricity, telephone, radio, internet, television, or other services to a **location**; and
 - c. Any towers, poles, or similar supporting structures.
50. a. **Period of restoration** means the period of time that begins immediately after the time of direct physical loss or damage caused by or resulting from a **covered cause of loss** to property at the **location** and ends on the earlier of:
- (1) The date when such property at the **location** should be repaired, rebuilt, or replaced with reasonable speed and like kind and quality; or
 - (2) The date when business is resumed at a new permanent location.
- b. **Period of restoration** does not include any increased period due to the enforcement of any **ordinance or law**, including any **ordinance or law** that requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify, or neutralize, or in any way respond to, or assess the effects of **pollutants**.
- c. The expiration date of this Policy will not cut short the **period of restoration**.
51. **Personal effects** means apparel, tools, and other personal possessions owned by you, your partners, **members**, officers, **managers**, directors, trustees, or employees (including leased employees). **Personal effects** does not mean a vehicle.
52. **Personal property of others** means personal property that does not belong to you and is in your care, custody, or control. **Personal property of others** does not mean personal property you lease or rent from others or **personal effects**.



53. **Pollutants** means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, asbestos, and waste. Waste includes material to be recycled, reconditioned, or reclaimed.
54. **Premises** means the building(s) at the **location** you occupy. If you occupy only part of the building at the **location**, then your **premises** is the portion of the building which you rent, lease, or occupy.
55. **Processing water** means water used in your **operations**, which is contained within any enclosed water storage tanks, associated piping used for the delivery of such water; or processing equipment.
56. **Property damage loss** means covered loss, damage, or expense insured under any coverage provided by this Coverage Form, other than that insured under a **time element loss**.
57. **Property Insured** means **business real property**, **business personal property**, or both.
58. a. **Prototype** means an original version or model of a newly designed product which:
- (1) You own; or
 - (2) Is owned by others and is in your care, custody, or control.
- A **prototype** includes cultures, sample designs, experimental models or displays integral to the manufacture of the original version or model of a newly designed product.
- b. **Prototype** does not mean stock held for sale.
59. **Public health authority** means the governmental authority having jurisdiction over your **operations** relative to health and hygiene standards necessary for the protection of the public.
60. a. **Replacement cost** means the cost to repair or replace covered property which has sustained loss or damage with other property:
- (1) Of like kind, quality, size, and capacity, as that with which it was originally constructed; and
 - (2) Used for the same occupancy and purpose;
- without a deduction for physical deterioration, depreciation, depletion, or obsolescence.
- b. **Replacement cost** includes:
- (1) The cost of digging, excavating, backfilling, filling, or grading of land directly related to the repair, rebuilding, or replacement of **business real property**; and
 - (2) Your interest in labor, materials, or services furnished or arranged by you and other expenses accrued, but only with respect to **buildings while in the course of construction** or **business personal property** insured under Installation Coverage.
61. **Research and development documentation** means recorded evidence of your **research and development operations** which:
- a. You own; or
 - b. Is owned by others and is in your care, custody, or control.
- Research and development documentation** includes facts, information, research, concepts, processes, or formulas that are directly related to the development of new products or enhancement of existing products.
- Research and development documentation** does not mean **research and development documentation** no longer used in your **research and development operations**.
62. **Research and development operations** means your **operations** that are directly related to the development of new products or enhancement of existing products.
63. **Salesperson's samples** means samples of **stock** while in the care, custody, or control of a salesperson employed by you.



64. **Securities** means negotiable and nonnegotiable instruments or contracts representing either **money** or property and includes:
- a. Checks, drafts, money orders, travelers checks, and register checks drawn to your order that you have accepted as payment;
 - b. Revenue and other stamps in current use (whether represented by actual unused stamps or unused value in a meter); and
 - c. Evidences of debt issued in connection with credit or charge cards that you have accepted as payment, which cards are not issued by you.

Securities does not include **money**.

65. **Sinkhole collapse** means the sudden sinking or collapse of land into underground empty spaces created by the action of water on limestone or dolomite. **Sinkhole collapse** does not mean sinking, subsidence, or collapse of land into a man-made underground mine or other such cavity, or the cost of filling sinkholes.

66. **Soft costs** mean:

- a. Realty taxes or other government assessments which you incur;
- b. Insurance premiums;
- c. Marketing, advertising, and promotional expenses;
- d. Commissions which result from renegotiation of leases and other similar extra expenses;
- e. Fees for services from attorneys, architects, engineers, surveyors, public accountants, or Certified Public Accountants;
- f. Permit fees; and
- g. Interest expense incurred including bond interest, financing fees or charges, or other debt service payments, on money you borrow in order to finance construction or repair.

Soft costs do not include fees for any services from a public adjuster.

67. a. **Stock** means the following:

- (1) Merchandise including animals which are held for sale, or for delivery after sale;
- (2) Raw materials, in the state in which you receive it, used for conversion into **finished stock**;
- (3) Stock-in-process, which is raw materials that are undergoing the mechanical process of manufacturing, aging, or seasoning but which is not yet **finished stock**; or
- (4) **Finished stock**.

- b. **Stock** includes:

- (1) Your interest in labor, materials, or services furnished or arranged by you on **personal property of others**; or
- (2) Supplies used in packing or shipping of any of these items described as **stock** including the shipping or marketing container.

68. a. **Storm** means all types of weather conditions, atmospheric disturbances, precipitation, or any combination thereof, including tornados, wind, hail, rain, snow, ice, sleet, sand, or dust, whether driven by wind or not, but not including **hurricane, named storm**, or changes in temperature.

- b. **Storm** includes loss or damage to the interior of any covered building or structure or to covered property located inside any building or structure which is caused by or resulting from:

- (1) An opening in such building or structure created by the force of a **storm**;



- (2) The weight or accumulation of hail, rain, snow, ice, sleet, sand, or dust; or
 - (3) Any hail, rain, material, object, or debris that is carried, propelled, or in any manner moved by the force of a **storm**.
- 69. **Suspension** means the slowdown or cessation of your **operations**, or that a part or all of the described **premises** is rendered untenable.
- 70. a. **Tenant's improvements and betterments** means fixtures, alterations, installations, or additions:
 - (1) Made a part of the **business real property** you occupy but do not own; and
 - (2) You acquired or made at your expense, exclusive of rent paid by you, and cannot legally remove.
- b. **Tenant's improvements and betterments** also means **business personal property**, including the value of any repairs, additions, or improvements, while awaiting or during the course of construction or renovation activities as long as such property is destined to become a **tenant improvement and betterment** and a permanent part of **business real property**.
- c. **Tenant's improvements and betterments** while in the course of construction does not mean:
 - (1) **Soft costs**; or
 - (2) **Tenant's improvements and betterments** for which separate insurance coverage has been obtained and such separate insurance covers your interest.
- 71. **Tenant moving costs** means the following documented and necessary costs or fees associated with moving from and moving back to the **premises** for:
 - a. Packing, insuring, and carting **business personal property**;
 - b. Re-establishing utility services that were in place prior to the tenant moving from the **premises**, less refunds from discontinued services;
 - c. Assembling and setting up fixtures and equipment;
 - d. Unpacking and re-shelving of **stock** and supplies; and
 - e. Rent abatement offered to the tenant(s) as an incentive to reoccupy the premises.
- 72. **Theft** means any act of stealing, including robbery or burglary.
- 73. **Time element loss** means a covered **business income** or **extra expense** loss such as losses insured under the following types of coverage: Business Income Coverage; Extra Expense Coverage; Business Income with Extra Expense; Extended Business Income and Extra Expense Coverage; Dependent Property Coverage; Rental Value Coverage; Utility Services Coverage.
- 74. **Transit** means the transportation or shipping of **Property Insured** using your **vehicles** or carriers for hire:
 - a. If the mode of transportation is a **vehicle** which you own, lease, rent, or operate, then **transit** begins from the time **Property Insured** departs from your location or the originating point of shipment.
 - b. If the mode of transportation is a carrier for hire, then **transit** begins from the time **Property Insured** is placed in the care, custody, or control of any carrier for hire.
 - c. **Transit** extends continuously thereafter, while in the due course of **transit**, and includes any reasonable stops, interruptions, delays or transfers incidental to the route and method of shipment including connecting carriers.
 - d. **Transit** ends on the earlier of the following:
 - (1) When responsibility for the **Property Insured** is the buyer's in accordance with the terms of sale or bill of lading, as applicable;



- (2) When the **Property Insured** is accepted by or on behalf of the consignee or receiver at the intended destination; or
 - (3) When the **Property Insured** arrives at a location.
- 75. **Unloading** means the act of moving **Property Insured** from the transporting conveyance to a consignee's conveyance, a platform, or the ground immediately adjacent to the transporting conveyance. **Unloading** ends when **Property Insured** has been placed on the consignee's conveyance, ground, or loading platform and the any slings or other devices used to move such property have been released.
- 76. **Utility services** means services that are necessary to conduct your **operations** at the **location**, including:
 - a. Water Supply Services, defined as the following types of property supplying water to the **location**: Pumping stations and water mains.
 - b. Communication Supply Services, defined as the following types of property supplying telephone, internet, cellular, radio, microwave, **cloud computing**, or television services to the **location**: Communication transmission or distribution lines, including fiber optic transmission or distribution lines; coaxial cables; microwave radio relays; and satellites.
 - c. Power Supply Services, defined as the following types of property supplying electricity to the **location**: Utility generating plants; switching stations; substations; transformers; and transmission or distribution lines.
 - d. Sewage Treatment Services, defined as the following types of property discharging sewage from the **location**: Pumping stations; sewer lines; and public waste treatment plants.
 - e. Other Supply Services supplying goods or services to the **location** necessary for your **operations**, including refrigeration, steam, gas, or fuel.
- 77. a. **Valuable papers and records** mean the following types of property which you own; or is owned by others and is in your care, custody, or control:
 - (1) Inscribed, printed, or written documents such as: Passports; manuscripts or records; abstracts; books; magazines; periodicals; newspapers; deeds; drawings; mechanical drawings; maps; stamp collections; mortgages or leases; and
 - (2) Recordings of any type such as: Film, negatives, slides, photographs, videotape, cylinders, or vinyl records, including such records which exist in electronic or magnetic media, discs, or tape.
- b. **Valuable papers and records** do not mean:
 - (1) **Money** or **securities**;
 - (2) **Valuable papers and records** held for sale; or
 - (3) **Valuable papers and records** no longer used in your **operations**.
- 78. **Value** means the monetary worth of covered property at the time of covered loss or damage that is determined based on the applicable valuation method.
- 79. **Vehicle(s)** means any:
 - a. Self-propelled land motor vehicle required to be licensed for use on public roads including: Automobiles, buses, motorcycles, trucks, or tractors;
 - b. Trailers or semi-trailers required to be licensed for use on public roads; or
 - c. Similar means of transporting people or property on land.

Two or more **vehicles** connected together will be considered a single **vehicle**. A **vehicle** does not mean **mobile equipment**.



80. **Voice communication systems** means telephone systems, telephone switch-gear including operating programs and related **software**, voice terminals, telephone circuit packs, and other such equipment and component parts whose function is the transmission of voice communications.
81. **Volcanic action** means the eruption, explosion, or effusion of a volcano including the airborne volcanic blast; airborne shock waves; ash, dust, or particulate matter; lava flow, mud flow, or other debris flow.
82. **Your business** means the trade, profession, or occupation in which you are engaged.
- B. Additional Definitions may be included within endorsements that may be attached to this Coverage Form.



Property-Gard Pinnacle® - Additional Covered Causes of Loss 250001 01 13

Policy Amendment - Commercial Property Coverage Section

This Endorsement modifies insurance provided under the Property-Gard Pinnacle Coverage Form - 250000.

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- I. A. If a Limit of Insurance is shown in the Declarations applicable to this Endorsement for any of the following causes of loss, then each such cause of loss is a **covered cause of loss** and we will pay for direct physical loss or damage to **Property Insured** caused by or resulting from such **covered cause(s) of loss** at a **location** shown in the Declarations applicable to this Endorsement:
1. **Earth movement;**
 2. **Fire protection equipment leakage from earth movement;** or
 3. **Flood.**
- B. Business Income and Extra Expense
1. If the Declarations show you have Business Income and Extra Expense Coverage, then we will pay for the actual loss of **business income** or necessary **extra expense** that you sustain due to the necessary **suspension** of your **operations** during the **period of restoration**. The **suspension** of your **operations** must be caused by or result from direct physical loss or damage to property at a **location** shown in the Declarations applicable to this Endorsement caused by a **covered cause of loss** insured under this Endorsement.
 2. A covered loss under this Endorsement involving **business income** or necessary **extra expense** will be governed by the terms and conditions of Business Income and Extra Expense Coverage provided under the Property-Gard - Pinnacle Coverage Form - 250000 but will be subject to the Limits of Insurance shown in the Declarations applicable to this Endorsement.
- C. 1. If **earth movement** or **fire protection equipment leakage from earth movement** are **covered causes of loss** insured under this Endorsement, then the Earth Movement exclusion (Item IV.A.3.a.) contained in the Property-Gard - Pinnacle Coverage Form - 250000 does not apply, but only with respect to coverage provided by this Endorsement.
2. If **flood** is a **covered causes of loss** insured under this Endorsement, then the Flood exclusion (Item IV.A.3.b.) contained in the Property-Gard - Pinnacle Coverage Form - 250000 does not apply, but only with respect to coverage provided by this Endorsement.
- II. Additional Exclusions
- The following exclusions are added to Item IV.A.1. of the Property-Gard Pinnacle Coverage Form - 250000 with respect to coverage provided by this Endorsement:
- A. **Earth movement, fire protection equipment leakage from earth movement, or flood** that begins before the inception of this Policy; or
 - B. The cost to remove ash, dust, or other particulate matter caused by or resulting from **volcanic action** that does not cause direct physical loss or damage to property insured by this Endorsement.
- III. Deductible
- A. 1. If **flood** is a **covered causes of loss** insured under this Endorsement, then the Flood exclusion (Item IV.A.3.b.) contained in the Property-Gard - Pinnacle Coverage Form - 250000 does not apply, but only with respect to coverage provided by this Endorsement.

This Form must be attached to Change Endorsement when issued after the policy is written.
One of the **Allianz Global Risks US Companies** as named in the policy.



2. The deductible(s) stated in the Declarations, applicable to the **covered causes of loss** insured under this Endorsement, apply to each **loss event**, except as described below in Item III.B.3.
3. We will not pay for covered **property damage loss** or **time element loss** in any one **loss event** until the amount of covered **property damage loss** or **time element loss** exceeds the deductible shown in the Declarations applicable to the **covered causes of loss** insured under this Endorsement. We will then pay the amount of such covered **property damage loss** or **time element loss** in excess of the deductible, up to the applicable Limit of Insurance.

B. Property Damage Loss

1. If the deductible stated in the Declarations applicable to this Endorsement is a Dollar Deductible Amount, then the stated dollar amount is the sum we will subtract from a covered **property damage loss** in any one **loss event**.
2. If the deductible stated in the Declarations applicable to this Endorsement is a Percentage Deductible, then for covered property that has sustained loss or damage, the sum we will subtract from a **property damage loss** in any one **loss event** is the indicated percentage multiplied by 100% of the total **value** of such covered property immediately prior to the loss. However, if a Minimum Deductible amount is stated in the Declarations, then we will subtract at least the Minimum Deductible amount from the covered **property damage loss** you sustain in any one **loss event**.
3. The Dollar Deductible Amount and Percentage Deductible indicated in the Declarations applicable to this Endorsement will be calculated separately for and applied separately to the following subjects of insurance for each **loss event** wherever such loss or damage is sustained and for which claim is made:
 - a. Each **building** that sustains covered loss or damage, if any part of such **building** sustains covered loss or damage;
 - b. **Business personal property** in each **building**, if any portion of such **business personal property** sustains covered loss or damage;
 - c. **Business personal property** situated outside of a **building** and in the open, and **business real property** other than **buildings** situated outside of a **building** and in the open, if any portion of such property sustains covered loss or damage; and
 - d. Any other covered property insured by an Extension of Coverage under Section V. of the Property-Gard- Pinnacle Coverage Form - 250000.

C. Time Element Loss

1. If the deductible stated in the Declarations applicable to this Endorsement is a Dollar Deductible Amount, then the stated dollar amount is the sum we will subtract from a covered **time element loss** in any one **loss event**.
2. If the deductible stated in the Declarations applicable to this Endorsement is an Hour Deductible, then we will not pay for any covered **time element loss** you sustain during the specified number of consecutive hours immediately following the initial covered loss or damage. However, if a Minimum Deductible amount is stated in the Declarations applicable to this Endorsement, then we will subtract at least the Minimum Deductible amount from the covered **time element loss** you sustain in any one **loss event**.

D. When Multiple Deductibles Apply

If more than one deductible is applicable to covered loss, damage, or expense insured under this Endorsement, then each such deductible applies separately and will be determined based on the deductible shown in the Declarations applicable to this Endorsement. If deductibles are shown in the Declarations applicable to this Endorsement for a **property damage loss** and a **time element loss**, then each deductible will be subtracted from the applicable covered **property damage loss** or **time element loss** in any one **loss event**.



IV. Limits of Insurance

- A. Regardless of any other coverage, Limits of Insurance stated in this Policy, or the number of locations involved, the most we will pay for **property damage loss** or **time element loss**, or both, in any one **loss event** caused by or resulting from a **covered cause of loss** is the Blanket Per Loss Event Limit of Insurance shown in the Declarations applicable to this Endorsement. However, the most we will pay with respect to such losses to a **location** that has been assigned a Per Loss Event Sublimit of Insurance is the applicable Per Loss Event Sublimit of Insurance shown in the Declarations applicable to this Endorsement.
- B. If the Declarations applicable to this Endorsement show a Blanket Per Loss Event Limit of Insurance in conjunction with a Per Loss Event Sublimit of Insurance, then such sublimit is included within, not in addition to, the corresponding Blanket Per Loss Event Limit of Insurance.
- C. The most we will pay for **property damage loss** or **time element loss** in all **loss events** in any one Policy Period under this Endorsement, is the **Annual Aggregate** Limit of Insurance shown in the Declarations applicable to this Endorsement.
- D. If a **covered cause of loss** insured under this Endorsement causes fire or explosion, and both **covered causes of loss** create covered loss or damage, then only the higher of the two Limits of Insurance will apply.

V. Additional Definitions

The following are additional definitions applicable only to this Endorsement:

- A. **Building** means a type of **business real property** which is a structure used to support or shelter your operations.
- B. **Loss event** means:
 1. With respect to **earth movement** and **fire protection equipment leakage from earth movement**, all elements of loss, regardless of the number of locations involved, caused by or resulting from **earth movement** and **fire protection equipment leakage from earth movement**. All **earth movement** that occurs within any 168 hour period will constitute a single **loss event**. The expiration of this Policy will not reduce the 168 hour period.
 2. With respect to **flood**, all elements of loss, regardless of the number of locations involved, caused by or resulting from a single **flood** that begins when **flood** water enters your location during the Policy Period.

VI. Examples - Application of Percentage Deductible in a Covered Loss

- A. As used in the following examples, the terms Specific Limits of Insurance and Blanket Limits of Insurance have the following meanings:
 1. Specific Limits of Insurance means each subject of insurance at each **location** under a separate Limit of Insurance. For example:
 - a. **Business real property** at a **location** insured under a Limit of Insurance which applies only to such **location**; or
 - b. **Business personal property** at a **location** insured under a Limit of Insurance which applies only to such **location**.
 2. Blanket Limits of Insurance means two or more subjects of insurance under a single Limit of Insurance. For example:
 - a. **Business real property** and **business personal property** located at a single **location** insured under a single Limit of Insurance; or
 - b. **Business real property**, **business personal property**, or both combined, at two separate **locations** insured under a single Limit of Insurance.

Subjects of insurance, **locations**, and corresponding Limits of Insurance are shown in the Declarations applicable to this Endorsement.



B. Example 1: Specific Limits of Insurance

1. The Limits of Insurance shown in the Declarations are as follows:
 - a. **Building** = \$80,000
 - b. **Business personal property** situated in such **building** = \$64,000
2. The **value** of the **building** is \$100,000. The **value** of **business personal property** situated in such **building** is \$80,000.
3. **Building** and **business personal property** situated in such **building** have sustained covered loss or damage. The amounts of such covered loss or damage are:
 - a. **Building** = \$60,000; and
 - b. **Business personal property** situated in such **building** = \$40,000.
4. The Percentage Deductible shown in the Declarations that applies is 2%.
5. The application of the Percentage Deductible is determined and applied as follows:

Building	Business Personal Property
Step 1: \$100,000 X 2% = \$2,000 Step 2: \$60,000 - \$2,000 = \$58,000	Step 1: \$80,000 X 2% = \$1,600 Step 2: \$40,000 - \$1,600 = \$38,400

6. The most we will pay in this example is \$96,400 (\$58,000 + \$38,400 = \$96,400). That portion of the total loss not covered due to application of the deductible is \$3,600 (\$2,000 + \$1,600 = \$3,600).
7. Note that the dollar equivalent of the Percentage Deductible shown in the Declarations applicable to this Endorsement is determined by applying such Percentage Deductible to the 100% total **value** of the damaged **building** and **business personal property** immediately before the covered loss or damage occurs.

C. Example 2: Blanket Limits of Insurance

1. The Blanket Limit of Insurance applicable to Business Real Property shown in the Declarations is \$1,800,000 and insures **buildings** #1, #2, and #3.
2. The **value** of each **building** included in such Blanket Limit of Insurance totals \$2,000,000 and is comprised of the following:
 - a. **Building** #1 with a **value** of \$500,000;
 - b. **Building** #2 with a **value** of \$500,000; and
 - c. **Building** #3 with a **value** of \$1,000,000.
3. **Buildings** #1 and **building** #2 have sustained covered loss or damage. The amounts of loss to these buildings are:
 - a. **Building** #1 = \$40,000; and
 - b. **Building** #2 = \$20,000.
4. The Percentage Deductible shown in the Declarations that applies is 2%.
5. The application of the Percentage Deductible is determined and applied as follows:



Building #1	Building #2
Step 1: \$500,000 X 2% = \$10,000 Step 2: \$40,000 - \$10,000 = \$30,000	Step 1: \$500,000 X 2% = \$10,000 Step 2: \$20,000 - \$10,000 = \$10,000

6. The most we will pay is \$40,000 (\$30,000 + \$10,000 = \$40,000). That portion of the total loss not covered due to application of the Percentage Deductible is \$20,000 (\$10,000 + \$10,000 = \$20,000).
7. Note that the dollar equivalent of the Percentage Deductible shown in the Declarations applicable to this Endorsement is determined by applying such Percentage Deductible to the 100% total **value** of each damaged **building** (**building #1** and **building #2**) immediately before the covered loss or damage occurs.

VII. This Endorsement is otherwise subject to all the terms, conditions, exclusions, limitations, and provisions of the Policy to which it is attached.



Property-Gard Pinnacle® - Employee Theft and Forgery or Alteration Coverage - Limited - 250037 01 13

Policy Amendment - Commercial Property Coverage Section

This Endorsement modifies insurance provided under the Property-Gard Pinnacle Coverage Form - 250000.

I. Section V.D., Extensions of Coverage Applicable only to Property Coverage, provided under the Property-Gard Pinnacle Coverage Form - 250000, is amended to include the following:

A. Employee Theft and Forgery or Alteration Coverage - Limited

1. Employee Theft - Limited

We will pay for loss or damage resulting directly from **theft** of:

- a. **Money, securities, and other tangible property**; and
- b. Tangible property belonging to your **client** or such property in your **client's** care, custody, or control, but only if such **theft** occurs during the time you are inside the premises of your **client**, whether or not you are legally liable for the loss of such property;

committed by an **employee**, whether identified or not, acting alone or in collusion with other persons. This insurance is for your benefit only. It provides no rights or benefits to any other person or organization. Any claim for loss that is covered under this insurance must be presented by you.

2. Forgery or Alteration - Limited

We will pay for loss resulting directly from **forgery** or alteration of checks, drafts, promissory notes, or similar written promises, orders, or directions to pay a sum certain in **money** by other than an **employee** that are:

- a. Made or drawn by or drawn upon you; or
- b. Made or drawn by one acting as your agent;

or that are purported to have been so made or drawn. For the purpose of Forgery or Alteration - Limited, a substitute check, as described or defined in the Check Clearing for the 21st Century Act, shall be treated the same as the original it replaced.

3. Additional Locations and Employees

If, while this insurance is in force, you:

- a. Establish any additional locations; or
- b. Hire additional **employees**; or
- c. Consolidate, merge with, or purchase or acquire the assets or liabilities of, another entity;

then such locations and **employees** shall automatically be covered under the provisions of this Endorsement. Notice to us of an increase in the number of locations or **employees** need not be given and no additional premium need be paid for the remainder of the Policy Period shown in the Declarations. However, you must give us written notice of such expansion in your **operations** prior to the next Policy renewal or anniversary.

B. Property Not Insured

Employee Theft and Forgery or Alteration Coverage - Limited does not insure **data, media and software**.

This Form must be attached to Change Endorsement when issued after the policy is written.
One of the **Allianz Global Risks US Companies** as named in the policy.



C. Exclusions

We will not pay under this Endorsement for any loss, damage, or expense caused directly or indirectly by or resulting from any of the following excluded causes of loss; such loss, damage, or expense is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss:

1. Exclusions Applicable to Employee Theft and Forgery or Alteration Coverage - Limited

Regardless of how the cause of loss occurs, we will not pay under Employee Theft and Forgery or Alteration Coverage - Limited for direct physical loss or damage caused by or resulting from the following causes of loss:

- a. **Theft** or any other dishonest act committed by you or any of your partners or **members**, whether acting alone or in collusion with other persons.
- b. (1) The unauthorized use or disclosure of your confidential information including, but not limited to, patents, trade secrets, processing methods, or customer lists; or
 (2) The unauthorized use or disclosure of confidential information of another person or entity which is held by you, including but not limited to, financial information, personal information, credit card information, or similar non-public information.
- c. Consequential loss of any kind that is an indirect result of an **occurrence** covered by Employee Theft and Forgery or Alteration - Limited including, but not limited to, loss resulting from:
 - (1) Your inability to realize income that you would have realized had there been no covered loss or damage.
 - (2) Payment of damages of any type for which you are legally liable. But, we will pay compensatory damages arising directly from a loss covered under Employee Theft and Forgery or Alteration - Limited.
 - (3) Payment of costs, fees, or other expenses you incur in establishing either the existence or the amount of loss under Employee Theft and Forgery or Alteration - Limited.
- d. Fees, costs, or expenses incurred by you which are related to any legal action.

2. Exclusions Applicable to Employee Theft - Limited

Regardless of how the cause of loss occurs, we will not pay under Employee Theft - Limited for direct physical loss or damage caused by or resulting from the following causes of loss:

- a. Loss caused by any **employee** as soon as:
 - (1) You, a partner, or **member of your business**;
 - (2) A person employed by **your business** as a **manager**, officer, director, or member of your management level staff; or
 - (3) A trustee or other person with legal authority over **your business**;
 not in collusion with the **employee**, learn of **theft** or any other dishonest act committed by the **employee** whether before or after becoming employed by you.
- b. Loss caused by any **employee** of yours, or predecessor in interest of yours, for whom similar prior insurance has been cancelled and not reinstated since the last such cancellation.
- c. Disappearance of covered property where there is no physical evidence to show what happened to such property; or the only evidence of loss is an audit, an inventory computation, or a profit and loss computation; or any combination thereof. However, where you have independently established that you have sustained an otherwise insurable loss under Employee Theft - Limited, then you may offer your audit, inventory computation, profit and loss computation, or any combination thereof in support of the amount of loss claimed.



- d. Loss resulting from trading, whether in your name or in a genuine or fictitious account.
- e. Loss resulting from fraudulent or dishonest signing, issuing, canceling, or failing to cancel, a warehouse receipt or any papers connected with it.

3. Exclusions Applicable to Forgery or Alteration - Limited

Regardless of how the cause of loss occurs, we will not pay under Forgery or Alteration - Limited for direct physical loss or damage caused by or resulting from **theft** or any other dishonest act committed by:

- a. Any **employees** of **your business** including but not limited to **managers**, officers, directors, or other members of your management level staff; or
- b. A trustee or other person with legal authority over **your business**;

whether acting alone or in collusion with other persons or while performing services for you or otherwise.

D. Additional Conditions

The following Conditions apply in addition to the Loss Conditions and General Conditions contained in the Property-Gard Pinnacle Coverage Form - 250000, and the Common Policy Conditions:

- 1. We will only pay for covered loss that you sustain occurring during the Policy Period shown in the Declarations and **discovered** by you:
 - a. During the Policy Period shown in the Declarations; or
 - b. No later than 1 year from the date of termination or cancellation of this insurance. However, this extended period to **discover** loss terminates immediately upon the effective date of any other insurance obtained by you replacing, in whole or in part, the insurance afforded hereunder, whether or not such other insurance provides coverage for loss sustained prior to its effective date.
- 2. An **employee** of any Named Insured is considered to be an **employee** of every Named Insured.
- 3. Payment by us to the first Named Insured for covered loss sustained by any other Named Insured, other than an **employee benefit plan**, shall fully release us on account of such loss.
- 4. Regardless of the number of years this insurance remains in force or the number of premiums paid, no Limit of Insurance cumulates from year to year or Policy Period to Policy Period.
- 5. We will treat signatures that are produced or reproduced electronically, mechanically or by other means the same as handwritten signatures.
- 6. The following coverage clauses contained in the Property-Gard Pinnacle Coverage Form - 250000 or the Commercial Property Coverage Section do not apply to the coverages provided by this Endorsement:
 - a. Business Income Coverage;
 - b. Extra Expense Coverage;
 - c. Expediting Expense Coverage; or
 - d. Loss Adjustment Expense Coverage.

E. Employee Benefit Plans

- 1. The **employee benefit plan** shown in the Declarations applicable to this Endorsement is included as a Named Insured, but only with respect to coverage under Employee Theft - Limited.
- 2. If any **employee benefit plan** is insured jointly with any other entity under this insurance, then you or the administrator of the **employee benefit plan** must select a Limit of Insurance for Employee Theft - Limited that is sufficient to provide a Limit of Insurance for each **employee benefit plan** that is at least equal to that required if each **employee benefit plan** were separately insured.
- 3. With respect to loss sustained or **discovered** by any such **employee benefit plan**, Item I.A.1., Employee Theft - Limited, is replaced by the following:



We will pay for loss of or damage to **funds** and other tangible assets (other than **data, media** and **software**) resulting directly from fraudulent or dishonest acts committed by an **employee**, whether identified or not, acting alone or in collusion with other persons.

4. If the first Named Insured is an entity other than a **employee benefit plan**, then any payment we make for loss sustained by any **employee benefit plan** will be made to the **employee benefit plan** sustaining the loss.
5. If two or more **employee benefit plans** are insured under this insurance, then any payment we make for loss:
 - a. Sustained by two or more **employee benefit plans**; or
 - b. Of commingled **funds** or other tangible assets (other than **data, media** and **software**) of two or more **employee benefit plans**;

resulting directly from an **occurrence** will be made to each **employee benefit plan** sustaining loss in the proportion that the Limit of Insurance required for each **employee benefit plan** bears to the total Limit of Insurance of all **employee benefit plans** sustaining loss.

6. The Deductible Amount applicable to Employee Theft - Limited does not apply to loss sustained by any **employee benefit plan**.

F. Deductible

1. The deductible stated in Declarations applicable to this Endorsement supersedes any other such deductible contained elsewhere in this Policy but only with respect to coverage provided by this Endorsement. No other deductible applies to coverage provided by this Endorsement.
2. We will not pay for loss, damage, or expense in any one **occurrence** until the amount of such covered loss, damage, or expense exceeds the deductible shown in the Declarations applicable to this Endorsement. We will then pay the amount of covered loss, damage, or expense in excess of the deductible, up to the applicable Limit of Insurance stated in the Declarations applicable to this Endorsement.
3. If no deductible is stated in the Declarations applicable to this Endorsement, then the deductible applicable to Business Personal Property shown in such Declarations applies to coverage provided under this Endorsement.

G. Limits of Insurance

1. Property of Your Client - Inside the Premises of a Client:
The most we will pay under this Extension of Coverage for property insured above under Item I.A.1.b., in any one **occurrence**, is the Limit of Insurance shown in the Declarations applicable to this Endorsement for Property of Your Client - Inside the Premises of a Client.
2. Per Occurrence Limit of Insurance:
The most we will pay under this Extension of Coverage, including property insured above under Item I.A.1.b., in any one **occurrence**, is the Per Occurrence Limit of Insurance shown in the Declarations applicable to this Endorsement for Employee Theft and Forgery or Alteration Coverage - Limited.
3. Annual Aggregate Limit of Insurance:
The most we will pay under this Extension of Coverage in all **occurrences** during any one Policy Period is the **Annual Aggregate** Limit of Insurance shown in the Declarations applicable to this Endorsement for Employee Theft and Forgery or Alteration Coverage - Limited.

H. Additional Definitions

The following are additional definitions applicable only to this Endorsement:

1. **Client** means any person or entity for whom you perform services under a written agreement.



2. **Discover** or **discovered** means the time when you first:
 - a. Become aware of facts which would cause a reasonable person to presume that a loss of a type covered by this insurance has been or will be incurred, regardless of when the act or acts causing or contributing to such loss occurred, even though the exact amount or details of loss may not then be known; or
 - b. Receive notice of an actual or potential claim in which it is alleged that you are liable to a third party under circumstances which, if true, would constitute a loss under this insurance.
3. **Employee** means:
 - a. Any natural person:
 - (1) Who you compensate directly by salary, wages, or commissions;
 - (2) Who you have the right to direct and control while performing services for you; and
 - (3) While in your service and for thirty (30) consecutive calendar days after termination of service, unless such termination is due to **theft** or any dishonest act committed by the **employee**.
 - b. Any natural person who is furnished temporarily to you to substitute for a permanent **employee** as defined above in Item I.H.3.a. who is on leave; or to meet seasonal or short-term work load conditions; while that person is subject to your direction and control and performing services for you.
 - c. Any natural person who is leased to you under a written agreement between you and a labor leasing firm, to perform duties related to the conduct of your business, but does not mean a temporary employee as defined above in Item I.H.3.b.
 - d. Any natural person who is:
 - (1) Employed by **your business** as a **manager**, officer, director, member of your management level staff, or a trustee or other person with legal authority over **your business** (except an administrator or manager who is an independent contractor of any **employee benefit plan**), while:
 - (a) Performing acts within the scope of the usual duties of an **employee**; or
 - (b) Acting as a member of any committee duly elected or appointed by resolution of your board of directors or board of trustees to perform specific, as distinguished from general, directorial acts on your behalf; and
 - (2) A director or trustee of yours while that person is engaged in handling **funds** or other assets of any **employee benefit plan**.
 - e. Any natural person who is a former **employee**, partner, **member**, **manager**, director, or trustee retained as a consultant while performing services for you.
 - f. Any natural person who is a guest student or intern pursuing studies or duties relating to **your business**.
 - g. Any **employee** of an entity merged or consolidated with you prior to the effective date of this Policy.
 - h. **Employee** does not mean any agent, broker, factor, commission merchant, consignee, independent contractor, or representative of the same general character not specified above in Items I.H. 3.a. through g.
4. **Employee Benefit Plan** means any welfare or pension benefit plan shown in the Declarations applicable to this Endorsement that you sponsor and which is subject to the Employee Retirement Income Security Act of 1974 (ERISA) and any amendments thereto.
5. **Funds** mean **money** and **securities**.
6. a. **Occurrence** means with respect to Employee Theft - Limited:



- (1) An individual act;
- (2) The combined total of all separate acts whether or not related; or
- (3) A series of acts whether or not related;

committed by an **employee** acting alone or in collusion with other persons, during the Policy Period shown in the Declarations.

b. **Occurrence** means with respect to Forgery or Alteration - Limited:

- (a) An individual act;
- (b) The combined total of all separate acts whether or not related; or
- (c) A series of acts whether or not related;

committed by a person acting alone or in collusion with other persons, involving one or more instruments, during the Policy Period shown in the Declarations.

7. **Other tangible property** means:

- a. **Business real property**;
- b. Tangible **business personal property**;
- c. Tangible **personal property of others**; and
- d. Any other tangible property covered by the Property-Gard Pinnacle Coverage Form - 250000 and any endorsements forming a part of the Commercial Property Coverage Section.

8. **Theft** means the unlawful taking of property to your deprivation and includes **forgery** by an **employee**.

- II. This Endorsement is otherwise subject to all the terms, conditions, exclusions, limitations, and provisions of the Policy to which it is attached.



Property-Gard Pinnacle® - Restaurant Extension Endorsement 250038 01 13

Policy Amendment - Commercial Property Coverage Section

This Endorsement modifies insurance provided under the Property-Gard Pinnacle Coverage Form - 250000.

- I. Section V.E., Extensions of Coverage Applicable only to Business Income and Extra Expense Coverage, provided under the Property-Gard Pinnacle Coverage Form - 250000, is amended to include the following:
 - A. Off Premises Special Event Cancellation Coverage
 1. If the Declarations show a Limit of Insurance for Business Income and Extra Expense Coverage, then we will pay for the actual loss of **business income** and necessary **extra expense** you sustain due to the necessary cancellation of a **special event** due to direct physical loss or damage to property at the location of such **special event** caused by or resulting from a **covered cause of loss**, but only if the location of such **special event** is not specifically described in the Declarations and is situated within the Coverage Territory.
 2. The amount we pay under Off Premises Special Event Cancellation Coverage will be reduced by any income you receive from the use, in whole or in part, of any other alternative location reserved for the **special event** that has been canceled.
 3. Exclusion IV.B.2.b. contained in the Property-Gard Pinnacle Coverage Form - 250000 does not apply to Off Premises Special Event Cancellation coverage.
 4. We will not pay under Off Premises Special Event Cancellation Coverage for any loss of **business income** or **extra expense** you sustain which is insured under Item V.F.11. Unnamed Location Coverage contained in the Property-Gard Pinnacle Coverage Form - 250000.
 5. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Off Premises Special Event Cancellation Coverage.
- II. Section V.F., Extensions of Coverage Applicable to Property, Business Income, and Extra Expense Coverage, provided under the Property-Gard Pinnacle Coverage Form - 250000, is amended to include the following:
 - A. Contaminated Food Coverage
 1. We will pay for direct physical loss or damage to **Property Insured** caused by or resulting from a **contaminated food event** at a **location**, including the necessary expense incurred to:
 - a. Repair or rebuild **Property Insured** which has been damaged or destroyed by the **contaminated food event**;
 - b. Mitigate, contain, remediate, treat, clean, detoxify, disinfect, neutralize, cleanup, remove, dispose of, test for, monitor, and assess the effects of the **contaminated food event**; and
 - c. Replace consumable goods at such **location** which are declared contaminated by the local **public health authority**.
 2. If the Declarations show a Limit of Insurance for Business Income and Extra Expense Coverage, then we will pay for the actual loss of **business income** and necessary **extra expense** you sustain due to the necessary **suspension of operations** during the **period of restoration**. The **suspension** must be due to direct physical loss or damage to property at a **location** caused by or resulting from a **contaminated food event**.

This Form must be attached to Change Endorsement when issued after the policy is written.
One of the **Allianz Global Risks US Companies** as named in the policy.



3. A covered loss under Contaminated Food Coverage does not create, nor will it invoke coverage for Debris Removal Coverage, as described in Item V.D.3. of the Property-Gard Pinnacle Coverage Form-250000, except as provided by this Endorsement under Contaminated Food Coverage.
4. We will not pay under Contaminated Food Coverage for any loss, damage, or expense caused directly or indirectly by or resulting from:
 - a. A loss incurred prior to the Policy Period shown in the Declarations;
 - b. Testing or monitoring to assess the existence, concentration, or effects of a **contaminated food event** or **pollutants** beyond ninety (90) consecutive calendar days following the date when damaged property is remediated, repaired, rebuilt, or any combination thereof; or
 - c. A claim that is reported to us in writing more than one hundred and eighty (180) consecutive calendar days after the date that a **contaminated food event** has occurred.

Such loss, damage, or expense is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

5. a. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** including **business income**, **extra expense**, and debris removal, is the Per Occurrence or Loss Event Limit of Insurance shown in the Declarations applicable to Contaminated Food Coverage.
- b. The most we will pay under this Extension of Coverage in all occurrences or **loss events** during any one Policy Period is the **Annual Aggregate** Limit of Insurance shown in the Declarations applicable to Contaminated Food Coverage.

B. Refrigerant Contamination Coverage

1. a. We will pay for direct physical loss or damage to **perishable stock** at a **location** caused by or resulting from spoilage or contamination arising from the release of a refrigerant, including but not limited to ammonia, due to direct physical loss or damage to property at such **location** caused by or resulting from a **covered cause of loss**.
- b. Refrigerant Contamination Coverage includes the necessary expense incurred to cleanup, remove, and dispose of the debris of **perishable stock** and refrigerant caused by loss or damage covered under Refrigerant Contamination Coverage.
2. If the Declarations show a Limit of Insurance for Business Income and Extra Expense Coverage, then we will pay for the actual loss of **business income** and necessary **extra expense** you sustain due to the necessary **suspension of operations** during the **period of restoration**. The **suspension** must be due to direct physical loss or damage to **perishable stock** at a **location** caused by loss or damage covered under Refrigerant Contamination Coverage.
3. Exclusion IV.A.2.h.(12) contained in the Property-Gard Pinnacle Coverage Form - 250000 does not apply to Refrigerant Contamination Coverage provided under this Endorsement.
4. We will not pay under Refrigerant Contamination Coverage for any loss, damage, or expense caused directly or indirectly by or resulting from:
 - a. The normal storage life of the **perishable stock** having been exceeded; or
 - b. Failure to use reasonable care to maintain all refrigerating, cooling, or humidity control systems in proper operating condition.

Such loss, damage, or expense is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

5. A covered loss under Refrigerant Contamination Coverage does not create, nor will it invoke coverage for Debris Removal Coverage, as described under Item V.D.3. of the Property-Gard Pinnacle Coverage Form - 250000, except as provided by this Endorsement under Refrigerant Contamination Coverage.



6. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** including **business income, extra expense**, and debris removal, is the Limit of Insurance shown in the Declarations applicable to Refrigerant Contamination Coverage.

III. Deductible

- A. The deductible provisions described under Section X. of the Property-Gard Pinnacle Coverage Form - 250000 apply to coverage provided under this Endorsement.
- B. The deductible shown in the Declarations for Business Personal Property and Time Element Loss, whichever is applicable, will apply to loss, damage, or expense covered under this Endorsement unless a specific deductible is shown in the Declarations applicable to this Endorsement.

IV. Additional Definitions

The following are additional definitions applicable only to this Endorsement:

- A. **Contaminated food event** means:
 - 1. A **public health authority** orders the closure of a **location** due to the contamination of food; or
 - 2. You make an announcement warning the public of a health hazard because of your discovery or reasonable suspicion that contaminated food has been served to your patrons at a **location**.
 - B. **Perishable stock** means **stock** or **personal property of others**, which is intended for human consumption and which must be maintained under controlled conditions for its preservation and is susceptible to loss or damage if the controlled conditions change.
 - C. **Public health authority** means the governmental authority having jurisdiction over your **operations** relative to health and hygiene standards necessary for the protection of the public.
 - D. **Special event** means a planned convention, conference, banquet, seminar, wedding, Bat Mitzvah, Bar Mitzvah, party, or other similar event for which you have reserved space, or contracted for food, equipment, or other supporting material or services.
- V. This Endorsement is otherwise subject to all the terms, conditions, exclusions, limitations, and provisions of the Policy to which it is attached.



Property-Gard - Pinnacle® - Equipment Breakdown Coverage Endorsement 250048 01 13

Policy Amendment(s) Commercial Property Coverage

This Endorsement modifies Insurance provided under the Property-Gard - Pinnacle Coverage Form - 250000.

Equipment Breakdown Coverage Endorsement

A. The following is added to the Property-Gard Pinnacle Coverage Form - 250000 as an additional **covered cause of loss**:

Equipment Breakdown Coverage

The term **covered cause of loss** includes coverage as described and limited below;

1. We will pay for direct physical loss or damage to **Property Insured** that is the direct result of an **accident**.
2. Unless otherwise shown in the Declarations applicable to Equipment Breakdown Coverage, the following coverages also apply as a direct result of an **accident**. These coverages do not provide additional amounts of insurance.

a. Expediting Expenses Coverage

With respect to your damaged **Property Insured**, we will pay the necessary extra cost to:

- (1) Make temporary repairs; and
- (2) Expedite permanent repairs or permanent replacement.

The most we will pay for under this Expediting Expenses Coverage in any one **accident** is \$250,000 unless otherwise shown in the Declarations applicable to Expediting Expense Coverage provided by Equipment Breakdown Coverage.

b. Hazardous Substances Coverage

We will pay for the additional cost to repair or replace **Property Insured** because of contamination by a **hazardous substance**. This includes the additional expenses to clean up or dispose of such property.

This does not include contamination of **perishable stock** by refrigerant, including but not limited to ammonia, which is addressed in A.2.c. below. As used in this coverage, additional costs mean those beyond what would have been payable under this Equipment Breakdown Coverage had no **hazardous substance** been involved.

The most we will pay under this Hazardous Substances Coverage in any one **accident**, including actual loss of **business income** you sustain and necessary **extra expense** you incur, if shown as covered, is \$250,000 unless otherwise shown in the Declarations applicable to Hazardous Substances Coverage provided by Equipment Breakdown Coverage.

c. Perishable Stock Coverage

(1) We will pay for:

- (a) Direct physical loss or damage to **perishable stock** due to spoilage;
- (b) Direct physical loss or damage to **perishable stock** due to contamination from the release of refrigerant, including but not limited to ammonia; and



- (c) Any necessary expenses you incur to reduce the amount of loss under this coverage to the extent that they do not exceed the amount of loss that otherwise would have been payable under this coverage.
- (2) If you are unable to replace the **perishable stock** before its anticipated sale, then the amount of our payment will be determined on the basis of the sales price of the **perishable stock** at the time of the **accident**, less discounts and expenses you otherwise would have had. Otherwise our payment will be determined in accordance with the Valuation provision for **stock**.
- The most we will pay under this Perishable Stock Coverage in any one **accident** is \$250,000 unless otherwise shown in the Declarations applicable to Perishable Stock Coverage provided by Equipment Breakdown Coverage.
- d. Data Restoration Coverage
- If an **accident** occurs causing loss or damage to **data**, then we will pay the **information restoration cost** with respect to such **data**.
- The most we will pay under this Data Restoration Coverage in any one **accident**, including actual loss of **business income** you sustain and necessary **extra expense** you incur, if shown as covered, is \$250,000 unless otherwise shown in the Declarations applicable to Data Restoration Coverage provided by Equipment Breakdown Coverage.
- e. Service Interruption Coverage
- (1) Any insurance provided for **business income**, **extra expense** or **perishable stock** is extended to apply to your loss, damage, or expense caused by the interruption of utility services. The interruption must result from an **accident** to equipment, including **overhead transmission lines**, that is owned by a utility, landlord, a landlord's utility or other supplier who provides you with any of the following services: electrical power, waste disposal, air conditioning, refrigeration, heating, natural gas, compressed air, water, steam, internet access, telecommunications services, wide area networks, or **data** transmission. Such equipment must meet the definition of **covered equipment** with the exception that it need not be **Property Insured**.
- (2) We will not pay for any loss of **business income** you sustain that results from the interruption of utility services during the first 24 hours following the **accident**. However, if the **Time Element Loss** deductible shown in the Declarations applicable to Service Interruption Coverage provided by Equipment Breakdown Coverage as provided for in paragraph C. below is expressed as a time period and is greater than 24 hours, then such deductible or time period will apply instead of the 24 hours provided for in this paragraph.
- (3) The most we will pay under this Service Interruption Coverage in any **one accident** is the applicable Limit of Insurance for **business income**, **extra expense**, or **perishable stock**, except that if a Limit of Insurance is shown in the Declarations applicable to Service Interruption Coverage provided by Equipment Breakdown Coverage, then such Limit of Insurance will apply to **business income** and **extra expense** loss under this Service Interruption coverage.
- f. Business Income and Extra Expense Coverage
- (1) Any insurance provided under the Property-Gard Pinnacle Coverage Form - 250000 for **business income** or **extra expense** is extended to the coverage provided by this Equipment Breakdown Coverage Endorsement. However, if a deductible is shown in the Declarations applicable to Business Income and Extra Expense Coverage provided by Equipment Breakdown Coverage, then as respects Equipment Breakdown Coverage, the **period of restoration** will begin immediately after the **accident**, and the deductible for **Time Element Loss** shown in the Declarations applicable to Business Income and Extra Expense Coverage provided by Equipment Breakdown Coverage will apply.



- (2) The most we will pay for the actual loss of **business income** or necessary **extra expense** under this coverage in any one **accident** is the applicable Limit of Insurance stated in the Declarations for **business income** and **extra expense** provided by the Property-Gard Pinnacle Coverage Form - 250000, unless otherwise shown in the Declarations applicable to Business Income and Extra Expense Coverage provided by Equipment Breakdown Coverage.

g. Fungus Remediation Coverage

Any insurance provided under the Property-Gard Pinnacle Coverage Form - 250000 for **fungus** remediation coverage is extended to the coverage provided by this Endorsement. This does not include spoilage of **perishable stock**, which is addressed in A.2.c. Perishable Stock Coverage, above. The most we will pay under this Fungus Remediation Coverage in any one **accident** is the amount shown in the Declarations applicable to Fungus Remediation Coverage provided by the Property-Gard Pinnacle Coverage Form - 250000.

3. The following exclusions contained in Section IV. Exclusions of the Property-Gard - Pinnacle Coverage Form - 250000 do not apply, but only with respect to coverage provided by this Endorsement:

- a. Exclusion IV.A.1.a. Boiler Explosion;
- b. Exclusion IV.A.2.c. Mechanical Breakdown; and
- c. Exclusion IV.A.4. Electrical Arcing.

B. Exclusions

1. We will not pay under this Endorsement for any loss, damage, or expense caused directly or indirectly by or resulting from any of the following excluded causes of loss; such loss, damage, or expense is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss or damage:
 - a. Fire or water or other means used to extinguish a fire, lightning, explosion (except as specifically provided in F.1.c. below), **hurricane**, **named storm**, **storm**, smoke, aircraft or vehicles, riot or civil commotion, vandalism, leakage from **fire protection equipment**, elevator collision, molten material, breakage of glass, falling objects, **collapse**, or weight of snow, ice or sleet;
 - b. Freezing from weather related events;
 - c. Any **earth movement**, such as an **earthquake**, landslide, **mine subsidence** or earth sinking, rising or shifting;
 - d. **Flood**, however, if electrical **covered equipment** requires drying out because of a **flood**, then we will pay for the direct expense of such drying out subject to the applicable Limit of Insurance and Deductible;
 - e. A hydrostatic, pneumatic or gas pressure test of any boiler or pressure vessel, or an electrical insulation breakdown test of any type of electrical equipment;
 - f. Any of the following:
 - (1) Defect, programming error, programming limitation, computer virus, malicious code, loss of **data**, loss of access, loss of use, loss of functionality or other condition within or involving **data**, **media**, or **software** of any kind; or
 - (2) Misalignment, miscalibration, tripping off-line, or any condition which can be corrected by resetting, tightening, adjusting or cleaning, or by the performance of maintenance.

However, if an **accident** results, we will pay for the resulting loss, damage, or expense caused by such **accident**; or

- g. **Fungus** whether or not caused by or resulting from an **accident**. However, this exclusion does not apply to the extent that coverage is provided above in A.2.g. Fungus Remediation or for spoilage of personal



property that is **perishable stock**, to the extent that spoilage is covered under A.2.c. Perishable Stock Coverage, above.

2. We will not pay under this Endorsement for any loss or damage to animals.

C. Deductible

As respects this Endorsement only, Section X. Deductibles within the Property-Gard Pinnacle Coverage Form - 250000 is deleted and replaced with the following:

1. The coverage provided by this Endorsement may be subject to one or more of the following deductibles if shown in the Declarations applicable to Equipment Breakdown Coverage:
 - a. **Time Element Loss**: Such deductibles apply to **time element loss**, including **time element loss** under Service Interruption coverage.
 - b. **Perishable Stock**: Such deductibles apply to loss, damage, or expense to **perishable stock**, including **perishable stock** loss under Service Interruption coverage.
 - c. **Production Machinery**: Such deductible applies to loss, damage, or expense to **production machinery**.
 - d. **Property Insured**: Such deductible applies to all other loss, damage, or expense covered by this Endorsement including loss to **perishable stock** if no other **Perishable Stock** Deductible is specified and **time element loss** if no other **Time Element Loss** Deductible is specified and loss to **production machinery** if no other **Production Machinery** Deductible is specified.
2. If a dollar deductible is shown in the Declarations applicable to Equipment Breakdown Coverage, then we will not pay for covered loss, damage, or expense resulting from any **one accident** until the amount of such loss, damage, or expense exceeds the applicable Deductible shown. We will then pay the amount of covered loss, damage, or expense in excess of the applicable Deductible or Deductibles, up to the applicable Limit of Insurance.
3. If a time deductible is shown in the Declarations applicable to Equipment Breakdown Coverage for **Time Element Loss**, then we will not be liable for any loss occurring during the specified number of hours or days immediately following the **accident**. If a time deductible is expressed in days, then each day shall mean twenty-four (24) consecutive hours.
4. If a Multiplier is shown in the Declarations applicable to Equipment Breakdown Coverage for **Time Element Loss**, then the deductible is calculated by multiplying the One Hundred Percent Average Daily Value (100% ADV) times the Multiplier.
 - a. The 100% ADV is calculated by dividing the sum of the total:
 - (1) net profits; and
 - (2) normal continuing expenses (including your normal continuing payroll expenses);
 that are covered by the Property-Gard Pinnacle Coverage Form - 250000, and that would have been earned had no damage occurred during the **suspension of operations**, by the number of working days in that **suspension** period.
 - b. No reduction shall be made for net profits and normal continuing expenses (including your normal continuing payroll expenses) not being earned, or in the number of working days in the **suspension period**, because of the physical loss or damage to **Property Insured** or other scheduled or unscheduled shutdown(s) during the **suspension**.
 - c. The ADV applies to all locations included in the valuation of the loss.
5. If a **Perishable Stock** Deductible is expressed as a percentage of loss, then we will not be liable for the indicated percentage of the gross amount of loss, damage, or expense (prior to any applicable deductible



or coinsurance) insured under the applicable coverage. If the dollar amount of such percentage is less than the indicated minimum deductible, then the minimum deductible will be the applicable deductible.

D. Conditions

As respects this Endorsement only, the following conditions are in addition to the Loss Conditions and General Conditions described within the Property-Gard - Pinnacle Coverage Form - 250000:

1. Suspension

Whenever **covered equipment** is found to be in, or exposed to, a dangerous condition, any of our representatives may immediately suspend the insurance against loss from an **accident** to that **covered equipment**. This can be done by mailing or delivering a written notice of suspension to:

- a. Your last known address; or
- b. The address where the **covered equipment** is located.

Once suspended in this way, your insurance can be reinstated only by an endorsement for that **covered equipment**. If we suspend your insurance, then you will get a pro rata refund of premium for that **covered equipment** for the period of suspension. But the suspension will be effective even if we have not yet made or offered a refund.

2. Jurisdictional Inspections

If any property that is **covered equipment** under this endorsement requires inspection to comply with state or municipal boiler and pressure vessel regulations, then we agree to perform such inspection on your behalf. We do not warrant that conditions are safe or healthful.

3. Environmental, Safety and Efficiency Improvements

If **covered equipment** requires replacement due to an **accident**, then we will pay your additional cost to replace with equipment that is better for the environment, safer or more efficient than the equipment being replaced.

However, we will not pay more than 150% of what the cost would have been to replace with like kind and quality. This condition does not increase any of the applicable limits. This condition does not apply to any property to which **actual cash value** applies.

E. Limit of Insurance

1. Except as otherwise provided in this Endorsement, the most we will pay for loss, damage, or expense under this Endorsement arising from any **one accident** is the applicable Limit of Insurance shown in the Declarations applicable to Equipment Breakdown Coverage.
2. Payments under any Limit of Insurance provided by this Endorsement are included within, not in addition to, any applicable Limit of Insurance provided by the Property-Gard Pinnacle Coverage Form - 250000.

F. Additional Definitions

The following are additional definitions applicable only to this Endorsement:

1. **Accident** means a fortuitous event that causes direct physical damage to **covered equipment**. The **accident** event must be one of the following:
 - a. Mechanical breakdown, including rupture or bursting caused by centrifugal force;
 - b. Artificially generated electrical, magnetic or electromagnetic energy, including electric arcing, that damages, disturbs, disrupts or otherwise interferes with any electrical or electronic wire, device, appliance, system or network;
 - c. Explosion of steam boilers, steam pipes, steam engines or steam turbines owned or leased by you, or operated under your control;



- d. Loss or damage to steam boilers, steam pipes, steam engines or steam turbines caused by or resulting from any condition or event inside such equipment; or
- e. Loss or damage to hot water boilers or other water heating equipment caused by or resulting from any condition or event inside such boilers or equipment.

One accident means: If an initial **accident** causes other **accidents**, all will be considered **one accident**. All **accidents** that are the result of the same event will be considered **one accident**.

2. Covered equipment

- a. **Covered equipment** means, unless otherwise specified in the Declarations applicable to Equipment Breakdown Coverage, **Property Insured** that:
 - (1) Generates, transmits, or utilizes energy; or
 - (2) During normal usage, operates under vacuum or pressure, other than the weight of its contents.
- b. None of the following is **covered equipment**:
 - (1) Any structure, foundation, cabinet, compartment, or air supported structure or building;
 - (2) Insulating or refractory material;
 - (3) Sewer piping, buried vessels or piping, or piping forming a part of a sprinkler or fire suppression system;
 - (4) Water piping, other than boiler feedwater piping, boiler condensate return piping or water piping, forming a part of a refrigerating or air conditioning system;
 - (5) Any **vehicle** or any equipment mounted on a **vehicle**;
 - (6) Any satellite, spacecraft or any equipment mounted on a satellite or spacecraft;
 - (7) Any dragline, excavation or construction equipment; or
 - (8) Equipment manufactured by you for sale.

- 3. **Hazardous substance** means any substance that is hazardous to health or has been declared to be hazardous to health by a governmental agency.
- 4. **Perishable stock** means personal property maintained under controlled conditions for its preservation, and susceptible to loss or damage if the controlled conditions change.
- 5. **Production machinery** means **covered equipment** that is a machine or apparatus that processes or produces a product intended for eventual sale. However, **production machinery** does not mean any fired or unfired pressure vessel other than a cylinder containing a movable plunger or piston.
- 6. **Vehicle** means, as respects this Endorsement only, any machine or apparatus that is used for transportation or moves under its own power. **Vehicle** includes, but is not limited to, car, truck, bus, trailer, train, aircraft, watercraft, forklift, bulldozer, tractor or harvester.

However, any property that is stationary, permanently installed at a covered location and that receives electrical power from an external power source will not be considered a **vehicle**.

- G. This Endorsement is otherwise subject to all the terms, conditions, exclusions, limitations, and provisions of the Policy to which it is attached.



Property-Gard Pinnacle® - Conditional Vacancy Exclusion - 250050 01 13

Policy Amendment - Commercial Property Coverage Section

This Endorsement modifies insurance provided under the Property-Gard Pinnacle Coverage Form - 250000.

I. Section IX., Limitations of Coverage contained in the Property-Gard Pinnacle Coverage Form - 250000, is amended to include the following:

A. Conditional Vacancy Exclusion

1. We will not pay for any loss or damage sustained at any building insured under this Policy which has been **vacant** for more than 60 consecutive days prior to the occurrence of such loss or damage, whether or not such building is at a **location**, unless:
 - a. You notify us in writing prior to the 60th consecutive day such building remains vacant; and
 - b. Existing private fire protection, watch, or alarm services at a location, and within your control, are properly maintained and kept in complete working order.
2. Item I.A.1. above does not apply to:
 - a. **Buildings while in the course of construction**, but only if:
 - (1) Construction permits have been approved by, and are on file with, the building department having jurisdiction over the work to be done in connection with such construction; and
 - (2) Substantial construction activities are being performed by construction personnel at such buildings on a regular and continuing basis, not including architects, engineers, or inspectors; or
 - b. A building that is **vacant** due to repairs being made following loss or damage that is covered by the Property-Gard Pinnacle Coverage Form - 250000 or an endorsement attached to such Coverage Form.
3. If applicable state law only allows the provisions of this Endorsement to apply to a building described in the Declarations, then such provisions will continue to apply in such states to buildings that are not described in such Declarations, but only with respect to causes of loss other than fire.
4. If you notify us that a building at a location has become **vacant**, then we may remove such building from the Policy and return any applicable premium refund due to the first Named Insured shown in the Declarations. Such premium refund will be calculated on a pro-rata basis from the date that coverage for such building ceased to apply in accordance with the terms of this Endorsement.

B. Additional Definitions

The following are additional definitions applicable only to this Endorsement:

1. **Vacant** means that:
 - a. 70% or more of the rentable square footage of a building at an insured location is not being actively used by you or a tenant for its intended purpose; or
 - b. 70% or more of the total square footage of a building at an insured location utilized by you to conduct **your business** is no longer used to conduct your customary **operations**; or

This Form must be attached to Change Endorsement when issued after the policy is written.
One of the **Allianz Global Risks US Companies** as named in the policy.



c. A building at an insured location utilized by you to conduct your business does not contain enough **business personal property** to conduct your customary **operations**;

whether or not you intend to use or rent such building.

II. This Endorsement is otherwise subject to all the terms, conditions, exclusions, limitations, and provisions of the Policy to which it is attached.



Property-Gard Pinnacle® - South Carolina State Exception Endorsement 250112 01 13

Policy Amendment - Commercial Property Coverage Section

This Endorsement modifies insurance provided under the Property-Gard Pinnacle Coverage Form - 250000.

- I. Section XIII., General Conditions, Items C.1.b., and C.1.c., are deleted and replaced by the following:
 - b. If this Policy has been in effect for less than one hundred and twenty (120) days, and is not a renewal of a previously existing policy we issued, then we may cancel this Policy for any reason by mailing or delivering to the first Named Insured and agent, if any, written notice of cancellation at least:
 - (1) Ten (10) days before the effective date of cancellation if we cancel for nonpayment of premium; or
 - (2) Thirty (30) days before the effective date of cancellation if we cancel for any other reason.
 - c. We will mail or deliver our notice of cancellation to the first Named Insured's and agent's last known addresses. Notice of cancellation will state the effective date of cancellation, and the Policy Period will end on that date.
- II. Section XIII., General Conditions, Item C.1., Cancellation, is amended to add the following:
 - f. If this Policy has been in effect for one hundred and twenty (120) days or more, or is a renewal or continuation of a previously existing policy we issued, then we may cancel this Policy only for one or more of the following reasons:
 - (1) Nonpayment of premium;
 - (2) Material misrepresentation of fact which, if known to us, would have caused us not to issue the Policy;
 - (3) Substantial change in the risk assumed, except to the extent that we should reasonably have foreseen the change or contemplated the risk in writing the Policy;
 - (4) Substantial breaches of contractual duties, conditions or warranties; or
 - (5) Loss of our reinsurance covering all or a significant portion of the Policy insured, or where continuation of the Policy would imperil our solvency or place us in violation of the insurance laws of South Carolina.

Prior to cancellation for reasons permitted in this Item (5), we will notify the Director of Insurance, in writing, at least sixty (60) days prior to such cancellation and the Director will, within thirty (30) days of such notification, approve or disapprove such action.

Any notice of cancellation will state the precise reason for cancellation.
- III. Section XIII., General Conditions, Item C.2., Nonrenewal, is deleted and replaced by the following:
 2. Nonrenewal
 - a. We will not refuse to renew a policy issued for a term of more than one (1) year, until expiration of its full term, if anniversary renewal has been guaranteed by additional premium consideration.
 - b. If we decide not to renew this Policy, then we will:
 - (1) Mail or deliver written notice of nonrenewal to the first Named Insured and agent, if any, before:
 - (a) The expiration date of this Policy, if the Policy is written for a term of one (1) year or less; or
 - (b) An anniversary date of this Policy, if the Policy is written for a term of more than one year or for an indefinite term; and

This Form must be attached to Change Endorsement when issued after the policy is written.
One of the **Allianz Global Risks US Companies** as named in the policy.



(2) Provide at least:

(a) Sixty (60) days' notice of nonrenewal, when nonrenewal is to become effective between November 1 and May 31; or

(b) Ninety (90) days' notice of nonrenewal, when nonrenewal is to become effective between June 1 and October 31.

c. Any notice of nonrenewal will be mailed or delivered to the first Named Insured's and agent's last known addresses. If notice is mailed, proof of mailing will be sufficient proof of notice.

d. Any notice of nonrenewal will state the precise reason for nonrenewal.

IV. Section XIII., General Conditions, Item M.2., is deleted and replaced by the following:

2. The legal action is brought within three (3) years after the date on which the direct physical loss or damage occurred.

V. This Endorsement is otherwise subject to all the terms, conditions, exclusions, limitations, and provisions of the Policy to which it is attached.



GENERAL LIABILITY



Silica Particles Exclusion - 145917 06 04

Policy Amendment

This endorsement modifies insurance provided under the following:

**Commercial General Liability Coverage
Liquor Liability Coverage
Owners and Contractors Protective Liability Coverage
Pollution Liability Coverage
Products/Completed Operations Liability Coverage
Railroad Protective Liability Coverage
Underground Storage Tank Liability Coverage
Farm Liability Coverage
American Business Coverage (Section II)
Garage Coverage (Section II)**

The following exclusion is added:

This insurance does not apply to any claim or liability arising, in whole or in part, directly or indirectly out of, or which is in any way related to, "Silica".

As used in this exclusion, the term "Silica" includes, but is not limited to, silicon dioxide, silica, silica products, silica fibers, silica dust, any other silica byproducts, and silica, whether alone or in combination with any substance, product or material.

Without limiting the foregoing, this exclusion applies to every injury, damage, loss, cost or expense otherwise covered by this policy, if any.



Economic or Trade Sanctions Compliance - 145985 06 14

Policy Amendment

The following is added to the Policy and replaces any other provision in the Policy addressing economic or trade sanctions:

This insurance does not apply to the extent that economic or trade sanctions or other laws or regulations prohibit us (the Company) from providing insurance.

All other terms and conditions of the policy remain unchanged.

IL 00 03 09 08

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CALCULATION OF PREMIUM

This endorsement modifies insurance provided under the following:

CAPITAL ASSETS PROGRAM (OUTPUT POLICY) COVERAGE PART
COMMERCIAL AUTOMOBILE COVERAGE PART
COMMERCIAL GENERAL LIABILITY COVERAGE PART
COMMERCIAL INLAND MARINE COVERAGE PART
COMMERCIAL PROPERTY COVERAGE PART
CRIME AND FIDELITY COVERAGE PART
EMPLOYMENT-RELATED PRACTICES LIABILITY COVERAGE PART
EQUIPMENT BREAKDOWN COVERAGE PART
FARM COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
MEDICAL PROFESSIONAL LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART

The following is added:

The premium shown in the Declarations was computed based on rates in effect at the time the policy was issued. On each renewal, continuation, or anniversary of the effective date of this policy, we will compute the premium in accordance with our rates and rules then in effect.

IL 00 17 11 98

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

COMMON POLICY CONDITIONS

All Coverage Parts included in this policy are subject to the following conditions.

A. Cancellation

1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
2. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:
 - a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
 - b. 30 days before the effective date of cancellation if we cancel for any other reason.
3. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.
4. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.
5. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.
6. If notice is mailed, proof of mailing will be sufficient proof of notice.

B. Changes

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

C. Examination Of Your Books And Records

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.

D. Inspections And Surveys

1. We have the right to:
 - a. Make inspections and surveys at any time;
 - b. Give you reports on the conditions we find; and
 - c. Recommend changes.
2. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:
 - a. Are safe or healthful; or
 - b. Comply with laws, regulations, codes or standards.
3. Paragraphs 1. and 2. of this condition apply not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.
4. Paragraph 2. of this condition does not apply to any inspections, surveys, reports or recommendations we may make relative to certification, under state or municipal statutes, ordinances or regulations, of boilers, pressure vessels or elevators.

E. Premiums

The first Named Insured shown in the Declarations:

1. Is responsible for the payment of all premiums; and
2. Will be the payee for any return premiums we pay.

F. Transfer Of Your Rights And Duties Under This Policy

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

IL 00 21 09 08

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NUCLEAR ENERGY LIABILITY EXCLUSION ENDORSEMENT (Broad Form)

This endorsement modifies insurance provided under the following:

COMMERCIAL AUTOMOBILE COVERAGE PART
 COMMERCIAL GENERAL LIABILITY COVERAGE PART
 FARM COVERAGE PART
 LIQUOR LIABILITY COVERAGE PART
 MEDICAL PROFESSIONAL LIABILITY COVERAGE PART
 OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
 POLLUTION LIABILITY COVERAGE PART
 PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
 RAILROAD PROTECTIVE LIABILITY COVERAGE PART
 UNDERGROUND STORAGE TANK POLICY

1. The insurance does not apply:

A. Under any Liability Coverage, to “bodily injury” or “property damage”:

- (1) With respect to which an “insured” under the policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or
- (2) Resulting from the “hazardous properties” of “nuclear material” and with respect to which (a) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (b) the “insured” is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

B. Under any Medical Payments coverage, to expenses incurred with respect to “bodily injury” resulting from the “hazardous properties” of “nuclear material” and arising out of the operation of a “nuclear facility” by any person or organization.

C. Under any Liability Coverage, to “bodily injury” or “property damage” resulting from “hazardous properties” of “nuclear material”, if:

- (1) The “nuclear material” (a) is at any “nuclear facility” owned by, or operated by or on behalf of, an “insured” or (b) has been discharged or dispersed therefrom;
- (2) The “nuclear material” is contained in “spent fuel” or “waste” at any time possessed, handled, used, processed, stored, transported or disposed of, by or on behalf of an “insured”; or
- (3) The “bodily injury” or “property damage” arises out of the furnishing by an “insured” of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any “nuclear facility”, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (3) applies only to “property damage” to such “nuclear facility” and any property thereat.

2. As used in this endorsement:

“Hazardous properties” includes radioactive, toxic or explosive properties.

“Nuclear material” means “source material”, “special nuclear material” or “by-product material”.

“Source material”, “special nuclear material”, and “by-product material” have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof.

“Spent fuel” means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a “nuclear reactor”.

“Waste” means any waste material **(a)** containing “by-product material” other than the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its “source material” content, and **(b)** resulting from the operation by any person or organization of any “nuclear facility” included under the first two paragraphs of the definition of “nuclear facility”.

“Nuclear facility” means:

- (a)** Any “nuclear reactor”;
 - (b)** Any equipment or device designed or used for **(1)** separating the isotopes of uranium or plutonium, **(2)** processing or utilizing “spent fuel”, or **(3)** handling, processing or packaging “waste”;
 - (c)** Any equipment or device used for the processing, fabricating or alloying of “special nuclear material” if at any time the total amount of such material in the custody of the “insured” at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235;
 - (d)** Any structure, basin, excavation, premises or place prepared or used for the storage or disposal of “waste”;
- and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations.

“Nuclear reactor” means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material.

“Property damage” includes all forms of radioactive contamination of property.

IL 02 49 09 08

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SOUTH CAROLINA CHANGES – CANCELLATION AND NONRENEWAL

This endorsement modifies insurance provided under the following:

CAPITAL ASSETS PROGRAM (OUTPUT POLICY) COVERAGE PART
 COMMERCIAL GENERAL LIABILITY COVERAGE PART
 COMMERCIAL INLAND MARINE COVERAGE PART
 COMMERCIAL PROPERTY COVERAGE PART
 CRIME AND FIDELITY COVERAGE PART
 EMPLOYMENT-RELATED PRACTICES LIABILITY COVERAGE PART
 EQUIPMENT BREAKDOWN COVERAGE PART
 FARM COVERAGE PART
 LIQUOR LIABILITY COVERAGE PART
 MEDICAL PROFESSIONAL LIABILITY COVERAGE PART
 POLLUTION LIABILITY COVERAGE PART
 PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

A. Paragraphs **2.** and **3.** of **Cancellation** Common Policy Condition are replaced by the following:

- 2.** We may cancel this policy by mailing or delivering to the first Named Insured and the agent, if any, written notice of cancellation at least:
 - a.** 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
 - b.** 30 days before the effective date of cancellation if we cancel for any other reason.
- 3.** We will mail or deliver our notice to the first Named Insured's and agent's last known addresses.

B. The following is added to the **Cancellation** Common Policy Condition:

7. Cancellation Of Policies In Effect For 120 Days Or More

If this policy has been in effect for 120 days or more, or is a renewal or continuation of a policy we issued, we may cancel this policy only for one or more of the following reasons:

- a.** Nonpayment of premium;
- b.** Material misrepresentation of fact which, if known to us, would have caused us not to issue the policy;
- c.** Substantial change in the risk assumed, except to the extent that we should reasonably have foreseen the change or contemplated the risk in writing the policy;
- d.** Substantial breaches of contractual duties, conditions or warranties; or
- e.** Loss of our reinsurance covering all or a significant portion of the particular policy insured, or where continuation of the policy would imperil our solvency or place us in violation of the insurance laws of South Carolina.

Prior to cancellation for reasons permitted in this Item **e.**, we will notify the Commissioner, in writing, at least 60 days prior to such cancellation and the Commissioner will, within 30 days of such notification, approve or disapprove such action.

Any notice of cancellation will state the precise reason for cancellation.

C. The following is added and supersedes any provisions to the contrary:

Nonrenewal

- 1.** We will not refuse to renew a policy issued for a term of more than one year, until expiration of its full term, if anniversary renewal has been guaranteed by additional premium consideration.
- 2.** If we decide not to renew this policy, we will:
 - a.** Mail or deliver written notice of nonrenewal to the first Named Insured and agent, if any, before:

- (1) The expiration date of this policy, if the policy is written for a term of one year or less; or
 - (2) An anniversary date of this policy, if the policy is written for a term of more than one year or for an indefinite term; and
- b. Provide at least:
 - (1) 60 days' notice of nonrenewal, when nonrenewal is to become effective between November 1 and May 31; or
 - (2) 90 days' notice of nonrenewal, when nonrenewal is to become effective between June 1 and October 31.
3. Any notice of nonrenewal will be mailed or delivered to the first Named Insured's and agent's last known addresses. If notice is mailed, proof of mailing will be sufficient proof of notice.
4. Any notice of nonrenewal will state the precise reason for nonrenewal.



GENERAL LIABILITY COVERAGE SECTION – DECLARATIONS

- These Declarations, together with the Common Policy Declarations and Policy Conditions, Coverage Form(s) and any Endorsement(s), complete this policy.
- If one or more numbers are shown in the Location(s) column of these Declarations, then each number represents that specific **location(s)** as displayed on the Common Policy Declarations. If the word **"ALL"** is shown in the Location(s) column shown in these Declarations, then such word means all **locations** as displayed on the Common Policy Declarations **except** operations at locations that are specifically excluded.

Audit Period Annual

Commercial General Liability Coverage Form (CG 00 01 04 13)

Coverage Description	Limits of Insurance
Commercial General Liability Coverage Part	
General Aggregate Limit (Other than Products – Completed Operations)	\$ 2,000,000
Products-Completed Operations Aggregate Limit	\$ 2,000,000
Personal & Advertising Injury Limit	\$ 1,000,000
Each Occurrence Limit	\$ 1,000,000
Damage To Premises Rented To You Limit-Any One Premises	\$ 100,000
Medical Expense Limit- Any One Person	Excluded

Employee Benefits Administration Errors and Omissions Insurance (EB 70 00 12 97)

Coverage Description	Limits of Insurance
Each Employee Limit	\$ 1,000,000
Aggregate Limit	\$ 2,000,000

Liquor Liability Coverage Form (CG 00 33 04 13)

Coverage Description	Limits of Insurance
Aggregate Limit	\$ 1,000,000
Each Common Cause Limit	\$ 1,000,000

Classification(s)

Location(s)	Included Location(s)	Coverage(s)	Class Code(s)	Classification Description(s)	Basis of Premium	Exposure
1	13	Liquor Liability	58161	Liquor Liability - Restaurants, Taverns, Hotels, Motels, Including Package Sales	Alcoholic Beverage Sales	1,238,037

**Classification(s), Continued**

Location(s)	Included Location(s)	Coverage(s)	Class Code(s)	Classification Description(s)	Basis of Premium	Exposure
1	13	Products-Completed Operations	83000	Full-Service Restaurants - 83000 basic	Sales less alcoholic bev	3,217,509
1	13	Premises/Operations	83000	Full-Service Restaurants - 83000 basic	Sales less alcoholic bev	3,217,509
2		Liquor Liability	58161	Liquor Liability - Restaurants, Taverns, Hotels, Motels, Including Package Sales	Alcoholic Beverage Sales	896,277
2		Premises/Operations	83000	Full-Service Restaurants - 83000 basic	Sales less alcoholic bev	2,384,059
2		Products-Completed Operations	83000	Full-Service Restaurants - 83000 basic	Sales less alcoholic bev	2,384,059
3		Products-Completed Operations	83000	Full-Service Restaurants - 83000 basic	Sales less alcoholic bev	3,669,856
3		Liquor Liability	58161	Liquor Liability - Restaurants, Taverns, Hotels, Motels, Including Package Sales	Alcoholic Beverage Sales	1,500,305
3		Premises/Operations	83000	Full-Service Restaurants - 83000 basic	Sales less alcoholic bev	3,669,856
4		Products-Completed Operations	83000	Full-Service Restaurants - 83000 basic	Sales less alcoholic bev	3,261,375
4		Liquor Liability	58161	Liquor Liability - Restaurants, Taverns, Hotels, Motels, Including Package Sales	Alcoholic Beverage Sales	986,172
4		Premises/Operations	83000	Full-Service Restaurants - 83000 basic	Sales less alcoholic bev	3,261,375
5		Premises/Operations	83000	Full-Service Restaurants - 83000 basic	Sales less alcoholic bev	2,688,380

**Classification(s), Continued**

Location(s)	Included Location(s)	Coverage(s)	Class Code(s)	Classification Description(s)	Basis of Premium	Exposure
5		Liquor Liability	58161	Liquor Liability - Restaurants, Taverns, Hotels, Motels, Including Package Sales	Alcoholic Beverage Sales	901,911
5		Products-Completed Operations	83000	Full-Service Restaurants - 83000 basic	Sales less alcoholic bev	2,688,380
6		Premises/Operations (Products Included)	68606	Vacant Buildings - Not Factories - Other Than Not-For-Profit	Area	7,900
7		Products-Completed Operations	83000	Full-Service Restaurants - 83000 basic	Sales less alcoholic bev	5,780,243
7		Liquor Liability	58161	Liquor Liability - Restaurants, Taverns, Hotels, Motels, Including Package Sales	Alcoholic Beverage Sales	1,910,518
7		Premises/Operations	83000	Full-Service Restaurants - 83000 basic	Sales less alcoholic bev	5,780,243
8		Products-Completed Operations	83000	Full-Service Restaurants - 83000 basic	Sales less alcoholic bev	2,196,975
8		Liquor Liability	58161	Liquor Liability - Restaurants, Taverns, Hotels, Motels, Including Package Sales	Alcoholic Beverage Sales	1,049,874
8		Premises/Operations	83000	Full-Service Restaurants - 83000 basic	Sales less alcoholic bev	2,196,975
9		Premises/Operations	83000	Full-Service Restaurants - 83000 basic	Sales less alcoholic bev	3,592,016
9		Liquor Liability	58161	Liquor Liability - Restaurants, Taverns, Hotels, Motels, Including Package Sales	Alcoholic Beverage Sales	1,239,158
9		Products-Completed Operations	83000	Full-Service Restaurants - 83000 basic	Sales less alcoholic bev	3,592,016


Classification(s), Continued

Location(s)	Included Location(s)	Coverage(s)	Class Code(s)	Classification Description(s)	Basis of Premium	Exposure
10		Premises/Operations	83000	Full-Service Restaurants - 83000 basic	Sales less alcoholic bev	3,101,119
10		Liquor Liability	58161	Liquor Liability - Restaurants, Taverns, Hotels, Motels, Including Package Sales	Alcoholic Beverage Sales	1,121,830
10		Products-Completed Operations	83000	Full-Service Restaurants - 83000 basic	Sales less alcoholic bev	3,101,119
11		Premises/Operations (Products Included)	83107	Mercantile - Lessor's Risk Only (LRO)	Area	1,993
12		Premises/Operations (Products Included)	49451	Vacant Land - Other Than Not-For-Profit	Each Acre	1

Endorsements
Exclusion-Coverage C-Medical Payments (CG 21 35 10 01)

Description And Location Of Premises Or Classification

All

Products/Completed Operations Hazard Redefined (CG 24 07 01 96)

Location(s) and Description of Premises & Operations

ALL	All Locations Per General Liability Schedule

Fungi or Bacteria Exclusion (CG 72 77 04 08)

Specified Location (If Applicable)

All

COMMERCIAL GENERAL LIABILITY
CG 00 01 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section **II** – Who Is An Insured. Other words and phrases that appear in quotation marks have special meaning. Refer to Section **V** – Definitions.

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section **III** - Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages **A** and **B**.

- b. This insurance applies to "bodily injury" and "property damage" only if:
 - (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";
 - (2) The "bodily injury" or "property damage" occurs during the policy period; and
 - (3) Prior to the policy period, no insured listed under Paragraph **1.** of Section **II** Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.
- c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.
- d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

- (1) Reports all, or any part, of the “bodily injury” or “property damage” to us or any other insurer;
 - (2) Receives a written or verbal demand or claim for damages because of the “bodily injury” or “property damage”; or
 - (3) Becomes aware by any other means that “bodily injury” or “property damage” has occurred or has begun to occur.
- e. Damages because of “bodily injury” include damages claimed by any person or organization for care, loss of services or death resulting at any time from the “bodily injury”.

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

“Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an “insured contract”, provided the “bodily injury” or “property damage” occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an “insured contract”, reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of “bodily injury” or “property damage”, provided:
 - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same “insured contract”; and
 - (b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability

“Bodily injury” or “property damage” for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in:

- (a) The supervision, hiring, employment, training or monitoring of others by that insured; or
- (b) Providing or failing to provide transportation with respect to any person that may be under the influence of alcohol;

if the “occurrence” which caused the “bodily injury” or “property damage”, involved that which is described in Paragraph (1), (2) or (3) above.

However, this exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages. For the purposes of this exclusion, permitting a person to bring alcoholic beverages on your premises, for consumption on your premises, whether or not a fee is charged or a license is required for such activity, is not by itself considered the business of selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability

"Bodily injury" to:

- (1) An "employee" of the insured arising out of and in the course of:
 - (a) Employment by the insured; or
 - (b) Performing duties related to the conduct of the insured's business; or
- (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

f. Pollution

- (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":
 - (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:
 - (i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;
 - (ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or
 - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";
 - (b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
 - (c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:
 - (i) Any insured; or
 - (ii) Any person or organization for whom you may be legally responsible; or
 - (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:
 - (i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;
 - (ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or
 - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

- (e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".
- (2) Any loss, cost or expense arising out of any:
 - (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
 - (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

- (1) A watercraft while ashore on premises you own or rent;
- (2) A watercraft you do not own that is:
 - (a) Less than 26 feet long; and
 - (b) Not being used to carry persons or property for a charge;
- (3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;
- (4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or
- (5) "Bodily injury" or "property damage" arising out of:
 - (a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged; or
 - (b) The operation of any of the machinery or equipment listed in Paragraph f.(2) or f.(3) of the definition of "mobile equipment".

h. Mobile Equipment

"Bodily injury" or "property damage" arising out of:

- (1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or
- (2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

i. War

“Bodily injury” or “property damage”, however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

j. Damage To Property

“Property damage” to:

- (1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;
- (2) Premises you sell, give away or abandon, if the “property damage” arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody or control of the insured;
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the “property damage” arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to “property damage” (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of seven or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III – Limits Of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are “your work” and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to “property damage” included in the “products-completed operations hazard”.

k. Damage To Your Product

“Property damage” to “your product” arising out of it or any part of it.

l. Damage To Your Work

“Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard”.

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

o. Personal And Advertising Injury

"Bodily injury" arising out of "personal and advertising injury".

p. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

However, this exclusion does not apply to liability for damages because of "bodily injury".

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

q. Recording And Distribution Of Material Or Information In Violation Of Law

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;
- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;
- (3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA); or
- (4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

Exclusions **c.** through **n.** do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section **III** - Limits Of Insurance.

COVERAGE B – PERSONAL AND ADVERTISING INJURY LIABILITY**1. Insuring Agreement**

- a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section **III** - Limits Of Insurance; and
- (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages **A** and **B**.

- b.** This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

2. Exclusions

This insurance does not apply to:

a. **Knowing Violation Of Rights Of Another**

"Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

b. **Material Published With Knowledge Of Falsity**

"Personal and advertising injury" arising out of oral or written publication, in any manner, of material, if done by or at the direction of the insured with knowledge of its falsity.

c. **Material Published Prior To Policy Period**

"Personal and advertising injury" arising out of oral or written publication, in any manner, of material whose first publication took place before the beginning of the policy period.

d. **Criminal Acts**

"Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

e. **Contractual Liability**

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

f. **Breach Of Contract**

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement".

g. **Quality Or Performance Of Goods – Failure To Conform To Statements**

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

h. **Wrong Description Of Prices**

"Personal and advertising injury" arising out of the wrong description of the price of goods, products or services stated in your "advertisement".

i. **Infringement Of Copyright, Patent, Trademark Or Trade Secret**

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your "advertisement".

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

j. **Insureds In Media And Internet Type Businesses**

"Personal and advertising injury" committed by an insured whose business is:

- (1) Advertising, broadcasting, publishing or telecasting;
- (2) Designing or determining content of web sites for others; or
- (3) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs **14.a.**, **b.** and **c.** of "personal and advertising injury" under the Definitions section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

k. **Electronic Chatrooms Or Bulletin Boards**

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

I. Unauthorized Use Of Another's Name Or Product

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

m. Pollution

"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

n. Pollution-related

Any loss, cost or expense arising out of any:

- (1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
- (2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

o. War

"Personal and advertising injury", however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

p. Recording And Distribution Of Material Or Information In Violation Of Law

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;
- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;
- (3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA); or
- (4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

COVERAGE C – MEDICAL PAYMENTS**1. Insuring Agreement**

- a.** We will pay medical expenses as described below for "bodily injury" caused by an accident:

- (1) On premises you own or rent;
- (2) On ways next to premises you own or rent; or
- (3) Because of your operations;

provided that:

- (a) The accident takes place in the "coverage territory" and during the policy period;
- (b) The expenses are incurred and reported to us within one year of the date of the accident; and
- (c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

- b.** We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

- (1) First aid administered at the time of an accident;
- (2) Necessary medical, surgical, X-ray and dental services, including prosthetic devices; and
- (3) Necessary ambulance, hospital, professional nursing and funeral services.

2. Exclusions

We will not pay expenses for “bodily injury”:

a. Any Insured

To any insured, except “volunteer workers”.

b. Hired Person

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

c. Injury On Normally Occupied Premises

To a person injured on that part of premises you own or rent that the person normally occupies.

d. Workers' Compensation And Similar Laws

To a person, whether or not an “employee” of any insured, if benefits for the “bodily injury” are payable or must be provided under a workers' compensation or disability benefits law or a similar law.

e. Athletics Activities

To a person injured while practicing, instructing or participating in any physical exercises or games, sports, or athletic contests.

f. Products-Completed Operations Hazard

Included within the “products-completed operations hazard”.

g. Coverage A Exclusions

Excluded under Coverage A.

SUPPLEMENTARY PAYMENTS – COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any “suit” against an insured we defend:

- a. All expenses we incur.
- b. Up to \$250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.
- c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
- d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or “suit”, including actual loss of earnings up to \$250 a day because of time off from work.
- e. All court costs taxed against the insured in the “suit”. However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.
- f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
- g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

2. If we defend an insured against a “suit” and an indemnitee of the insured is also named as a party to the “suit”, we will defend that indemnitee if all of the following conditions are met:

- a. The “suit” against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an “insured contract”;
- b. This insurance applies to such liability assumed by the insured;

- c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same “insured contract”;
- d. The allegations in the “suit” and the information we know about the “occurrence” are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;
- e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such “suit” and agree that we can assign the same counsel to defend the insured and the indemnitee; and
- f. The indemnitee:
 - (1) Agrees in writing to:
 - (a) Cooperate with us in the investigation, settlement or defense of the “suit”;
 - (b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the “suit”;
 - (c) Notify any other insurer whose coverage is available to the indemnitee; and
 - (d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and
 - (2) Provides us with written authorization to:
 - (a) Obtain records and other information related to the “suit”; and
 - (b) Conduct and control the defense of the indemnitee in such “suit”.

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph **2.b.(2)** of Section I – Coverage **A** – Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for “bodily injury” and “property damage” and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when we have used up the applicable limit of insurance in the payment of judgments or settlements or the conditions set forth above, or the terms of the agreement described in Paragraph **f.** above, are no longer met.

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:
 - a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
 - b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
 - c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
 - d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your “executive officers” and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
 - e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.
2. Each of the following is also an insured:
 - a. Your “volunteer workers” only while performing duties related to the conduct of your business, or your “employees”, other than either your “executive officers” (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these “employees” or “volunteer workers” are insureds for:

(1) “Bodily injury” or “personal and advertising injury”:

- (a)** To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-“employee” while in the course of his or her employment or performing duties related to the conduct of your business, or to your other “volunteer workers” while performing duties related to the conduct of your business;
- (b)** To the spouse, child, parent, brother or sister of that co-“employee” or “volunteer worker” as a consequence of Paragraph **(1)(a)** above;
- (c)** For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraph **(1)(a)** or **(b)** above; or
- (d)** Arising out of his or her providing or failing to provide professional health care services.

(2) “Property damage” to property:

- (a)** Owned, occupied or used by;
 - (b)** Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by;
- you, any of your “employees”, “volunteer workers”, any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).

- b.** Any person (other than your “employee” or “volunteer worker”), or any organization while acting as your real estate manager.
- c.** Any person or organization having proper temporary custody of your property if you die, but only:
 - (1)** With respect to liability arising out of the maintenance or use of that property; and
 - (2)** Until your legal representative has been appointed.
- d.** Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.

- 3.** Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:
 - a.** Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;
 - b.** Coverage **A** does not apply to “bodily injury” or “property damage” that occurred before you acquired or formed the organization; and
 - c.** Coverage **B** does not apply to “personal and advertising injury” arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

SECTION III – LIMITS OF INSURANCE

- 1.** The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
 - a.** Insureds;
 - b.** Claims made or “suits” brought; or
 - c.** Persons or organizations making claims or bringing “suits”.
- 2.** The General Aggregate Limit is the most we will pay for the sum of:
 - a.** Medical expenses under Coverage **C**;
 - b.** Damages under Coverage **A**, except damages because of “bodily injury” or “property damage” included in the “products-completed operations hazard”; and
 - c.** Damages under Coverage **B**.

3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage **A** for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".
4. Subject to Paragraph 2. above, the Personal And Advertising Injury Limit is the most we will pay under Coverage **B** for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.
5. Subject to Paragraph 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:
 - a. Damages under Coverage **A**; and
 - b. Medical expenses under Coverage **C**
 because of all "bodily injury" and "property damage" arising out of any one "occurrence".
6. Subject to Paragraph 5. above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage **A** for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.
7. Subject to Paragraph 5. above, the Medical Expense Limit is the most we will pay under Coverage **C** for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

- a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
 - (1) How, when and where the "occurrence" or offense took place;
 - (2) The names and addresses of any injured persons and witnesses; and
 - (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
- b. If a claim is made or "suit" is brought against any insured, you must:
 - (1) Immediately record the specifics of the claim or "suit" and the date received; and
 - (2) Notify us as soon as practicable.
 You must see to it that we receive written notice of the claim or "suit" as soon as practicable.
- c. You and any other involved insured must:
 - (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
 - (2) Authorize us to obtain records and other information;
 - (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
 - (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.
- d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

- b.** To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph **c.** below.

b. Excess Insurance

- (1)** This insurance is excess over:

- (a)** Any of the other insurance, whether primary, excess, contingent or on any other basis:

- (i)** That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
- (ii)** That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;
- (iii)** That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or
- (iv)** If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion **g.** of Section **I** – Coverage **A** – Bodily Injury And Property Damage Liability.

- (b)** Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured.

- (2)** When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

- (3)** When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

- (a)** The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
- (b)** The total of all deductible and self-insured amounts under all that other insurance.

- (4)** We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

5. Premium Audit

- a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.
- b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.
- c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

6. Representations

By accepting this policy, you agree:

- a. The statements in the Declarations are accurate and complete;
- b. Those statements are based upon representations you made to us; and
- c. We have issued this policy in reliance upon your representations.

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

SECTION V – DEFINITIONS

- 1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:
 - a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
 - b. Regarding web sites, only that part of a web site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.
- 2. "Auto" means:
 - a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or
 - b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".
- 3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

4. “Coverage territory” means:

- a.** The United States of America (including its territories and possessions), Puerto Rico and Canada;
- b.** International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph **a.** above; or
- c.** All other parts of the world if the injury or damage arises out of:
 - (1)** Goods or products made or sold by you in the territory described in Paragraph **a.** above;
 - (2)** The activities of a person whose home is in the territory described in Paragraph **a.** above, but is away for a short time on your business; or
 - (3)** “Personal and advertising injury” offenses that take place through the Internet or similar electronic means of communication;

provided the insured's responsibility to pay damages is determined in a “suit” on the merits, in the territory described in Paragraph **a.** above or in a settlement we agree to.

- 5.** “Employee” includes a “leased worker”. “Employee” does not include a “temporary worker”.
- 6.** “Executive officer” means a person holding any of the officer positions created by your charter, constitution, bylaws or any other similar governing document.
- 7.** “Hostile fire” means one which becomes uncontrollable or breaks out from where it was intended to be.
- 8.** “Impaired property” means tangible property, other than “your product” or “your work”, that cannot be used or is less useful because:
 - a.** It incorporates “your product” or “your work” that is known or thought to be defective, deficient, inadequate or dangerous; or
 - b.** You have failed to fulfill the terms of a contract or agreement;
 if such property can be restored to use by the repair, replacement, adjustment or removal of “your product” or “your work” or your fulfilling the terms of the contract or agreement.

9. “Insured contract” means:

- a.** A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an “insured contract”;
- b.** A sidetrack agreement;
- c.** Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d.** An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e.** An elevator maintenance agreement;
- f.** That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph **f.** does not include that part of any contract or agreement:

- (1)** That indemnifies a railroad for “bodily injury” or “property damage” arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
- (2)** That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a)** Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
 - (b)** Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

(3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".
11. "Loading or unloading" means the handling of property:
 - a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";
 - b. While it is in or on an aircraft, watercraft or "auto"; or
 - c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;
 but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".
12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:
 - a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
 - b. Vehicles maintained for use solely on or next to premises you own or rent;
 - c. Vehicles that travel on crawler treads;
 - d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
 - (1) Power cranes, shovels, loaders, diggers or drills; or
 - (2) Road construction or resurfacing equipment such as graders, scrapers or rollers;
 - e. Vehicles not described in Paragraph a., b., c. or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
 - (1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or
 - (2) Cherry pickers and similar devices used to raise or lower workers;
 - f. Vehicles not described in Paragraph a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

- (1) Equipment designed primarily for:
 - (a) Snow removal;
 - (b) Road maintenance, but not construction or resurfacing; or
 - (c) Street cleaning;
- (2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
- (3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:
 - a. False arrest, detention or imprisonment;
 - b. Malicious prosecution;

- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
 - d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
 - e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
 - f. The use of another's advertising idea in your "advertisement"; or
 - g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".
15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
16. "Products-completed operations hazard":
- a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
 - (1) Products that are still in your physical possession; or
 - (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
 - (a) When all of the work called for in your contract has been completed.
 - (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
 - (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.
 - b. Does not include "bodily injury" or "property damage" arising out of:
 - (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;
 - (2) The existence of tools, uninstalled equipment or abandoned or unused materials; or
 - (3) Products or operations for which the classification, listed in the Declarations or in a policy Schedule, states that products-completed operations are subject to the General Aggregate Limit.
17. "Property damage" means:
- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
 - b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.
- For the purposes of this insurance, electronic data is not tangible property.
- As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.
18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:
- a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
 - b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.
19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

- 20.** “Volunteer worker” means a person who is not your “employee”, and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.
- 21.** “Your product”:
- a.** Means:
 - (1)** Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
 - (a)** You;
 - (b)** Others trading under your name; or
 - (c)** A person or organization whose business or assets you have acquired; and
 - (2)** Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.
 - b.** Includes:
 - (1)** Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your product”; and
 - (2)** The providing of or failure to provide warnings or instructions.
 - c.** Does not include vending machines or other property rented to or located for the use of others but not sold.
- 22.** “Your work”:
- a.** Means:
 - (1)** Work or operations performed by you or on your behalf; and
 - (2)** Materials, parts or equipment furnished in connection with such work or operations.
 - b.** Includes:
 - (1)** Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your work”; and
 - (2)** The providing of or failure to provide warnings or instructions.

COMMERCIAL GENERAL LIABILITY
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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LIQUOR LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V – Definitions.

SECTION I – LIQUOR LIABILITY COVERAGE

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "injury" to which this insurance applies if liability for such "injury" is imposed on the insured by reason of the selling, serving or furnishing of any alcoholic beverage. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "injury" to which this insurance does not apply. We may, at our discretion, investigate any "injury" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments.

- b. This insurance applies to "injury" only if:

- (1) The "injury" occurs during the policy period in the "coverage territory"; and
- (2) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "injury" or claim, knew that the "injury" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "injury" occurred, then any continuation, change or resumption of such "injury" during or after the policy period will be deemed to have been known prior to the policy period.

- c. "Injury" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "injury" or claim, includes any continuation, change or resumption of that "injury" after the end of the policy period.

- d. "Injury" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "injury" or claim:

- (1) Reports all, or any part, of the "injury" to us or any other insurer;
- (2) Receives a written or verbal demand or claim for damages because of the "injury"; or
- (3) Becomes aware by any other means that "injury" has occurred or has begun to occur.

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Injury" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

c. Employer's Liability

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the "injury".

d. Liquor License Not In Effect

"Injury" arising out of any alcoholic beverage sold, served or furnished while any required license is not in effect.

e. Your Product

"Injury" arising out of "your product". This exclusion does not apply to "injury" for which the insured or the insured's indemnitees may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

f. Other Insurance

Any "injury" with respect to which other insurance is afforded, or would be afforded but for the exhaustion of the limits of insurance.

This exclusion does not apply if the other insurance responds to liability for "injury" imposed on the insured by reason of the selling, serving or furnishing of any alcoholic beverage.

g. War

"Injury", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

SUPPLEMENTARY PAYMENTS

We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

1. All expenses we incur.
2. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
3. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to \$250 a day because of time off from work.
4. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.
5. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.

6. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.
7. Expenses incurred by the insured for first aid administered to others at the time of an event to which this insurance applies.

These payments will not reduce the limits of insurance.

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:
 - a. An individual, you and your spouse are insureds.
 - b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
 - c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
 - d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your “executive officers” and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
 - e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.
2. Each of the following is also an insured:
 - a. Your “employees”, other than either your “executive officers” (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these “employees” is an insured for:
 - (1) “Injury”:
 - (a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), or to a co-“employee” while that co-“employee” is either in the course of his or her employment or performing duties related to the conduct of your business;
 - (b) To the spouse, child, parent, brother or sister of that co-“employee” as a consequence of Paragraph (a) above; or
 - (c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraph (a) or (b) above.
 - (2) “Property damage” to property:
 - (a) Owned or occupied by; or
 - (b) Rented or loaned;
 to that “employee”, any of your other “employees”, by any of your partners or members (if you are a partnership or joint venture), or by any of your members (if you are a limited liability company).
 - b. Any person or organization having proper temporary custody of your property if you die, but only:
 - (1) With respect to liability arising out of the maintenance or use of that property; and
 - (2) Until your legal representative has been appointed.
 - c. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.
3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:
 - a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier; and
 - b. Coverage does not apply to “injury” that occurred before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
 - a. Insureds;
 - b. Claims made or “suits” brought; or
 - c. Persons or organizations making claims or bringing “suits”.
2. The Aggregate Limit is the most we will pay for all “injury” as the result of the selling, serving or furnishing of alcoholic beverages.
3. Subject to the Aggregate Limit, the Each Common Cause Limit is the most we will pay for all “injury” sustained by one or more persons or organizations as the result of the selling, serving or furnishing of any alcoholic beverage to any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV – LIQUOR LIABILITY CONDITIONS

1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

2. Duties In The Event Of Injury, Claim Or Suit

- a. You must see to it that we are notified as soon as practicable of an “injury” which may result in a claim. To the extent possible, notice should include:
 - (1) How, when and where the “injury” took place;
 - (2) The names and addresses of any injured persons and witnesses; and
 - (3) The nature and location of any “injury”.
- b. If a claim is made or “suit” is brought against any insured, you must:
 - (1) Immediately record the specifics of the claim or “suit” and the date received; and
 - (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or “suit” as soon as practicable.
- c. You and any other involved insured must:
 - (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or “suit”;
 - (2) Authorize us to obtain records and other information;
 - (3) Cooperate with us in the investigation or settlement of the claim or defense against the “suit”; and
 - (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of “injury” to which this insurance may also apply.
- d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a “suit” asking for damages from an insured; or
- b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary. Our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in b. below.

b. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

5. Premium Audit

- a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.
- b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.
- c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

6. Representations

By accepting this policy, you agree:

- a. The statements in the Declarations are accurate and complete;
- b. Those statements are based upon representations you made to us; and
- c. We have issued this policy in reliance upon your representations.

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

SECTION V – DEFINITIONS

1. “Bodily injury” means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
2. “Coverage territory” means:
 - a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
 - b. International waters or airspace, but only if the “injury” occurs in the course of travel or transportation between any places included in Paragraph a. above; or
 - c. All other parts of the world if the “injury” arises out of:
 - (1) Goods or products made or sold by you in the territory described in Paragraph a. above; or
 - (2) The activities of a person whose home is in the territory described in Paragraph a. above, but is away for a short time on your business;

provided the insured's responsibility to pay damages is determined in a “suit” on the merits, in the territory described in Paragraph a. above or in a settlement we agree to.
3. “Employee” includes a “leased worker”. “Employee” does not include a “temporary worker”.
4. “Executive officer” means a person holding any of the officer positions created by your charter, constitution, bylaws or any other similar governing document.
5. “Injury” means damages because of “bodily injury” and “property damage”, including damages for care, loss of services or loss of support.
6. “Leased worker” means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. “Leased worker” does not include a “temporary worker”.
7. “Property damage” means:
 - a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
 - b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the occurrence that caused it.
8. “Suit” means a civil proceeding in which damages because of “injury” to which this insurance applies are alleged. “Suit” includes:
 - a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
 - b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.
9. “Temporary worker” means a person who is furnished to you to substitute for a permanent “employee” on leave or to meet seasonal or short-term workload conditions.
10. “Your product”:
 - a. Means:
 - (1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
 - (a) You;
 - (b) Others trading under your name; or
 - (c) A person or organization whose business or assets you have acquired; and
 - (2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.
 - b. Includes:
 - (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your product”; and

- (2) The providing of or failure to provide warnings or instructions.
- c. Does not include vending machines or other property rented to or located for the use of others but not sold.

**COMMERCIAL GENERAL LIABILITY
CG 21 06 05 14**

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**EXCLUSION - ACCESS OR DISCLOSURE OF CONFIDENTIAL OR
PERSONAL INFORMATION AND DATA-RELATED LIABILITY - WITH LIMITED
BODILY INJURY EXCEPTION**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A.** Exclusion **2.p.** of **Section I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:

2. Exclusions

This insurance does not apply to:

p. Access Or Disclosure Of Confidential Or Personal Information And Data-related Liability

Damages arising out of:

- (1)** Any access to or disclosure of any person's or organization's confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information, credit card information, health information or any other type of nonpublic information; or
- (2)** The loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

This exclusion applies even if damages are claimed for notification costs, credit monitoring expenses, forensic expenses, public relations expenses or any other loss, cost or expense incurred by you or others arising out of that which is described in Paragraph **(1)** or **(2)** above.

However, unless Paragraph **(1)** above applies, this exclusion does not apply to damages because of "bodily injury".

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

- B.** The following is added to Paragraph **2. Exclusions** of **Section I – Coverage B – Personal And Advertising Injury Liability**:

2. Exclusions

This insurance does not apply to:

Access Or Disclosure Of Confidential Or Personal Information

"Personal and advertising injury" arising out of any access to or disclosure of any person's or organization's confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information, credit card information, health information or any other type of nonpublic information.

This exclusion applies even if damages are claimed for notification costs, credit monitoring expenses, forensic expenses, public relations expenses or any other loss, cost or expense incurred by you or others arising out of any access to or disclosure of any person's or organization's confidential or personal information.

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 21 35 10 01

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION - COVERAGE C - MEDICAL PAYMENTS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Schedule

Description And Location Of Premises Or Classification

(If no entry appears above, information required to complete this Endorsement will be shown in the Declarations as applicable to this Endorsement.)

With respect to any premises or classification shown in the Schedule:

1. Section **I** – Coverage **C** – Medical Payments does not apply and none of the references to it in the Coverage Part apply; and
2. The following is added to Section **I** - Supplementary Payments:
 - h. Expenses incurred by the insured for first aid administered to others at the time of an accident for “bodily injury” to which this insurance applies.

COMMERCIAL GENERAL LIABILITY
CG 21 47 12 07

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EMPLOYMENT- RELATED PRACTICES EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. The following exclusion is added to Paragraph 2., Exclusions of Section I - Coverage A - Bodily Injury And Property Damage Liability:

This insurance does not apply to:

“Bodily injury” to:

- (1) A person arising out of any:
 - (a) Refusal to employ that person;
 - (b) Termination of that person's employment; or
 - (c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or malicious prosecution directed at that person; or
- (2) The spouse, child, parent, brother or sister of that person as a consequence of “bodily injury” to that person at whom any of the employment-related practices described in Paragraphs (a), (b), or (c) above is directed.

This exclusion applies:

- (1) Whether the injury-causing event described in Paragraphs (a), (b) or (c) above occurs before employment, during employment or after employment of that person;
- (2) Whether the insured may be liable as an employer or in any other capacity; and
- (3) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

B. The following exclusion is added to Paragraph 2., Exclusions of Section I - Coverage B - Personal And Advertising Injury Liability:

This insurance does not apply to:

Personal and advertising injury” to:

- (1) A person arising out of any:
 - (a) Refusal to employ that person;
 - (b) Termination of that person's employment; or
 - (c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or malicious prosecution directed at that person; or
- (2) The spouse, child, parent, brother or sister of that person as a consequence of “personal and advertising injury” to that person at whom any of the employment-related practices described in Paragraphs (a), (b), or (c) above is directed.

This exclusion applies:

- (1) Whether the injury-causing event described in Paragraphs (a), (b) or (c) above occurs before employment, during employment or after employment of that person;
- (2) Whether the insured may be liable as an employer or in any other capacity; and
- (3) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

**COMMERCIAL GENERAL LIABILITY
CG 24 06 04 13**

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LIQUOR LIABILITY - BRING YOUR OWN ALCOHOL ESTABLISHMENTS

This endorsement modifies insurance provided under the following:

LIQUOR LIABILITY COVERAGE PART

The following is added to Paragraph 1. **Insuring Agreement** of **Section I – Liquor Liability Coverage**:

1. Insuring Agreement

An insured who permits any person to bring any alcoholic beverage on their premises, for consumption on the premises, whether or not a fee is charged for such activity, will also be considered selling, serving or furnishing alcoholic beverages.

POLICY NUMBER:

**COMMERCIAL GENERAL LIABILITY
CG 24 07 01 96**

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PRODUCTS/COMPLETED OPERATIONS HAZARD REDEFINED

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

SCHEDULE

Description of Premises and Operations:

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

With respect to "bodily injury" or "property damage" arising out of "your products" manufactured, sold, handled or distributed:

1. On, from or in connection with the use of any premises described in the Schedule, or
2. In connection with the conduct of any operation described in the Schedule, when conducted by you or on your behalf,

Paragraph **a.** of the definition of "Products-completed operations hazard" in the DEFINITIONS Section is replaced by the following:

"Products-completed operations hazard":

- a.** Includes all "bodily injury" and "property damage" that arises out of "your products" if the "bodily injury" or "property damage" occurs after you have relinquished possession of those products.



Complete Lead Poisoning and Lead Contamination Exclusion CG 70 92 12 92

This insurance does not apply to any injury, damage, liability, loss, cost or expense in whole or in part caused by, resulting from, arising out of, or in any way related to **lead**, including, but not limited to:

- (1) The manufacture, sale, distribution, handling, use, installation, removal, abatement, containment, storage, emission, release, inhalation, ingestion, absorption, or transmission of or exposure to **lead**;
- (2) Any supervision, instructions, recommendations, notices, warnings or advice given or which should have been given in connection with **lead**;
- (3) Any request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify, remediate, neutralize, or in any way respond to or assess the extent or the effects of **lead**; or
- (4) Any claim, **suit** or proceeding for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, remediating, neutralizing or in any way responding to, or assessing the effects of **lead**.

We shall have no obligation of any kind, including, but not limited to, any obligation to investigate, defend, pay defense costs, settle, or pay settlements or judgements as to any claim, **suit** or proceeding involving or allegedly involving, **lead**.

As used in this exclusion, **lead** includes, but is not limited to the mineral **lead** (chemical element & symbol {lead (Pb)} Atomic number 82) in any form, whether or not the **lead** is:

- (1) Pure;
- (2) Contained in, or on, or incorporated into, products, goods or materials;
- (3) Solid, liquid, gaseous or in fumes; or
- (4) Contained in any part of any building, structure, building material, product or any other real or personal property.

This exclusion does not apply to any **Bodily injury** or **Property damage** that is caused by a sudden, abrupt striking by, or impact with, **lead**, which causes an immediate and conspicuous manifestation of physical injury to persons or property.



Complete Asbestos Exclusion - CG 70 93 12 92

This insurance does not apply to any injury, damage, liability, loss, cost or expense in whole or in part caused by, resulting from, arising out of, or in any way related to **asbestos**, including, but not limited to:

- (1) The manufacture, sale, distribution, handling, use, installation, removal, abatement, containment, storage, transportation, disposal, existence, presence, emanation, emission, release, inhalation, ingestion, absorption, or transmission of or exposure to **asbestos**;
- (2) Any supervision, instructions, recommendations, notices, warnings or advice given or which should have been given in connection with **asbestos**;
- (3) Any request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify, remediate, neutralize, or in any way respond to or assess the extent or the effects of **asbestos**; or
- (4) Any claim, **suit** or proceeding for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, remediating neutralizing or in any way responding to, or assessing the effects of **asbestos**.

We shall have no obligation of any kind, including, but not limited to, any obligation to investigate, defend, pay defense costs, settle, or pay settlements or judgements as to any claim, **suit** or proceeding involving or allegedly involving **asbestos**.

As used in this exclusion, **asbestos** includes, but is not limited to the mineral **asbestos** in any form, whether or not the **asbestos** is:

- (1) A fiber, particle, or dust;
- (2) Contained in, or on, or incorporated into, products, goods or materials; or
- (3) Contained in any part of any building, structure, building material, product or any other real or personal property.

This exclusion does not apply to any **bodily injury** or **property damage** that is caused by a sudden, abrupt striking by, or impact with, **asbestos**, which causes an immediate and conspicuous manifestation of physical injury to persons or property.



MultiCover® - Without Medical Payments - CG 71 93 01 14

Policy Amendment(s) Commercial General Liability Coverage Form

Your Commercial General Liability Coverage Form is revised as follows:

1. Broadened Named Insured

A. SECTION II - WHO IS AN INSURED, item 3., is deleted and replaced by the following:

3. Any organization that you own at the inception of this policy, or newly acquire or form during the policy period, and over which you maintain during the policy period majority ownership or majority interest, will qualify as a Named Insured if:
 - a. There is no other similar insurance available to that organization; and
 - b. The first Named Insured shown in the Declarations has the responsibility of placing insurance for that organization; and
 - c. That organization is incorporated or organized under the laws of the United States of America.

However:

- (1) Coverage under this provision 3 is afforded only until the next occurring annual anniversary of the beginning of the policy period shown in the Declarations, or the end of the policy period, whichever is earlier; and
- (2) Coverage A does not apply to **bodily injury** or **property damage** that occurred before you acquired or formed the organization; and
- (3) Coverage B does not apply to **personal and advertising injury** arising out of an offense committed before you acquired or formed the organization.

B. SECTION II - WHO IS AN INSURED, the last paragraph, is deleted and replaced by the following:

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture, or limited liability company that is not shown as a Named Insured in the Declarations. However, this does not apply to a limited liability company that meets all of the conditions in Section II - Who Is An Insured, item 3., above.

2. Additional Insured

If an Additional Insured endorsement is attached to this policy that specifically names a person or organization as an additional insured, then this Section 2. Additional Insured does not apply to such person or organization.

SECTION II - WHO IS AN INSURED, subsection 2.e., is added as follows:

- e. Any person or organization is included as an additional insured, but only to the extent such person or organization is legally obligated to pay for **bodily injury, property damage or personal and advertising injury** caused by your acts or omissions. With respect to the insurance afforded to such additional insured, all of the following additional provisions apply:
 - (1) You have agreed in a written **insured contract** that such person or organization be added as an additional insured under this policy;
 - (2) The **bodily injury, property damage or personal and advertising injury** for which said person or organization is legally obligated to pay occurs subsequent to the execution of such **insured contract**;
 - (3) The most we will pay is the lesser of either the amount of insurance available under the applicable Limits of Insurance shown in the Declarations or the limits of insurance required by the **insured contract**;
 - (4) The insurance afforded to such additional insured only applies to the extent permitted by law;



- (5) Such person or organization is an additional insured only with respect to:
- (a) Their ownership, maintenance, or use of that part of the premises, or land, owned by, rented to, or leased to you, except such person or organization is not an insured with respect to structural alterations, new construction or demolition operations performed by or on behalf of such person or organization;
 - (b) Your ongoing operations performed for that insured;
 - (c) Their financial control of you, except such person or organization is not an insured with respect to structural alterations, new construction or demolition operations performed by or on behalf of such person or organization;
 - (d) The maintenance, operation or use by you of equipment leased to you by such person or organization;
 - (e) Operations performed by you or on your behalf and for which a state or political subdivision has issued a permit, provided such operations are not performed for such state or political subdivision, and are not included within the **products-completed operations hazard**; or
 - (f) Their liability as a grantor of a franchise to you.
- (6) This insurance does not apply to **bodily injury, property damage, personal and advertising injury, occurrence** or offense:
- (a) Which takes place at a particular premises after you cease to be a tenant of that premises;
 - (b) Which takes place after all work, including materials, parts or equipment furnished in connection with such work to be performed by or on behalf of the additional insured at the site of the covered operations, has been completed;
 - (c) Which takes place after that portion of **your work** out of which the injury or damage arises has been put to its intended use by any other person or organization other than another contractor or subcontractor engaged in performing operations for a principal as part of the same project; or
 - (d) Which takes place after the expiration of any equipment lease to which (4)(d) above applies;
- (7) With respect to architects, engineers or surveyors, coverage does not apply to **bodily injury, property damage** or **personal and advertising injury** arising out of the rendering or failure to render any professional services by or for you, including:
- (a) The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; or
 - (b) Supervisory, inspection, architectural, or engineering services.

These exclusions apply even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the **occurrence** which caused the **bodily injury** or **property damage**, or the offense which caused the **personal or advertising injury**, involved the rendering of or the failure to render any professional services by or for you.

3. Additional Insured - Vendors

If an Additional Insured Vendors endorsement is attached to this policy that specifically names a person or organization as an additional insured, then this Section 3. Additional Insured - Vendors does not apply to that person or organization.

Unless the **products-completed operations hazard** is excluded from this policy, SECTION II - WHO IS AN INSURED, item 2.f. is added as follows:

- f. Any vendor of yours is included as an additional insured, but only with respect to **bodily injury** or **property damage** caused by **your products** which are distributed or sold in the regular course of the vendor's business, subject to the following additional exclusions:



- (1) The insurance afforded such vendor does not apply to:
 - (a) **Bodily injury or property damage** for which the vendor is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that the vendor would have in the absence of the contract or agreement;
 - (b) Any express warranty unauthorized by you;
 - (c) Any physical or chemical change in the product made intentionally by the vendor;
 - (d) Repackaging, unless unpacked solely for the purpose of inspection, demonstration, testing, or the substitution of parts under instructions from the manufacturer, and then repackaged in the original container;
 - (e) Any failure to make such inspections, adjustments, tests or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products;
 - (f) Demonstration, installation, servicing or repair operations, except such operations performed by the vendor in full compliance with the manufacturer's written instructions at the vendor's premises in connection with the sale of the product;
 - (g) Products which, after distribution or sale by you, have been labeled or relabeled or used as a container, part or ingredient of any other thing or substance by or for the vendor; or
 - (h) **Bodily injury or property damage** arising out of the liability of the vendor for its own acts or omissions or those of its employees or anyone else acting on its behalf.
- (2) This insurance does not apply to any insured person or organization from whom you have acquired such products or any ingredient, part or container, entering into, accompanying or containing such products;
- (3) The most we will pay is the lesser of either the amount of insurance available under the applicable Limits of Insurance shown in the Declarations or the limits of insurance required by the contract or agreement; and
- (4) The insurance afforded to such vendor only applies to the extent permitted by law.

4. **Additional Insured - Limited Primary and Noncontributory Provision**

The following is added as a second paragraph to Section IV Conditions, Condition 4. Other Insurance, following paragraph b.(2):

However, if you have added any person, organization or vendor of yours as an additional insured to this policy by way of this MultiCover® endorsement and have agreed in a written **insured contract** that this insurance is primary and non-contributory with other insurance available to that additional insured, this insurance is primary and we will not seek contribution from such additional insured's other insurance, provided that the additional insured is a Named Insured under such other insurance.

5. **Waiver of Subrogation**

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS, item 8., is deleted and replaced by the following:

8. **Transfer of Rights of Recovery Against Others to Us and Blanket Waiver of Subrogation**
 - a. If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after the loss to impair those rights. At our request, the insured will bring suit or transfer those rights to us and help us enforce them.
 - b. If required by a written **insured contract** executed prior to the **occurrence** or offense, we waive any right of recovery we may have against any person or organization named in such **insured contract**, because of payments we make for injury or damage arising out of your operations or **your work** for that person or organization.



6. Cancellation - 90 Days

Common Policy Conditions endorsement IL0017, A. Cancellation, item 2.b. is deleted and replaced by the following:

- b. 90 days before the effective date of cancellation if we cancel for any other reason.

7. Liberalization

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS, the following is added as an additional Condition:

Liberalization

If we adopt a change in our forms or rules which would broaden the coverage provided by any form that is a part of this policy without an extra premium charge, the broader coverage will apply to this policy. This extension is effective upon the approval of such broader coverage in your state.

8. Fire, Explosion, Sprinkler Leakage, or Lightning Legal Liability Coverage

- A. SECTION I - COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions, the last paragraph, is deleted and replaced by the following:

Exclusions c. through n. do not apply to damage by fire, explosion, sprinkler leakage, or lightning to premises while:

- 1. Rented to you;
- 2. Temporarily occupied by you with the permission of the owner; or
- 3. Managed by you under a written agreement with the owner.

A separate limit of insurance applies to this coverage as described in Section III - LIMITS OF INSURANCE.

- B. SECTION III - LIMITS OF INSURANCE, item 6., is deleted and replaced by the following:

- 6. Subject to 5. above, the Damage to Premises Rented To You Limit shown in the Declarations, for **property damage** to any one premises while rented to you, or in the case of damage by fire, explosion, sprinkler leakage, or lightning while rented to you, temporarily occupied by you with the permission of the owner, or managed by you under a written agreement with the owner, is the greater of:

- a. \$1,000,000 Any One Premises; or
- b. The Damage To Premises Rented To You Limit shown in the Declarations.

- C. SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS, 4. Other Insurance, b. Excess Insurance, (1)(a), items (i) and (iii), are deleted and replaced by the following:

- (i) That is Fire, Explosion, Sprinkler Leakage or Lightning insurance for premises while rented to you, temporarily occupied by you with permission of the owner, or managed by you under a written agreement with the owner;
- (iii) That is insurance purchased by you to cover your liability as a tenant for **property damage** to premises rented to you, temporarily occupied by you with the permission of the owner, or managed by you under a written agreement with the owner; or

- D. SECTION V - DEFINITIONS, 9. **Insured Contract**, item a., is deleted and replaced by the following:

- (a) A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire, explosion, sprinkler leakage, or lightning to premises while rented to you, temporarily occupied by you with permission of the owner, or managed by you under a written agreement with the owner, is not an **insured contract**;

9. Damage to Invitees' Automobiles from Falling Trees or Tree Limbs - Limited Coverage



This coverage applies to direct physical damage to automobiles owned by invitees subject to all of the following:

1. Provided such damage originates from trees on premises owned, managed, leased or rented by an insured;
2. Coverage applies only to invitees of an insured or an insured's tenant;
3. Such damage is directly caused by wind-driven falling trees or tree limbs;
4. The most we will pay for any one loss is the lowest of:
 - a. the actual cash value of the damaged automobile as of the time of the loss; or
 - b. the cost of repairing the damaged automobile; or
 - c. the cost of replacing the damaged automobile with another automobile of like kind and quality.

Regardless of the number of occurrences, losses or claims, this coverage is subject to a limit of \$25,000 in any one policy period;

5. This coverage is not subject to the General Liability General Aggregate Limit; and
6. We will make payments under this coverage without regard to fault.

10. **Non-Owned or Chartered Watercraft**

SECTION I - COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions, item g. Aircraft, Auto, or Watercraft, item (2), is deleted and replaced by the following:

- (2) A watercraft you do not own that is:
- (a) Less than 51 feet long; and
 - (b) Not being used for public transportation or as a common carrier;

11. **Chartered Aircraft**

SECTION I - COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions, g. Aircraft, Auto Or Watercraft, item (6), is added as follows:

- (6) An aircraft in which you have no ownership interest and that you have chartered with crew.

12. **Coverage Territory - Broadened**

SECTION V - DEFINITIONS, item 4.a., is deleted and replaced by the following:

- a. The United States of America (including its territories and possessions), Puerto Rico, Canada, Bermuda, the Bahamas, The Cayman Islands and the British Virgin Islands;

13. **Personal and Advertising Injury - Contractual**

Unless **personal and advertising injury** is excluded from this policy the following applies:

SECTION I - COVERAGES, COVERAGE B, 2. Exclusions, item e., is deleted.

14. **Fellow Employee Coverage**

SECTION II - WHO IS AN INSURED, 2.a., item (1) is deleted and replaced by the following:

- (1) **Personal and advertising injury:**

However, subsections (a), (b), (c) and (d) of item (1) remain unchanged.

15. **Bodily Injury Definition - Broadened**

SECTION V - DEFINITIONS, 3. **Bodily Injury** is deleted and replaced by the following:

Bodily injury means bodily injury, sickness or disease sustained by a person including death or mental anguish resulting from any of these at any time. Mental anguish means any type of mental or emotional illness or disease.

16. **Expected or Intended Injury - Amendment to Exclusion**



SECTION I. Coverage A Bodily Injury and Property Damage Liability, 2. EXCLUSIONS, a. Expected or Intended Injury, is deleted and replaced by the following:

a. Expected or Intended Injury

Bodily injury or **property damage** expected or intended from the standpoint of the insured.

This exclusion does not apply to **bodily injury** or **property damage** resulting from the use of reasonable force to protect persons or property.

17. **Unintentional Failure to Disclose Hazards**

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS, item 6. Representations, the following is added:

- d. If you unintentionally fail to disclose any hazards existing at the inception date of this policy, we will not deny coverage under this Coverage Form because of such failure. However, this provision does not affect our right to collect additional premium or exercise our right of cancellation or non-renewal.

18. **Supplementary Payments - Increased Limits**

SECTION I - COVERAGES, SUPPLEMENTARY PAYMENTS - COVERAGES A AND B, items 1.b. and 1.d., are deleted and replaced by the following:

- b. The cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.
- d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or suit, including substantiated loss of earnings up to \$500 a day because of time off from work.

19. **Duties in the Event of an Occurrence, Offense, Claim or Suit - Amended**

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS, item 2.a. is deleted and replaced by the following:

- (1) You must see to it that we or any licensed agent of ours are notified of a General Liability **occurrence** or offense which may result in a claim as soon as practicable after it becomes known to:

- (a) You, if you are an individual;
- (b) Your partner or member, if you are a partnership or joint venture;
- (c) Your member, if you are a limited liability company;
- (d) Your executive officer if you are an organization other than a partnership, joint venture or limited liability company; or
- (e) Your authorized representative or insurance manager.

Knowledge of an **occurrence** or offense by persons other than those listed above does not imply that those listed above also have such knowledge.

- (2) To the extent possible, notice should include:

- (a) How, when and where the **occurrence** or offense took place;
- (b) The names and addresses of any injured persons and witnesses; and
- (c) The nature and location of any injury or damage arising out of the **occurrence** or offense.

20. **Non Employment Discrimination Liability**

Unless **personal and advertising injury** is excluded from this policy the following applies:

- A. SECTION V - DEFINITIONS, 14. **Personal and advertising injury**, item h. is added as follows:

h. **Discrimination.**

- B. SECTION V - DEFINITIONS, item 23. is added as follows:



23. **Discrimination** means the unlawful treatment of a person or class of persons because of their specific race, color, religion, gender, age, or national origin in comparison to one or more persons who are not members of the specified class.

C. SECTION I - COVERAGES, COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY, 2. Exclusions, the following are added:

- q. **Discrimination** directly or indirectly related to the past employment, employment or prospective employment of any person or class of persons by any insured;
- r. **Discrimination** directly or indirectly related to the sale, rental, lease or sublease or prospective sale, rental, lease or sublease of any dwelling or permanent lodging by or at the direction of any insured;
- s. **Discrimination**, if insurance thereof is prohibited by law; or
- t. Fines, penalties, specific performance, or injunctions levied or imposed by a governmental entity, governmental code, law, or statute because of **discrimination**.

All other terms and conditions of the policy apply.



Amendment- Medical Payments for Restaurants - CG 72 52 12 07

Policy Amendment(s) Commercial General Liability Coverage Form

This endorsement modifies insurance provided under the following:

A. Section 1., Coverage C. Medical Payments, 1., a. is deleted and replaced in its entirety by the following:

1. a. We will pay medical expenses as described below for **bodily injury** caused by an accident:

- (1) On premises you own or rent;
- (2) On ways next to premises you own or rent; or
- (3) Because of your operations;

provided that:

- (a) The accident takes place in the **coverage territory** and during the policy period;
- (b) The expenses are incurred and reported to us within three years of the date of the accident; and
- (c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

B. Section 1., Coverage C. Medical Payments, Exclusion 2.f. is deleted.



Personal and Advertising Injury Hazard Redefined - CG 72 75 06 07

Policy Amendment(s) Commercial General Liability Coverage Form

Your Commercial General Liability Coverage Form is revised as follows:

SECTION V - DEFINITIONS, 14. **Personal and Advertising Injury**, item c., is replaced by the following:

- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person or organization occupies, committed by or on behalf of its owner, landlord or lessor;



Fungi or Bacteria Exclusion - CG 72 77 04 08

Policy Amendment(s) Commercial General Liability

This endorsement modifies insurance provided under the following:

Commercial General Liability Coverage Part

Schedule

Specified Location (If Applicable)

Information required to complete this schedule, if not shown above, will be shown in the declarations.

With respect to the location(s) shown in the above Schedule, the Commercial General Liability Coverage Part is amended as follows.

A. The following exclusion is added to Paragraph 2. **Exclusions of Section I - Coverage A - Bodily Injury And Property Damage Liability:**

2. Exclusions

This insurance does not apply to:

Fungi or Bacteria

- a. **Bodily injury or property damage** which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any **fungi** or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.
- b. Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, **fungi** or bacteria, by any insured or by any other person or entity.

This exclusion does not apply to any fungi or bacteria that are, are on, or are contained in, a good or product intended for bodily consumption.

B. The following exclusion is added to Paragraph 2. **Exclusions of Section I - Coverage B - Personal And Advertising Injury Liability:**

2. Exclusions

This insurance does not apply to:

Fungi or Bacteria

- a. **Personal and advertising injury** which would not have taken place, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any **fungi** or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury.
- b. Any loss, cost or expense arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, **fungi** or bacteria, by any insured or by any other person or entity.



C. The following definition is added to the **Definitions** section:

Fungi means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or byproducts produced or released by fungi.

All other terms and conditions of the policy remain unchanged.



Emergency First Aid Endorsement- CG 72 86 12 08

Policy Amendment(s) Commercial General Liability Coverage Form

An **employee** at work on the Named Insured's premises will be construed to be acting within the course and scope of their employment while performing emergency first aid upon another person. If that other person is a co-employee, Exclusion E., Employer's Liability, will not apply.

A **volunteer worker** performing duties related to the conduct of your business on the Named Insured's premises will be construed to be acting within the course and scope of such duties while performing emergency first aid upon another person.

The coverage provided by this endorsement will not apply if the **employee** or **volunteer worker** is a medical professional.

All other terms and conditions remain unchanged.



Employee Benefits Administration Errors and Omissions Insurance EB 70 00 12 97

IMPORTANT NOTE: THIS INSURANCE PROVIDES LIMITED COVERAGE FOR LIABILITY WHICH ARISES OUT OF THE ADMINISTRATION OF YOUR EMPLOYEE BENEFITS PROGRAM. IN PARTICULAR, IT DOES NOT FULLY PROTECT YOU OR ANY OTHER INSURED AGAINST LIABILITY CREATED BY THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, OR ITS AMENDMENTS, OR ANY SIMILAR LAW.

Various provisions in this Coverage Form restrict coverage. Read the entire Coverage Form carefully to determine rights, duties and what is and is not covered.

Throughout this Coverage Form the words you and your refer to the Named Insured shown in the Declarations of this Coverage Form. The words we, us and our refer to the Company providing this insurance.

The word **insured** means any person or organization qualifying as such under **Section II - Who is an Insured** of this Coverage Form.

Other words and phrases that appear in bold face have special meaning. Refer to **Section V- Definitions**.

Section I - Coverages

A. Insuring Agreement

1. We will pay those sums that you become legally obligated to pay as damages because of a negligent act, error or omission in the **administration** of your **employee benefits program**. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under **Supplementary Payments** of this Coverage Form.

We will have the right and duty to defend any **suit** seeking those damages. But:

- a. The amount we will pay for all damages is limited as described in **Section III -Limits of Insurance** of this Coverage Form;
 - b. We may, at our discretion, investigate and settle any claim or **suit**; and
 - c. Our right and duty to defend end when we have used up the applicable Limit of Insurance in the payment of judgments or settlements under this Coverage Form.
2. This insurance applies to a negligent act, error or omission:
 - a. that first occurs during the policy period; or
 - b. that first occurred prior to the policy period where:
 - (1) There is no other insurance which:
 - (a) was expressly purchased to provide this coverage, and is valid and collectible; or
 - (b) was expressly purchased to provide this coverage, and would be valid and collectible, but for the exhaustion of the limits of insurance or the insolvency of the insurer.
 - (2) The insured had no prior knowledge or could not reasonably have foreseen any circumstances which might result in a claim or **suit**; and
 - (3) The claim is first made or **suit** is brought during the policy period.
 3. This insurance applies only to negligent acts, errors or omissions:
 - a. Which occur within the **coverage territory**; and
 - b. For which the claim is made or **suit** is brought within the **coverage territory**.



B. Exclusions

This insurance does not apply to:

1. **Bodily injury, property damage or personal injury;**
2. Claims for injury or damage arising out of:
 - a. A dishonest, fraudulent, criminal or malicious act, error or omission done by or at the direction of any insured;
 - b. An insurer's failure to perform its contract;
 - c. Failure of any plan to meet its obligations due to insufficient funds;
 - d. Failure of any investment to perform as represented by any insured;
 - e. Advice given by an insured to any person on whether or not to participate in any plan included in **your employee benefits program**;
 - f. Your failure to meet the requirement of any law concerning Workers' Compensation, unemployment insurance, social security, disability benefits or the Fair Labor Standards Act of 1938 and its amendments; or any similar laws;
 - g. Any insured's liability as a fiduciary under:
 - (1) EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 and its amendments; or
 - (2) INTERNAL REVENUE CODE OF 1986 (including the INTERNAL REVENUE CODE OF 1954) and its amendments;
 - h. Any claims for injury or damage to a person or organization arising from:
 - (1) Refusal to employ that person;
 - (2) Termination of that person's employment;
 - (3) **Employment-related Discrimination** , or employment-related practices, policies, acts or omissions, such as coercion, demotion, failure to promote, evaluation, criticism, reassignment, discipline, defamation, self-defamation, harassment, humiliation directed at that person or organization;
 - (4) Consequential injury or damage as a result of (1) through (3) above;
 - i. The act of terminating or altering any of **your employee benefits program**.

C. Supplementary Payments

We will pay, with respect to any claim we investigate or settle, or any **suit** against an insured we defend:

1. All expenses we incur.
2. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
3. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or **suit**, including actual loss of earnings up to \$250 a day because of time off from work.
4. All costs taxed against the insured in the **suit**.
5. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
6. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.



If we defend an insured against a **suit** and an indemnitee of the insured is also named as a party to the **suit**, we will defend that indemnitee if all of the following conditions are met:

- a. The **suit** against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a written contract or agreement;
- b. This insurance applies to such liability assumed by the insured;
- c. The obligation to defend or the cost of the defense of that indemnitee, has also been assumed by the insured in the same written contract or agreement.
- d. The allegation in the **suit** and the information we know about the negligent act, error or omission are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;
- e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such **suit** and agree that we can assign the same counsel to defend the insured and the indemnitee; and
- f. The indemnitee:
 - (1) Agrees in writing to:
 - (a) Cooperate with us in the investigation, settlement or defense of the **suit**; and
 - (b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the **suit**; and
 - (c) Notify any other insurer whose coverage is available to the indemnitee; and
 - (d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and
 - (2) Provides us with written authorization to:
 - (a) Obtain records and other information related to the **suit**; and
 - (b) Conduct and control the defense of the indemnitee in such **suit**.

So long as the above conditions are met, attorneys fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments.

Our obligation to defend an insured's indemnitee and to pay for attorney's fees and necessary litigation expenses as Supplementary Payments ends when:

- a. We have used up the applicable limit of insurance in the payment of judgments or settlements; or
- b. The conditions set forth above, or the terms of the agreement described in paragraph f. above, are no longer met.

Section II - Who is an Insured

1. We cover each of the following as insureds under this Coverage Form:
 - a. You; and
 - b. Your **employees**, but only with respect to the **administration of your employee benefits program**; and
 - c. Any other person or organization authorized to perform the **administration of your employee benefits program**.
2. In addition, if you are designated in the Declarations as:
 - a. An individual:
 - i. Your spouse is an insured, but only with respect to the **administration of your employee benefits program**; and
 - ii. Your legal representatives are insureds if you die, but only with respect to duties in the administration of your employee benefits program. That representative will have all your rights and duties under this endorsement.



- b. A partnership or joint venture:
 - i. Your partners or your members are insureds, but only with respect to the administration of your employee benefits program; and
 - ii. The spouses of your partners or your members are also insureds, but only with respect to the **administration of your employee benefits program.**
- c. A limited liability company:
 - i. Your members are insureds, but only with respect to the **administration of your employee benefits program;** and
 - ii. Your managers are insureds, but only with respect to the **administration of your employee benefits program.**
- d. A corporation:
 - i. Your **executive officers** and directors are insureds, but only with respect to the **administration of your employee benefits program;** and
 - ii. Your stockholders are also insureds, but only with respect to their liability as stockholders and only with respect to the **administration of your employee benefits program.**

Any organization which you newly acquire or form, other than a partnership or joint venture, and over which you maintain a primary and controlling interest will be considered an insured if there is no similar insurance available to that organization. However, coverage under this provision is afforded only until the end of the policy period.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture, or limited liability company that is not shown as a Named Insured in the Declarations of this Coverage Form.

Section III - Limits of Insurance

1. The Limits of Insurance stated in the Declarations of this Coverage Form and the rules below fix the most we will pay regardless of the number of:
 - a. Insureds;
 - b. Negligent acts, errors or omissions causing injury or damage;
 - c. Claims made or **suits** brought;
 - d. Persons or organizations making claims or bringing **suits**; or
 - e. Plans included in your **employee benefits program.**
2. The Aggregate Limit is the most we will pay for all damages because of negligent acts, errors or omissions in the **administration of your employee benefits program**, covered by this policy.
3. Subject to 2. above, the Each Employee Limit is the most we will pay for the sum of all damages incurred because of damages sustained, covered by this policy, by:
 - a. Any one **employee**, and
 - b. That **employee's** dependents or stated beneficiaries.
4. The limits of this Coverage Part apply separately to each consecutive annual policy period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations. If the policy period is extended after issuance for an additional period of less than 12 months, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

Section IV - Conditions

1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.



2. Duties In The Event of a Negligent Act, Error, Omission, Claim or Suit

- a. You must see to it that we are notified as soon as practicable of an alleged negligent act, error, omission, claim or **suit** which may result in a claim. To the extent possible, notice should include:
 - (1) How, when and where the alleged negligent act, error, or omission took place;
 - (2) The names and addresses of the persons or their representatives alleging the negligent act, error or omission;
 - (3) The nature of any injury or damage arising out of the negligent act, error or omission.
- b. If a claim is made or **suit** is brought against any insured, you must:
 - (1) Immediately record the specifics of the claim or **suit** and the date received; and
 - (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or **suit** as soon as practicable.
- c. You and any other involved insured must:
 - (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or **suit**;
 - (2) Authorize us to obtain records and other information;
 - (3) Cooperate with us in the investigation or settlement of the claim or defense against the **suit**; and
 - (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.
- d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a **suit** asking for damages from an insured; or
- b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

4. Other Insurance

This insurance is excess over any other valid and collectible similar insurance or insurance expressly purchased to provide this coverage, available to the insured.

5. Premium Audit

- a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.
- b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period. Audit premiums are due and payable on notice to the first Named Insured. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.
- c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.



6. Representation

By accepting this policy, you agree:

- a. The statements in the Declarations are accurate and complete;
- b. Those statements are based upon representations you made to us; and
- c. We have issued this policy in reliance upon your representations.

7. Separation of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or **suit** is brought.

8. Transfer of Rights of Recovery Against Others to Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring **suit** or transfer those rights to us and help us enforce them.

9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

10. Application of Insurance Services Office Endorsements Attached to This Coverage Part

In the event that an Insurance Services Office Endorsement is attached to this Coverage Part, it shall apply to this insurance even if the Insurance Services Office endorsement does not include Employee Benefits Administration Errors and Omissions Insurance within the introductory language of the endorsement.

Section V - Definitions

With respect to coverage provided by this Coverage Form, the following definitions apply:

1. **Administration** means performance of the ministerial functions of **your employee benefits program** and could include:
 - a. Applying the program rules to determine who is eligible to participate in benefits;
 - b. Calculating service and compensation credits of **employees**;
 - c. Preparing messages to tell **employees** about their benefits;
 - d. Maintaining service and employment records of those **employees** participating in **your employee benefits program**;
 - e. Preparing reports required by government agencies;
 - f. Calculating benefits;
 - g. Informing new **employees** about **your employee benefits program**;
 - h. Implementing enrollment instructions from your **employees** in **your employee benefits program**;
 - i. Advising, other than legal advice, **employees** who are participating in **your employee benefits program** of their rights and options;
 - j. Collecting contributions and applying them as called for under the rules of **your employee benefits program**;
 - k. Preparing benefits reports for your **employees** participating in **your employee benefits program**;
 - l. Processing claims.



2. **Bodily Injury** means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
3. **Coverage territory** means:
 - a. The United States of America (including its territories and possessions), Puerto Rico and Canada; or
 - b. All parts of the world if the insured's responsibility to pay damages is determined in a **suit** on the merits, in the territory described in a. above or in a settlement to which we agree.
4. **Employee** means your **executive officers** or any persons who have been employed and compensated by you, whether actively employed, formerly employed, disabled or retired, and includes **leased workers** and **temporary workers**, if they are subject to **your employee benefits program**.
5. **Employment-related discrimination** means the actual or alleged treatment of a person or group of persons based upon their race, color, nationality, ethnic origin, religion, gender, marital status, reproductive status, age, sexual orientation, sexual preference, physical disability, mental disability or on any basis which is prohibited by federal, state local law.
6. **Executive officer** means a person holding any of the officer positions created by your charter, constitution, by laws or any other similar governing document.
7. **Leased worker** means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. **Leased worker** does not include a **temporary worker**.
8. **Personal Injury** means injury, other than **bodily injury**, arising out of one or more of the following offenses:
 - a. False arrest, detention or imprisonment;
 - a. Malicious prosecution;
 - b. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor;
 - c. Oral or written publication of material that slanders, or libels a person or organization or disparages a person's or organization's goods, products or services; or
 - d. Oral or written publication of material that violates a person's right of privacy.
9. **Property Damage** means:
 - a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
 - b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the occurrence that caused it.
10. **Suit** means a civil proceeding in which damages because of a negligent act, error or omission to which this insurance applies are alleged. **Suit** includes:
 - a. An arbitration proceeding in which such damages are claimed and to which you must submit or do submit with our consent.
 - b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which you submit with our consent.
11. **Temporary worker** means a person who is furnished to you to substitute for a permanent employee on leave or to meet seasonal or short-term workload conditions. **Temporary worker** does not mean a **leased worker**.



12. **Your employee benefits program** means a type of insurance or other plan you maintain solely for the benefit of your **employees** and could include one or more of the following types:
- a. Group life insurance; group accident, dismemberment, dental, health insurance; health care and dependent care spending plans; legal advice plans; or educational tuition reimbursement plans;
 - b. Profit sharing plans; savings plans including 401K and 403B plans; pension plans and stock subscription plans;
 - c. Unemployment insurance; social security benefits; workers' compensation and disability benefits insurance.

About Allianz

Your insurance company is part of the Allianz Group – an organization with a 125-year history of partnering with clients and delivering exceptional insurance products around the world.

Allianz is the world's largest property & casualty insurance company by revenue and has one of the strongest financial ratings of the leading global property & casualty insurers. The strength of its financial ratings and quality of its people make Allianz the insurer of choice for thousands of mid-size businesses and the majority of Global Fortune 500® companies.

Allianz is also ranked "one of the world's most admired companies" by Fortune and "one of the top 100 global brands" by Interbrand.

APPENDIX 2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2020-CP-40-_____
	)	
SULLIVAN MANAGEMENT, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	SUMMONS
	)	
FIREMAN’S FUND INSURANCE COMPANY,	)	(Jury Trial Demanded)
AND ALLIANZ GLOBAL RISKS US	)	
INSURANCE COMPANY,	)	
	)	
Defendants.	)	

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in the above-entitled action, a copy of which is herewith served upon you, and to serve a copy of your Answer upon the subscribers at their offices located at 415 Mill Street, Mt. Pleasant, South Carolina 29464, within thirty (30) days after the date of such service, exclusive of the day of service. If you fail to answer the Complaint within the above-described time, judgment by default will be rendered against you for the relief demanded in the Complaint.

/s/Justin O'Toole Lucey
Justin O' Toole Lucey
Sohayla R. Townes
JUSTIN O'TOOLE LUCEY, PA
415 Mill Street
Mt. Pleasant, South Carolina 29464
(843) 849-8400
jlucey@lucey-law.com
stownes@lucey-law.com

Attorneys for Plaintiff

May 8, 2020
Mount Pleasant, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2020-CP-40-_____
	)	
SULLIVAN MANAGEMENT, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	COMPLAINT
	)	
FIREMAN’S FUND INSURANCE COMPANY,	)	(Jury Trial Demanded)
AND ALLIANZ GLOBAL RISKS US	)	
INSURANCE COMPANY,	)	
	)	
Defendants.	)	

COMES NOW Plaintiff Sullivan Management, LLC (hereinafter “Plaintiff” or “Sullivan”),
by and through its undersigned counsel and alleges as follows against the Defendants:

1. This is an insurance breach of contract and bad faith case brought by a Carolina hospitality management group to rectify the wrongful denial of coverage for losses, including business income loss and extra expense loss, resulting from the 2019 Novel Coronavirus at nine Carolina Ale House restaurants and related properties under an “all risks” insurance policy issued by Defendants.

PARTIES

2. Plaintiff is a limited liability company organized and existing under the laws of the State of North Carolina with its principal place of business at 710 Lady Street, Suite 100, Richland County, Columbia, South Carolina.

3. Plaintiff manages and oversees the operations of nine (9) Carolina Ale House (“CAH”) restaurants and their landlord ownership entities, primarily in South Carolina.

4. Plaintiff is the first named insured on the insurance policy at issue; the entities that own each of these CAH real estate locations and restaurants are also named insureds on the

insurance policy at issue. A copy of the Named Insured Schedule is appended hereto and incorporated by reference.

5. Defendant Fireman's Fund Insurance Company ("Fireman's Fund") is an insurance company organized and existing under the laws of the State of California with its principal place of business at 225 W. Washington Street, Suite 1800, Chicago, Illinois 60606, that is authorized and doing business in the State of South Carolina.

6. Defendant Allianz Global Risks US Insurance Company ("Allianz Global Risks") is an insurance company organized and existing under the laws of the State of Illinois with its principal place of business at 225 W. Washington Street, Suite 1800, Chicago, Illinois 60606, that is authorized and doing business in the State of South Carolina.

7. The insurance companies defined above are hereinafter collectively referred to as "Insurers".

8. This suit arises out of insurance business purposefully and continuously conducted by the Insurers with Plaintiff in the State of South Carolina.

JURISDICTION & VENUE

9. Venue is proper in this Court because the most substantial part of the acts and/or omissions complained of took place within the venue of this Court. Pursuant to South Carolina Code § 15-7-70 venue is also proper in this Court because Defendants are insurance companies doing business in this State and the losses occurred primarily within South Carolina counties, including in Richland County.

10. In addition to Plaintiff's breach of contract and bad faith causes of action, Plaintiff alternatively and additionally alleges and seeks declaratory relief pursuant to the South Carolina Code §§ 15-53-10, *et seq.* and South Carolina Rule of Civil Procedure 57. In accordance with

South Carolina Code § 15-53-80, all of the parties herein are proper parties to this action in that each has or claims an interest that would be affected by the requested declarations.

11. This Court has jurisdiction over the Defendants in this action as Fireman's Fund and Allianz Global Risks are (a) transacting business in South Carolina; (b) contracting to insure, person, property or risk located within South Carolina at the time of contracting; and (c) making contracts substantially connected with South Carolina. In addition, Fireman's Fund and Allianz Global Risks exercise substantial, systematic, and continuous contacts with South Carolina by doing business in South Carolina, serving insureds in South Carolina, and seeking additional business in South Carolina.

12. This Court has subject matter jurisdiction over the matters alleged in this action.

FACTUAL BACKGROUND

13. Insurers entered into a contract of insurance with Plaintiff Sullivan Management, LLC.

14. Both Insurers are part of the Allianz group of companies; both Insurers' names and logos appear on various portions of the policies and claims material, and the Insurers appear to have jointly issued the subject policy and adjusted the claim addressed herein.

15. Plaintiff agreed to pay significant premiums in exchange for Insurers' promises to indemnify losses, including, but not limited to, business income and extra expense losses at many locations, including CAH restaurants located in Greenville¹, Columbia², Summerville³,

¹ 113 S Main Street, Greenville County, Greenville, SC 29601 and 1115 Woodruff Road, Greenville County, Greenville, SC 29607.

² 277 Columbiana Drive, Lexington County, Columbia SC 29212 and 708 Lady Street, Richland County, Columbia, SC 29201.

³ 191 Sigma Drive, Berkeley County, Summerville, SC 29483.

Charleston⁴, Myrtle Beach⁵, and Fort Mill, South Carolina⁶ and in Augusta, Georgia⁷. The scheduled locations on the subject policy are identified on the Named Insured Schedule page and incorporated by reference.

16. The CAH restaurants are generally open 365 days a year for the majority of the day, evening, and night and generally have the capacity to hold hundreds of guests.

17. The insured entities, properties, and scheduled locations are covered under policy number [REDACTED] 8190, which is in place for the December 15, 2019, to December 15, 2020 policy period (the "Policy").

18. Plaintiff has fulfilled all of its responsibilities under the insurance contract, dutifully paying hundreds of thousands of dollars in premiums to Insurers over the years, promptly reporting claims, and providing all requested information.

19. Plaintiff paid these premiums on its own behalf and on behalf of each named insured on the Policy.

20. The Policy has been continuously in full force and effect since inception, providing first-party business income, extra expense, and additional coverages.

21. Insurers promised under the Policy to pay for

actual loss of **business income** and necessary **extra expense** [that named insureds] sustain due to the necessary **suspension** of [insureds'] **operations** during the **period of restoration** arising from direct physical loss or damage to property at a **location**, or within 1,000 feet of such **location**, caused by or resulting from a **covered cause of loss**.

22. Under the Policy, the insurance is also extended to apply to, *inter alia*, the actual loss of business income and necessary extra expense sustained when access to the scheduled

⁴ 145 Calhoun Street, Charleston County, Charleston, SC 29401.

⁵ 2915 Hollywood Drive, Horry County, Myrtle Beach, SC 29577.

⁶ 1342 Broadcloth Street, York County, Fort Mill, SC 29715.

⁷ 203 Robert C Daniel Jr Parkway, Richmond County, Augusta, GA 30909.

locations is prohibited by a civil authority as the result of a covered cause of loss to property in the immediate area of Plaintiff's scheduled locations.

23. The Policy also specifically extends coverage to direct physical loss or damage caused by virus.

24. The Policy is an all risks policy, insofar as it provides that a covered cause of loss means direct physical loss or damage unless the loss is specifically excluded or limited in the Policy.

25. The Policy is subject to a Business Income (and Extra Expense) limit of \$12,715,000.

26. Plaintiff, as first named insured under this policy, brings this action on behalf of all named insureds under the Policy.

(COVID-19 Disease Outbreak)

27. A pneumonia of unknown origin was first reported to the World Health Organization ("WHO") on December 31, 2019. China provided the genetic sequence for what has become known as the 2019 Novel Coronavirus (2019-nCoV) on or about January 12, 2020. The WHO recognized on January 25, 2020, that the 2019 Novel Coronavirus is a "global threat to human health..." On January 30, 2020, the Director of the WHO declared the 2019 Novel Coronavirus "outbreak a Public Health Emergency of International Concern." The disease caused by the 2019 Novel Coronavirus was identified as "COVID-19" on February 11, 2020. On March 11, 2020, the WHO characterized COVID-19 as a pandemic. The WHO saw "alarming levels of spread and severity, and by the alarming levels of inaction." WHO representatives stated

Pandemic is not a word to use lightly or carelessly . . . ***We have never before seen a pandemic sparked by a coronavirus.*** This is the first pandemic caused by a coronavirus. And we have never before seen a pandemic that can be controlled, at the same time.

(emphasis added). The pandemic spread from China to surrounding countries and then to Italy, Iran, Spain and across the globe. The Center for Disease Control (“CDC”) has stated

[A] pandemic is a global outbreak of disease. Pandemics happen when a new virus emerges to infect people and can spread between people sustainably. Because there is little to no pre-existing immunity against the new virus, it spreads worldwide.

(Presidential Proclamations)

28. On January 31, 2020, President Trump signed the Presidential Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus (the First Proclamation), suspending the entry of all aliens (i.e., non-citizens) who were physically present within the People’s Republic of China (excluding the Special Administrative Regions of Hong Kong and Macau) during the 14-day period preceding their attempted entry into the United States. On February 29, 2020, President Trump signed the Presidential Proclamation on the Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus (the Second Proclamation), suspending the entry of all aliens who were physically present within the Islamic Republic of Iran during the 14-day period preceding their attempted entry into the United States. On March 11, 2020, President Trump signed the Presidential Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus (the Third Proclamation), resulting in a travel ban and of the entry of all aliens who were physically present in any of the 26 European countries that make up the Schengen Area during the 14-day period preceding their attempted entry into the United States. The Schengen Area included: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland.

(Emergency Declarations)

29. On March 13, 2020, South Carolina Governor Henry McMaster determined that COVID-19 posed an actual or imminent public health *emergency for the State of South Carolina* in Executive Order No. 2020-08, and consequently (a) declared that a State of Emergency exists in South Carolina; (b) directed the South Carolina Department of Health and Environmental Control (“DHEC”) to use “every available means to prevent the transmission of infectious disease and to ensure that all cases of infectious disease are subject to proper control and treatment”; and (c) ordered, *inter alia*, the closure of public schools and state-supported colleges and universities in Kershaw and Lancaster counties, the first of many activity and gathering restrictions. In this and subsequent orders, the Governor noted the potential necessity of further proclamations, orders, and directives “to ensure the fullest possible *protection of* life and *property* during this State of Emergency” (emphasis added).

30. Also on March 13, 2020, the President of the United States declared that the COVID-19 pandemic in the United States constitutes a national emergency, pursuant to Sections 201 and 301 of the National Emergencies Act, 50 U.S.C. §§ 1601, *et seq.*, and consistent with Section 1135 of the Social Security Act, as amended (42 U.S.C. § 1320b-5), which began on March 1, 2020. The President further declared that the ongoing COVID-19 outbreak is a pandemic of sufficient severity and magnitude to warrant an emergency declaration for all states, tribes, territories, and the District of Columbia, pursuant to Section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5207 (“Stafford Act”).

(Fourth Presidential Proclamation)

31. On March 14, 2020, President Trump signed the Proclamation on the Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of

Transmitting Coronavirus (the Fourth Proclamation), further suspending the entry of all aliens who were physically present in the United Kingdom (excluding overseas territories outside of Europe) or the Republic of Ireland during the 14-day period preceding their attempted entry into the United States.

(South Carolina Gathering Restrictions)

32. On March 15, 2020, Governor McMaster extended public school closures to all counties in the State of South Carolina and urged that indoor and outdoor public gatherings be cancelled, postponed, or rescheduled, to the extent possible, or limited so as not to exceed one hundred (100) people. The Order notes that the Governor is authorized to order or direct “any person or group of persons to refrain from doing any act or thing which would, in his opinion, *endanger* life, limb or *property*” while a state of emergency has been declared (emphasis added). *See* SC Executive Order No. 2020-09.

33. As of March 15, 2020, there were 28 known, positive cases of COVID-19 in the State of South Carolina with an additional seven cases being monitored by DHEC. *See* City of Charleston Emergency Ordinance No. 2020-039(a).

(National Guidelines)

34. On March 16, 2020, the President of the United States and the White House Coronavirus Task Force issued new guidance, titled “The President’s Coronavirus Guidelines for America: 15 Days to Slow the Spread of Coronavirus (COVID-19)”, to help protect Americans during the global COVID-19 outbreak. The President’s Guidelines recommended, *inter alia*, that the American people “[a]void social gatherings in groups of more than 10 people” and “[a]void eating or drinking at bars, restaurants, and food courts—use drive-thru, pickup, or delivery options” (emphasis added).

(State and Local Mandates)

35. On March 16, 2020, the City of Charleston, South Carolina *required that bars, restaurants*, and public indoor establishments *not permit gatherings of 50 or more people* at their locations, under Emergency Ordinance No. 2020-039.

36. On March 17, 2020, Governor McMaster issued Executive Order No. 2020-10, *barring on-premises or dine-in consumption services at South Carolina restaurants* and food-service establishments that prepare, produce, or sell food or beverages of any kind. The Order further *prohibited* any organized events or *public gatherings of fifty (50) or more people* in a single room, area, or other confined indoor or outdoor space (emphasis added).⁸

37. On March 19, 2020, the City of Charleston issued Emergency Ordinance No. 2020-039(a), *ordering “bars and restaurants* which prepare, produce, or otherwise offer or sell food or beverages of any kind for on-premises consumption in the City” *to “suspend services for on-premises or dine-in consumption*, either indoors and outdoors” effective immediately (emphasis added). In addition, the Ordinance *ordered all public gatherings not to exceed 10 people*, except for medical facilities, pharmacies, grocery stores, and City government day to day operations. Violation of the Ordinance carried a fine of up to \$500, 30 days in jail or both.

38. As of March 19, 2020, there were 60 known, positive cases of COVID-19 in South Carolina. *See* City of Charleston Emergency Ordinance No. 2020-039(a).

39. On March 21, 2020, the Mayor of Augusta, Georgia *prohibited gatherings of more than 10 people* in the City and *ordered restaurants* and businesses with on-premises consumption

⁸ The lone CAH location in Augusta, Georgia, was subject to the same dine-in service mandate issued by the Augusta Mayor Hardie Davis on the previous day. *See* Executive Order No. 2020-003.

of alcoholic beverages *to close their on-premises operations*, amid a number of other closures. Executive Order No. 2020-05.

40. On March 23, 2020, Governor McMaster authorized law enforcement officers to disperse any group of 3 or more people that could pose a public health threat. *See* SC Executive Order No. 2020-13. On the same date, the City of Columbia issued Ordinance No. 2020-034, *closing dine in services and on premises consumption of food and beverages of restaurants and bars, prohibiting gatherings of 10 or more people, and requiring individuals to stay at home* except for those working at or conducting business that was deemed “essential”. City of Columbia Emergency Ordinance No. 2020-034.

(Continued Spread)

41. As of March 23, 2020, the total number of cases in the United States was well over 46,000 cases with at least 298 cases in the State of South Carolina, 31 cases in Charleston County with one death, 45 cases in Richland County, and 19 cases in Lexington County with one death. *See* City of Charleston Emergency Ordinance on Stay at Home No. 2020-042; City of Columbia Emergency Ordinance No. 2020-034.

42. COVID-19 was aggressively spreading across the State of South Carolina with DHEC confirming the localized person-to-person spread of COVID-19 in the State as of March 24, 2020. *See id.*

43. On March 24, 2020, the World Health Organization indicated that the United States had the potential to become the center of the COVID-19 pandemic. Also, on March 24, 2020, the City of Charleston ordered individuals to shelter at their residence. Only essential businesses were allowed to continue to operate. The Ordinance stated that “[p]ursuant to CDC guidelines, *social gatherings of 10 or more people*, for any reason other than working at or receiving essential

services, is *prohibited*” and that “*dine in or on premises consumption of food or beverages* whether indoors or outdoors,” *at bars and restaurants* is *prohibited* (emphasis added). City of Charleston Emergency Ordinance on Stay at Home, No. 2020-042.

(Major Disaster Declared)

44. On March 24, 2020, Governor McMaster requested that the President of the United States declare that a major disaster exists in the State of South Carolina pursuant to Section 401 of the Stafford Act.

45. Three days later, the President of the United States granted Governor McMaster’s aforementioned request and declared that a major disaster exists in the State of South Carolina and ordered federal assistance to supplement state, tribal, and local recovery efforts in the areas affected by the COVID-19 pandemic, with an effective date retroactive to January 20, 2020, and continuing.⁹

(Extended and Expanded Directives)

46. On March 28, 2020, Governor McMaster declared that “a *separate and distinct emergency exists in part due to the actual and ongoing impacts* associated” with “the evolving nature and scope of the public health threat or other risks posed by COVID-19”. The Order acknowledged that *COVID-19 involves an “actual and widespread ‘occurrence’*. . . with confirmed cases of COVID-19 in over eighty-five percent (85%) of South Carolina’s forty-six (46) counties” (emphasis added). See SC Executive Order No. 2020-15. The next day, the President of the United States expanded and extended the provisions of his Coronavirus Guidelines for America based on the ongoing nature and evolving scope of the global COVID-19 pandemic.

⁹ As of April 11, 2020, all 50 states as well as the U.S. Virgin Islands, the Northern Mariana Islands, Washington, D.C., Guam and Puerto Rico have received a federal disaster declaration as a result of the pandemic. American Samoa is the only U.S. territory that is not under a major disaster declaration.

47. As of March 31, 2020, the total number of cases in the United States was well over 189,500 cases with at least 1,083 cases in the State of South Carolina and 142 cases in Charleston County with one death. *See* City of Charleston Ordinance No. 2020-048.

48. On March 31, 2020, Governor McMaster ordered the ***closure of businesses, venues, facilities, services, and activities deemed “non-essential”***, including spectator sports, among entire categories of gathering spaces and athletic and recreational activities. *See* SC Executive Order No. 2020-17. One day later, the City of Charleston followed suit, expressly acknowledging Governor McMaster’s Executive Order and expanding the restrictions to include ***a prohibition on social gatherings of 10 or more people*** for any reason other than providing or receiving essential services. The Ordinance further noted that on premises consumption of food or beverages at bars and restaurants shall be prohibited. *See* City of Charleston Ordinance No. 2020-048.

49. On April 3, 2020, Governor McMaster barred short-term and vacation rental establishments from accepting new reservations for individuals residing in or travelling from any country, state, municipality, or other geographic area subject to or identified in a CDC travel advisory or other CDC notice as a location with extensive community transmission of COVID-19, to include the Tri-State Area (consisting of the States of New York, New Jersey, and Connecticut). *See* SC Executive Order No. 2020-19.

50. On April 6, 2020, Governor McMaster instituted a ***statewide stay-at-home order***.¹⁰ It states, *inter alia*, that:

[I]t is axiomatic that the health, welfare, and ***safety of the*** lives and ***property*** of the people are beyond questions matters of public concern;

.....

¹⁰ South Carolina’s three largest cities — Charleston, Columbia, and Greenville — had previously issued stay-at-home orders. *See* City of Columbia Ordinance No. 2020-034; City of Charleston Ordinance No. 2020-048; City of Greenville Ordinance No. 2020-036.

[A]s of April 6, 2020, public health officials have reported over 2,000 cases of COVID-19 in the State of South Carolina;

.....

B. I [Governor McMaster] hereby order and direct that...any and all ***residents and visitors*** of the State of South Carolina are required to limit social interaction, practice social distancing in accordance with CDC guidance, and take every possible precaution to avoid potential exposure to, and to slow the spread of, COVID-19, and ***shall limit their movements outside of their home, place of residence, or current place of abode*** (collectively, Residence), except as allowed by this Order, for purposes of engaging in Essential Business, Essential Activities, or Critical Infrastructure Operations, as set forth below and as such terms are further defined herein.

.....

L. ... [T]he foregoing definitions do not repeal, by implication or otherwise, the terms and provisions of Executive Order No. 2020-10, as extended by Executive Order No. 2020-15, which directed, *inter alia*, that ***any and all restaurants*** or other food-service establishments (collectively, Restaurants), as defined and set forth therein, that prepare, produce, or otherwise offer or sell food or beverages of any kind for on-premises consumption in the State of South Carolina, ***shall suspend services for, and may not permit, on-premises or dine-in consumption.***

SC Executive Order No. 2020-21 (internal citations omitted) (emphasis added). Six days later, Governor McMaster instituted South Carolina's third State of Emergency, noting that COVID-19 cases have been identified and reported in each of South Carolina's forty-six (46) counties. *See* SC Executive Order No. 2020-23.

51. On Monday, April 20, 2020, Governor McMaster allowed certain non-essential businesses to operate provided they limit their occupancy to 5 customers per 1,000 square feet or 20% of posted occupancy limits, whichever number is lower. However, South Carolina restaurants and bars remained barred from permitting any kind of on-premises consumption of food or beverages. *See* SC Executive Order No. 2020-28.

52. On April 29, 2020, Governor McMaster's orders barring restaurants and bars from providing dine-in or on-premises services and forbidding restaurants and bars from permitting any

food or beverage consumption at their locations remained in full force and effect. *See* SC Executive Order No. 2020-29.

53. As of May 8, 2020, there are approximately 1.2 million (1,200,000) confirmed cases of COVID-19 in the United States and 70,000 deaths. While South Carolina has 7,142 confirmed cases with 316 deaths, the actual number of total cases in South Carolina is estimated at 49,181.

54. As a direct and proximate result of the foregoing events, Plaintiff and each named insured, has incurred, and continues to incur a substantial loss of business income and additional expenses, and other damages covered under the Policy.

55. As a further direct and proximate result, Plaintiff has been forced to furlough hundreds of employees.

56. The scientific community, and those personally affected by the virus, recognize COVID-19 as a cause of real and direct physical loss and damage.

57. China, Italy, France, and Spain have implemented the cleaning and fumigating of public areas prior to allowing them to re-open publicly due to the intrusion of microbials.

58. Reports by the CDC indicate that the COVID-19 strains physically infect and can stay alive on surfaces for at least 17 days, a characteristic that renders property exposed to the contagion unsafe and dangerous. Other research indicates that the deadly virus physically infects and stays on surfaces of objects or materials, “fomities”, for up to twenty-eight days.

59. Recirculated air in restaurants has been documented to exacerbate spread, from an asymptomatic diner to others seated throughout the restaurant, over the course of just over one hour, by one or more nationally recognized health experts in the United States, based in part upon an investigation into the original Chinese propagation of the virus.

60. Additional research has documented that the prevalence of contaminating surfaces and resulting illnesses began before anyone ever knew it, preceding the first known cases by at least a month or so.

61. In the final days and weeks immediately prior to the national and international imposition of emergency measures, hundreds of customers patronized each CAH restaurant location, resulting in thousands of potential exposures.

62. More likely than not, surface contaminations occurred at CAH restaurants on or about March 11, 2020, though it may not have been known for days or weeks or until a lawsuit was brought by an employee or guest. Consequently, closure of dining rooms may have been necessary regardless of any ensuing government orders.

63. Moreover, all restaurant dining room closures were, and continue to be, necessary for insureds to mitigate their potential contamination, exposures, and losses.

64. The continuous presence of coronavirus in, on, and/or within the immediate area of Plaintiff's restaurants has rendered the premises unsafe and unfit for their intended use and therefore caused physical property damage or loss under the Policy.

65. The foregoing resulted in direct physical loss or damage to property at the named insureds' scheduled locations and/or within 1,000 feet and/or within one mile, resulting in coverage under the Policy.

66. Plaintiff and all named insureds have suffered similar orders, restrictions, city wide contamination, and closures; and all have suffered business interruption, extra expense, employee training losses, goodwill losses from inability to operate their restaurants, consumables and inventory damage and loss, costs for chemical cleanings of production lines and equipment to remove contaminants, increased cleaning and sanitization costs, event cancellation costs including marketing and planning losses, and other covered damages.

(Insurance Claim)

67. In early March 2020, Sullivan inquired of the agent that sold the Insurers' insurance contract, Gallagher, about available coverages in the Policy.

68. On March 17, 2020, Sullivan informed Gallagher of the government-ordered closure of dining rooms to patrons and inquired about the communicable disease coverage or any other coverage for the COVID-19 business interruption losses all of the named insureds were experiencing. Gallagher responded that the Policy's only potential coverage was under the communicable disease coverage part and would be limited to \$250,000; no other coverages would assist.

69. Promptly thereafter, Sullivan filed a claim under the Policy for, *inter alia*, business income loss and inventory loss, for the named insureds.

70. On March 23, 2020, an adjuster for Insurers acknowledged receipt of Sullivan's insurance claim for business interruption losses. The next day, Gallagher informed Sullivan that Insurers were engaging Sedgwick to assist with the investigation of Sullivan's claim.

71. On March 30, 2020, an adjuster from Sedgwick requested additional information from Sullivan, which Sullivan provided the same afternoon. On April 8, 2020, Sedgwick confirmed that it required no additional information from Sullivan.

72. On April 15, 2020, Sullivan emailed Insurers and Sedgwick to inquire about the status of its claim. Two days later, Insurers responded that their initial review indicated that there would not appear to be any coverage for Sullivan's claim. Insurers explained that this was not their final coverage position; an "evaluation of the facts of the loss at each location as they relate to the coverage forms" was purportedly under way.

73. On April 22, 2020, Sedgwick informed Sullivan that its claim under the Policy remained “open pending review and evaluation of your claim by your insurance company”.

74. On April 28, 2020, Sullivan received a letter from Insurers, indicating their purported investigation and coverage analysis was complete and Insurers’ conclusion was that there was no coverage for one penny of the named insureds’ losses under the Policy (“Denial Letter”).

75. Both Insurers and Sedgwick have refused to share their coverage investigation report with their insureds.

76. The Policy covers, *inter alia*, the named insureds’ losses, damage, and extra expense resulting from the virus pandemic, closures, and the like, including the business income and inventory losses named insureds suffered (and continue to suffer) from the mandated closures and stay at home orders in South Carolina and Georgia, as the Coronavirus has caused physical loss or damage to property at the scheduled locations or within the immediate area of Plaintiff’s locations, in accordance with the Policy’s coverage provisions.

77. Because the virus is physically impacting public and private property, including lease and business operations, and physical spaces in cities around the world and the United States, any effort by the Insurers to deny the reality that the virus causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger policyholders and the public.

FOR A FIRST CAUSE OF ACTION
BREACH OF CONTRACT
(against all Defendants)

78. Plaintiff incorporates each and every allegation set forth in this Complaint as if fully set forth in this section.

79. The Policy is a valid and binding indemnity contract between Insurers and Sullivan and each named insured.

80. Sullivan and each insured on the Policy has satisfied and performed all applicable terms and conditions of the Policy and fulfilled their obligations under the Policy.

81. Insurers failed to honor their duties and obligations under the Policy with their named insureds, and to negotiate the claim and compensate the named insureds for their covered losses. These failures constitute a breach of contract.

82. Moreover, Sullivan reasonably expected when it purchased the Policy from Insurers that this insurance contract included coverage for all business interruption and extra expense losses except possibly extraordinary events, *e.g.*, acts of war, that are obviously, overtly, and expressly excluded or limited in the Policy.

83. As Insurers have failed to define physical damage to property, the most favorable interpretation to the insured must be adopted.

84. Physical damage as used in the insurance industry commonly includes loss of use of undamaged, tangible property.

85. Moreover, there is a conflict and ambiguity in the Policy with regards to it providing all risks coverage, on the one hand, and the indecipherable and undefined loss provisions, on the other. Insurers breached their duties to their insureds and their contract of insurance by interpreting the Policy in a manner favorable to themselves instead of the insureds, who did not draft the Policy. As a result, South Carolina law and public policy requires the Policy be construed in favor of coverage.

86. The foregoing breaches of contract by Insurers proximately damaged the named insureds, therefore, Sullivan, individually and on behalf of the named insureds, is entitled to an award of actual, consequential, and punitive damages, together with an award of attorney's fees.

FOR A SECOND CAUSE OF ACTION
TORT OF BAD FAITH/ BREACH OF DUTY OF GOOD FAITH
(against all Defendants)

87. Plaintiff incorporates each and every allegation set forth in this Complaint as if fully set forth in this section.

88. The Policy includes an implied covenant of good faith and fair dealing.

89. Insurers owed a duty to fully and properly investigate the claims and indemnify their insureds for claims covered under the Policy.

90. Insurers owed a duty of good faith and fair dealing not only in the payment of the insureds' claims arising out of the insurance contract but also in the manner in which it adjusted and processed the claim.

91. Insurers materially breached the above described duties owed to Sullivan and each insured on the Policy, *to wit*, by: (a) wrongfully and/or unreasonably denying coverage; (b) failing to perform any meaningful investigation; (c) engaging in a one-sided and self-serving interpretation of the Policy; (d) misrepresenting Policy provisions; (e) engaging in a pre-textual "adjustment" of Sullivan's claim, looking for ways to avoid coverage rather than first trying to find coverage; (f) causing delay and/or loss of receipt of the Policy benefits; and (g) otherwise failing to act in the insureds' best interests.

92. Insurers' bad faith is exemplified by their Denial Letter, wherein Insurers denied any Policy coverage exists for Sullivan's claim, prior to inquiring as to, *e.g.*, any events planned and cancelled; as to the consumables lost; as to the increased sanitization costs, among a host of other

damages suffered by the named insureds. Instead, Insurers attempted to shift their duty to investigate to the insureds in the Denial Letter.

93. Insurers' refusal to properly investigate Sullivan's claim and indemnify their insureds for covered losses constitutes bad faith conduct which proximately damaged the insureds.

94. Insurers knew or should have known of the grievous damages and extraordinary harm that would be caused by breach of their duty of good faith and their wrongful denial of coverage.

95. Sullivan is entitled to actual and compensatory damages for, *inter alia*, Insurers' bad faith conduct. As Insurers' breach of duty of good faith was reckless, malicious, and/or grossly negligent, Sullivan is also entitled to an award of punitive damages.

FOR A THIRD CAUSE OF ACTION
DECLARATORY RELIEF
(against all Defendants)

96. Plaintiff incorporates each and every allegation set forth in this Complaint as if fully set forth in this section.

97. In the alternative, a declaratory judgment determining that there is coverage provided under the Policy will prevent Plaintiff from being left without vital coverage acquired to ensure the survival of its businesses due to the shutdown caused by the virus' presence and the civil authorities' necessary response.

98. Under the Uniform Declaratory Judgments Act, this Court may declare rights, status, and other legal relations whether or not further relief is or could be claimed. S.C. Code Ann. §§ 15-53-10 *et seq.*

99. An actual, present, and justiciable controversy has arisen between the parties to the insurance contract at issue.

100. Sullivan seeks a determination from the Court finding that coverage under the Policy is available for it and each insureds' losses incurred in connection with the above business interruption.

WHEREFORE, Plaintiff demands a trial by jury and prays for an award of actual, incidental and consequential damages; statutory or punitive damages; reasonable attorneys' fees; costs of suit; and prejudgment interest. Alternatively, Plaintiff prays for issuance of a declaratory judgment in its favor. In addition, Plaintiff prays for such further relief as the Court deems just and proper at law or in equity.

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May 8, 2020
Mount Pleasant, SC



Policy No: [REDACTED] 8190
 Named Insured: Sullivan Management LLC

Fireman's Fund Insurance Company

Named Insured Schedule

Named Insured	Legal Entity
Sullivan Management LLC	Limited Liability Company
Vista Partners, LLC	Limited Liability Company
CAH Harbison, LLC	Limited Liability Company
Killeen CAH LLC	Limited Liability Company
CAH Summeville LLC	Limited Liability Company
Carolina Ale House Operating Company LLC	Limited Liability Company
CAHOC 2, LLC	Limited Liability Company
CAHOC 3, LLC	Limited Liability Company
CAHOC 4, LLC	Limited Liability Company
CAHOC 5, LLC	Limited Liability Company
CAHOC 6, LLC	Limited Liability Company
CAHOC 7, LLC	Limited Liability Company
Texas Development Fund I, LLC	Limited Liability Company
SULOT, LLC	Limited Liability Company
CAHOC 8, LLC	Limited Liability Company
CAHOC 9, LLC	Limited Liability Company
SUMLOT 2, LLC	Limited Liability Company
CAHOC 10, LLC	Limited Liability Company

Business or Operations of the Named Insured: Restaurant Management

Location Schedule

Location	Address	City	County	State	Zip Code	Description
1	277 Columbiana Dr	Columbia	Lexington	SC	29212	1
2	708 Lady St	Columbia	Richland	SC	29201	2
3	113 S Main St	Greenville	Greenville	SC	29601	3
4	203 Robert C Daniel Jr Pkwy	Augusta	Richmond	GA	30909	4
5	1115 Woodruff Rd	Greenville	Greenville	SC	29607	5
6	3124 E Central Texas Expy	Killeen	Bell	TX	76543	6
7	191 Sigma Dr	Summerville	Berkeley	SC	29486	7
8	145 Calhoun St	Charleston	Charleston	SC	29401	8
9	2915 Hollywood Dr	Myrtle Beach	Horry	SC	29577	9
10	1342 Broadcloth St	Fort Mill	YORK	SC	29715	10



Fireman's Fund Insurance Company

Policy No: [REDACTED] 3190
Named Insured: Sullivan Management LLC

Location Schedule, Continued

Location	Address	City	County	State	Zip Code	Description
11	101 Sigma Dr	Summerville	Berkeley	SC	29486	11
12	Corner of Rose & Sigma drive	Summerville	DORCHESTER	SC	29483	12
13	710 Lady St	Columbia	Richland	SC	29201	13

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APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Sullivan Management, LLC,	)	Civil Action No. 3:20-cv-02275-MGL
	)	
Plaintiff,	)	
	)	
vs.	)	MEMORANDUM IN SUPPORT OF
	)	FIRST AMENDED MOTION TO
Fireman’s Fund Insurance Company, and	)	DISMISS SULLIVAN’S COMPLAINT
Allianz Global Risks US Insurance	)	FOR FAILURE TO STATE A CLAIM
Company,	)	
	)	
Defendants.	)	
	)	

Pursuant to Local Civil Rule 7.04, Fireman’s Fund Insurance Company (“Fireman’s Fund”) and Allianz Global Risks US Insurance Company (“AGR US”) (together, “Defendants”), submit this memorandum in support of their First Amended Motion to Dismiss the Complaint of Plaintiff Sullivan Management, LLC’s (“Sullivan”) for failure to state a claim upon which relief can be granted. Defendants file this Memorandum and their First Amended Motion to Dismiss pursuant to the Court’s order of January 26, 2021. *See* Dkt. 42.

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I. INTRODUCTION

This is a coverage dispute arising from a commercial property insurance policy. A central prerequisite to coverage requires that the policyholder establish *direct physical loss or damage to property*.

Fireman's Fund issued the commercial property insurance policy in question (the "Policy," attached as Exhibit A) to Sullivan. Sullivan owns restaurants in South Carolina and Georgia that are covered against direct physical loss or damage to property under the Policy. Sullivan alleges that it sustained economic loss when its restaurants were required to close their dining rooms to comply with social-distancing orders issued by state and local government officials. However, Sullivan fails to allege facts demonstrating any direct physical loss or damage to any insured fixture, improvement, or other personal or real property, which is a condition for coverage under *all* of the provisions of the Policy that may afford coverage here.

The key question here is accordingly straightforward. Can Sullivan's Complaint survive when Sullivan has not and cannot allege any non-conclusory facts demonstrating that the subject property sustained direct physical loss or damage? As over 100 other courts around the country have held, the answer is no.

The reasons why are clear. Sullivan does not actually allege that the virus was even physically present at any of its locations. Instead, it merely speculates that "surface contamination" by the virus was "more likely than not." But it does not matter anyway because Sullivan does not allege that the virus physically broke, tore, or damaged any insured faucet, drape, flooring, table, wall, or other fixture or improvement. As other courts have recognized, COVID-19 particles harm humans, not property. They are temporary, can be cleaned with a Lysol wipe or soap and water, and do not destroy or alter the structure of property. Plaintiff does not allege anything to the contrary. Because there has been no destruction or physical alteration, there is no direct physical loss or damage.

Social distancing orders no doubt reduce foot traffic and therefore patronage, but the property remains intact throughout the term of a social distancing order. In other words, all of the restaurant's property remains unchanged before, during, and after the social distancing orders. Pure economic loss stemming from a social distancing order—or from any ordinance such as, for example, those requiring liquor stores to close on Sundays—does not equate to direct physical loss or damage to property.

The vast majority of courts to have addressed the issue—more than 100 nationwide—concur. In fact, federal courts in California and New Jersey and a state court in California have already rejected virtually identical allegations based on Fireman's Fund policies bearing the same coverage terms. *See Boulevard Carroll Entm't Group, Inc. v. Fireman's Fund Ins. Co.*, 2:20-cv-11771-SDW-LDW, 2020 WL 7338081, at *2 (D.N.J. Dec. 14, 2020) ("Plaintiff has not alleged any facts that support a showing that its property was physically damaged. Instead, Plaintiff pleads that by forcing him to close his business, the Stay-At-Home Orders caused Plaintiff to lose income and incur expenses. This is not enough."); *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.*, 20-CV-03750-WHO, 2020 WL 6562332, at *3 (N.D. Cal. Nov. 9, 2020) ("I will follow the overwhelming majority of courts that have determined that the mere threat of coronavirus cannot cause a 'direct physical loss of or damage to' covered property as required under the Policy."); *Saddle Ranch Sunset, LLC v. Fireman's Fund Ins. Co.*, No. 20STCV36531, Minute Order, at *1 (Cal. Sup. Ct. Feb. 8, 2021) ("The Demurrer is sustained for failure to state Cause of Action.").¹

And other courts too have cogently summarized the reasons why Sullivan's allegations here do not give rise to coverage as a matter of law. As the Middle District of Florida explained:

[A]lthough the Court is sympathetic to Plaintiff and all insureds that experienced economic losses associated with COVID-19, there is simply no coverage under the policies if they require "direct physical loss of or damage" to property. Here, there

¹ A copy of the Minute Order is attached as Exhibit B. At the time of filing, a transcript of the hearing during which the court stated its reasons for sustaining the demurrer was not yet available.

is no business income coverage and no civil authority coverage because the Amended Complaint fails to allege facts describing how the Property suffered any actual physical loss or damage. It is also apparent that any amendment would be futile under these circumstances.

Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London Known as Syndicate PEM 4000, 8:20-cv-1605-T-30-AEP, 2020 WL 5791583, *5 (M.D. Fl. Sept. 28, 2020). The Southern District of New York similarly noted: “what has caused the damage is that the governor has said you need to stay home. It is not that there is any particular damage to your specific property.” *Social Life Magazine, Inc. v. Sentinel Ins. Co.*, No. 20-CV-3311(VEC), 2020 WL 2904834 (S.D.N.Y. May 14, 2020). And, recognizing the inherent defects in the same arguments Sullivan makes here, the Northern District of Georgia put it this way:

The [social distancing] Order merely recognized an existing threat. It did not represent an external event that changed the insured property. Every physical element of the dining rooms—the floors, the ceilings, the plumbing, the HVAC, the tables, the chairs—underwent no physical change as a result of the Order. The only possible change was an increased public and private perception of the existing threat, which cannot be deemed a physical change that rendered the property unsatisfactory. The Plaintiff’s construction [of the policy] would potentially make an insurer liable for the negative effects of operational changes resulting from any regulation or executive decree, such as a reduction in a space’s maximum occupancy.

Henry’s Louisiana Grill, Inc. et al. v. Allied Ins. Co. of Am., No. 1:20-cv-2939, 2020 WL 5938755, at * 5 (N.D. Ga. Oct. 6, 2020).

Finally, even if Sullivan could establish that it suffered direct physical loss or damage, coverage is excluded by the Policy’s virus exclusion, which bars coverage for all direct physical loss or damage arising from a virus. *Boulevard Carroll*, 2020 WL 7338081, at *2 (holding identical virus exclusion barred claims).

Because it cannot establish coverage for the reasons explained below, Sullivan has failed to plead any claims on which relief may be granted. Accordingly, all three counts of its Complaint,

must be dismissed. Indeed, based on its pleaded allegations, Sullivan can never establish coverage, and therefore any attempt to amend would be futile.

II. SUMMARY OF ALLEGED FACTS

A. The COVID-19 pandemic.

Sullivan pleads that it owns various restaurants in Georgia and South Carolina that were covered by a commercial property insurance Policy issued by Fireman’s Fund and AGR US.² *See* Complaint (Dkt. 1-1) ¶¶ 13-25. Sullivan pleads various allegations concerning COVID-19 generally and social distancing orders issued by state and local governments to respond to the pandemic. *Id.* ¶¶ 27-53. Sullivan alleges that people in both states were infected with COVID-19 during the initial stage of the pandemic. *Id.* ¶ 53. It also alleges that the COVID-19 virus can stay alive on surfaces for many days and that it can be spread via the air. *Id.* at 57-58. It then speculates that, as a result of these characteristics, “[m]ore likely than not, surface contaminations occurred at [its] restaurants on or about March 11, 2020” *Id.* at 62.

Sullivan does not plead facts that plausibly establish that COVID-19 was present on its properties, nor does it explain how—even if it COVID-19 were present—the virus physically altered or destroyed particular fixtures or improvements on Sullivan’s properties.

Sullivan attempts to fill that important hole in its allegations with various conclusory statements such as “[t]he scientific community, and those personally affected by the virus, recognize COVID-19 as a cause of real and direct physical loss and damage,” *id.* ¶ 56, and “[t]he foregoing resulted in direct physical loss or damage to property at the named insureds’ scheduled locations and/or within 1,000 feet and/or within one mile, resulting in coverage under the Policy.” *Id.* ¶ 65. But Sullivan fails to provide sufficient plausible factual predicate for its conclusion. Sullivan does

² The Policy was issued solely by Fireman’s Fund; AGR US is affiliated with Fireman’s Fund but is not a contracting party. Sullivan has no good-faith basis to dispute this fact.

not, for example, allege facts plausibly establishing that a temporary particle, which can be cleaned with a Lysol wipe, broke, tore, or destroyed any insured fixture or improvement, which then required repair or replacement.

Similarly, Sullivan also fails to allege that it incurred any expenses related to the repair, rebuilding, or replacement of any lost or damaged property; nor could it plead such after admitting that it does not know if COVID-19 was even on its premises. Instead, Sullivan alleges that it has suffered purely economic harm—namely “business interruption, extra expense, employee training loss, goodwill losses from inability to operate their restaurants, consumables and inventory damage and loss, costs for cleanings of production lines and equipment to remove contaminants, increased cleaning and sanitation costs, [and] event cancellation costs including marketing and planning losses”—just as all of us have experienced in our homes and businesses as a result of government social distancing orders and the pandemic generally. *Id.* ¶ 66.

Sullivan filed a claim with Fireman’s Fund, which was denied for failure to trigger coverage. *Id.* ¶¶ 67-74. It then sued here for Breach of Contract (Count I), Bad Faith/Breach of Fiduciary Duty of Good Faith (Count II), and Declaratory Relief (Count III). Counts I and III are essentially the same. In Count I, Plaintiff claims Fireman’s Fund breached the Policy by not paying the claim. In Count III, Plaintiff seeks a declaration in favor of coverage and a determination that Fireman’s Fund’s denial of coverage was a breach of contract. On its bad-faith claim, Sullivan merely makes various generic, conclusory allegations, all of which stem from the denial of coverage. *Id.* ¶ 91.

B. The relevant Policy provisions.

Sullivan fails to identify which Policy provisions it asserts afford coverage here.³ But reading its Complaint generously, one could predict that Sullivan might seek coverage under five provisions:

³ Although Sullivan did not attach the Policy to the Complaint, it is well-settled that this Court can refer to it in deciding this Motion. *See, e.g., American Chiropractic Ass’n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004) (“Although as a general rule extrinsic evidence should not be

(1) business income and extra expense coverage, (2) business access coverage, (3) dependent property coverage, (4) communicable disease coverage, and (5) civil authority coverage.

Relevant excerpts from the text of the Policy are provided below. To trigger coverage, each Policy provision explicitly requires “direct physical loss or damage” to property.

Business Income and Extra Expense Coverage	If a Limit of Insurance for Business Income and Extra Expense is shown in the Declarations, then we will pay for the actual loss of business income and necessary extra expense you sustain due to the necessary suspension of your operations during the period of restoration arising from <u>direct physical loss or damage</u> to property at a location, or within 1,000 feet of such location, caused by or resulting from a covered cause of loss. Policy (Ex. A) at 29 (bold in original; <u>underline italics</u> added). Applicable definitions include: 13. Covered cause of loss means risks of direct physical loss or damage not excluded or limited in this Coverage Form. 50. a. Period of restoration means the period of time that begins immediately after the time of direct physical loss or damage caused by or resulting from a covered cause of loss to property at the location and ends on the earlier of: (1) The date when such property at the location should be repaired, rebuilt, or replaced with reasonable speed and like kind and quality; or (2) The date when the business is resumed at a new permanent location. b. Period of restoration does not include any increased period due to the enforcement of any ordinance or law, including any ordinance or law that requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify, or neutralize, or in any way respond to, or assess the effects of pollutants.

considered at the 12(b)(6) stage, we have held that when a defendant attaches a document to its motion to dismiss, a court may consider it in determining whether to dismiss the complaint if it was integral to and explicitly relied on in the complaint and if the Plaintiffs do not challenge its authenticity.”).

	c. The expiration date of this Policy will not cut short the period of restoration. 69. Suspension means the slowdown or cessation of your operations, or that a part or all of the described premises is rendered untenable. Policy (Ex. A) at 75, 81, 84 (bold in original).
Business Access Coverage	a. We will pay for the actual loss of business income and necessary extra expense you sustain due to the necessary suspension of operations at a location if access to such location is impaired or obstructed. Such impairment or obstruction must: (1) Arise from <u>direct physical loss or damage to property</u> other than at such location; and (2) Be caused by or result from a covered cause of loss; and (3) Occur within the number of miles stated in the Declarations from such location. b. We will not pay under Business Access Coverage for business income loss or extra expense incurred caused by or resulting from action of civil authority or military authority. c. The most we will pay under the Extension of Coverage in any one occurrence or loss event is the Limit of Insurance shown in the Declarations applicable to Business Access Coverage. Policy (Ex. A) at 41 (bold in original; <u>underline italics</u> added).
Dependent Property Coverage	a. Dependent Property Coverage (1) We will pay for the actual loss of business income and necessary extra expense you sustain due to the necessary suspension of operations during the period of restoration at a location. (2) The suspension must be due <u>to direct physical loss or damage</u> at the location of a dependent property, situated inside or outside of the Coverage Territory, caused by or resulting from a covered cause of loss. ... d. With respect to Dependent Property Coverage the period of restoration begins immediately after the time that <u>direct</u>

	<u>physical loss or damage</u> occurs at the location of the dependent property caused by or resulting from a covered cause of loss. Policy (Ex. A) at 41-42 (bold in original; <u>underline italics</u> added).
Communicable Disease Coverage	1. Communicable Disease Coverage a. (1) We will pay for <u>direct physical loss or damage</u> to Property Insured caused by or resulting from a covered communicable disease event at a location including the following necessary costs incurred to: (a) Tear out and replace any part of Property Insured in order to gain access to the communicable disease; (b) Repair or rebuild Property Insured which has been damaged or destroyed by the communicable disease; and (c) Mitigate, contain, remediate, treat, clean, detoxify, disinfect, neutralize, cleanup, remove, dispose of, test for, monitor, and assess the effects the communicable disease. Policy (Ex. A) at 44-45 (bold in original; <u>underline italics</u> added). Applicable definitions include: 10. Communicable disease means any disease, bacteria, or virus that may be transmitted directly or indirectly from human or animal to a human. 11. Communicable disease event means an event in which a public health authority has ordered that a location be evacuated, decontaminated, or disinfected due to the outbreak of a communicable disease at such location. 59. Public health authority means the governmental authority having jurisdiction over your operations relative to health and hygiene standards necessary for the protection of the public. Policy (Ex. A) at 75, 82 (bold in original).
Civil Authority Coverage	We will pay for the actual loss of business income and necessary extra expense you sustain due to the necessary suspension of your operations caused by action of civil authority that prohibits access to a location. Such prohibition of access to such location by a civil authority must:

	(1) Arise from <u>direct physical loss or damage</u> to property other than at such location; and (2) Be caused by or result from a covered cause of loss; and (3) Occur within the number of miles stated in the Declarations from such location. Policy (Ex. A) at 41 (bold in original; <u>underline italics</u> added).
Virus Exclusion	A. Exclusions Applicable to all Coverages: We will not pay under Property Coverage, Business Income and Extra Expense Coverage, or any Extensions of Coverage, for any loss, damage, or expense caused directly or indirectly by or resulting from any of the following excluded causes of loss; such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss: 1. Regardless of how the cause of loss occurs, we will not pay for direct physical loss, damage, or expense caused by or resulting from the following causes of loss: ... h. Mortality <u>and Disease</u> Mortality, death by natural causes, disease, sickness, any condition of health, bacteria, <u>or virus</u>. Policy (Ex. A) at 30-31 (<u>underline italics</u> added).

III. ARGUMENTS AND AUTHORITIES

A. Applicable legal standards.

1. Rule 12(b)(6) motion to dismiss.

Dismissal under Rule 12(b)(6) is appropriate if a plaintiff has failed to plead a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); accord *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. When, however, a complaint’s facts “do not permit the

court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘shown’—‘that the pleader is entitled to relief.’” *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

In its evaluation, the court is “not required to accept as true the legal conclusions set forth in a Plaintiff’s complaint.” *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). To the contrary, “legal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement fail to constitute well-pled facts for Rule 12(b)(6) purposes.” *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009). Courts must “also decline to consider ‘unwarranted inferences, unreasonable conclusions, or arguments.’” *Id.* (quoting *Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 615 n. 26 (4th Cir. 2009)).

2. The Policy must be construed by the Court as a matter of law. Unambiguous provisions are given their plain meaning.

“An insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law.” *Auto Owners Ins. Co. v. Rollison*, 663 S.E.2d 484, 487 (S.C. 2008).⁴ “The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties’ intentions as determined by the contract language.” *Beaufort County Sch. Dist. v. United Nat’l Ins. Co.*, 709 S.E.2d 85, 90 (S.C. Ct. App. 2011) (citing *Schulmeyer v. State Farm Fire & Cas. Co.*, 579 S.E.2d 132, 134 (S.C. 2003)). “If the contract’s language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract’s force and effect.” *Id.* An insurer’s obligation under a policy of insurance is “defined by the terms of the policy itself and cannot be enlarged by judicial construction.” *South Carolina Ins. Co. v. White*, 390 S.E. 2d 471, 474 (S.C. Ct. App. 1990).

⁴ The parties agree that South Carolina law applies here. *See* S.C. CODE ANN. § 38-61-10 (“All contracts of insurance, property, lives or interest in this State are considered to be made in the State and all contracts of insurance the applications for which are taken within the State are considered to have been made within this State and are subject to the laws of this State.”).

An “insurance contract is read as a whole document so that one may not, by pointing out a single sentence or clause, create an ambiguity.” *Schulmeyer*, 579 S.E. 2d at 134 (internal citations and quotations omitted). Similarly, “[t]he meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole and considering the context and subject matter of the insurance contract.” *See Farm Fire and Cas. Co. v. Morningstar Consultants, Inc.*, No. 6:16-01685-MGL, 2017 WL 2265919 at *2 (D.S.C. May 24, 2017) (internal citations omitted).

3. Sullivan bears the burden of pleading into coverage.

“It is axiomatic that an entity seeking coverage under a policy of insurance bears the burden of proving that the claims alleged against it and the damages paid fall within the grant of coverage provided by that policy.” *Pennsylvania Nat’l Mut. Cas. Ins. Co. v. Lewis*, 105 F. Supp. 3d 573, 583 (D.S.C. 2015), *aff’d sub nom. Pennsylvania Nat’l Mut. Cas. Ins. Co. v. Lewis*, 650 Fed. Appx. 159 (4th Cir. 2016); *see also Gamble v. Travelers Ins. Co.*, 160 S.E.2d 523, 525 (S.C. 1979) (same); *Auto–Owners Ins. Co. v. Newsome*, No. 4:12–CV–00447–RBH, 2013 WL 5797729, at *8 (D.S.C. Oct. 25, 2013) (“It is the insured’s burden to establish that a claim falls within the coverage of an insurance contract.”).

B. Sullivan’s allegations do not plausibly establish direct physical loss or damage to property. Therefore, there can be no coverage under any Policy provision.

1. Direct physical loss or damage requires destruction (i.e. physical loss) or physical alteration (i.e. physical damage) to property.

As set forth in the table in Section II(B) above, the Policy coverages presumably invoked by Sullivan—(1) business income and extra expense coverage, (2) business access coverage, (3) dependent property coverage, (4) communicable disease coverage, and (5) civil authority coverage—all require “direct physical loss or damage to property.”

“Direct physical loss or damage” to property is not defined in the Policy. However, the meaning of such a plain-worded phrase, particularly when used in the context of a property insurance policy, is unambiguous. The dictionary definitions are plain enough.

Direct	adj.: marked by the absence of an intervening agency, instrumentality, or influence
Physical	adj.: (a) having material existence: perceptible especially through the senses and subject to the laws of nature; (b) of or relating to material things.
Loss	n.: destruction; ruin
Damage	n.: loss or harm resulting from injury to person, property, or reputation

See Meriam-Webster.com (accessed February 6, 2021). In other words, the Policy requires destruction, ruin, or harm of a material/perceptible nature to property, which was suffered without an intervening agency, instrumentality, or influence—frequently described by courts as the direct destruction or “physical alteration” of property.

Long before COVID-19, South Carolina—like most of its sister states—had adopted this plain-meaning, common-sense interpretation. For example, in *Campbell, Inc. v. Northern Insurance Co. of New York*, this Court held that similar policy language insuring “direct physical loss” unambiguously covered only *physical* damage or destruction. 337 F. Supp. 2d 764, 769 (D.S.C. 2004). Importantly, this Court declined the insured’s invitation to contort “the plain meaning of the policy in such a way as to find that direct physical accidental loss or damage could mean consequential or intangible damage such as loss of use.” *Id.* And, as the Court in *Campbell* correctly noted, its decision agrees with the South Carolina Supreme Court, which “has found that consequential and intangible damages are unavailable in an instance such as this when the term ‘physical’ is employed to define property damage.” *Id.* (citing *Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 588 S.E.2d 112, 116–17 (S.C. 2003)).

In *Auto-Owners*, the supreme court responded to a certified question from the Fourth Circuit by explaining that, under the language of the insurance policy at issue, economic loss caused by the contamination of property by a hazardous substance was not “physical damage.” *Auto-Owners*, 588 S.E.2d at 116–17. That was so because, as the supreme court explained, the injury was purely *economic*—not physical—even though the economic injury was caused by the physical *presence* of hazardous materials. *Id.* at 115. The supreme court noted that its “conclusion is consistent” with “most courts” across the country. *Id.*; cf. *Pulliam v. Travelers Indemnity Co.*, 743 S.E. 2d 117, 122 (S.C. Ct. App. 2013) (“economic damage” stemming from requirement to establish a cash reserve for repairs “did not result in physical damage to tangible property”).

Indeed it is. It is also consistent with Couch on Insurance, a leading insurance treatise. For example, in a pre-COVID-19 case that has been widely cited by COVID-19 courts, an insured restaurant owner sought coverage under a policy requiring “direct physical loss of or damage to property” for significant lost business income and cleaning expenses arising from heavy construction dust and debris infiltrating the restaurant premises for over a year. *Mama Jo’s, Inc. v. Sparta Ins. Co.*, 17-CV-23362-KMM, 2018 WL 3412974, at *1-2 (S.D. Fla. June 11, 2018), *aff’d*, 823 Fed. Appx. 868 (11th Cir. 2020). The insured alleged that the nearby construction work caused physical damage by throwing “construction related debris and dust” onto the insured restaurant property’s “floors, walls, tables, chairs, and countertops.” *Id.* at *1. In granting the insurer’s motion for summary judgment, the court—quoting Couch on Insurance—held that “direct physical loss” requires a tangible and demonstrable alteration of the property:

The requirement that the loss be ‘physical,’ given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by ‘***a distinct, demonstrable, physical alteration of the property.***’

Id. at *9 (quoting 10A Couch on Ins. § 148:46 (3d. Ed. West 1998)) (emphasis added). The Eleventh Circuit affirmed, holding that “an item or structure that merely needs to be cleaned has not suffered a ‘loss’ which is both ‘direct’ and ‘physical.’” *Mama Jo’s Inc. v. Sparta Ins. Co.*, 823 Fed. Appx. 868, 879 (11th Cir. 2020).

a. Federal courts have overwhelmingly rejected allegations like Sullivan’s.

The overwhelming majority of COVID-19 decisions concur with this analysis. In addition to the courts quoted in the introduction above, over ***100 other federal (and state) courts have dismissed the same allegations made by Sullivan here.*** For example, in the face of materially similar claims, a court in the Eastern District of Pennsylvania explained last month that

Plaintiffs’ allegations show they were denied some access to their insured properties or were only able to run their businesses for limited purposes, which caused them to lose income. However, no Closure Order by any authority identified by Plaintiffs required restaurants and shops like those run by Plaintiffs to close completely. . . . Further, the presence or threatened presence of the coronavirus is a physical condition that can be largely remediated by mask wearing, social distancing, and disinfecting surfaces. This does not meet the standard for a physical loss caused by a source invisible to the naked eye.

Zagafen Bala, LLC v. Twin City Fire Ins. Co., No. 20-3033, 2021 WL 131657, at *5 (E.D. Pa. Jan. 14, 2021) (dismissing with prejudice). And the Northern District of California confirmed that

Numerous courts have considered whether allegations similar to KBFA’s constitute a “direct physical loss of . . . property,” and the overwhelming majority have concluded that temporarily closing a business due to government closure orders during the pandemic does not constitute a direct loss of property under insurance policies with the same coverage provision.

Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co., Ltd., No. 20-cv-04783, 2021 WL 141180, at *3 (N.D. Cal. Jan. 13, 2021). And the Western District of Texas held that

In order to trigger coverage under a commercial property policy, “physical loss” requires there to be some “distinct, demonstrable, physical alteration of the property,” as opposed to merely economic losses. . . . The civil authority orders did not cause any tangible physical alteration to Plaintiffs’ property. Rather, Plaintiffs were precluded only from fully operating their restaurants temporarily, while the orders were in effect.

Terry Black's Barbecue, LLC v. State Automobile Mut. Ins. Co., 2020 WL 7351246, at *5 1:20-CV-665-RP (W.D. Tex. Dec. 14, 2020). And the Middle District of Alabama concluded that

A reasonable Insured would not understand the policy to cover Plaintiffs' purely economic losses incurred due to the Order. . . . Plaintiffs maintain their inability to use their property constitutes a direct physical loss. The Court does not agree. Plaintiffs' loss of usability did not result from an immediate occurrence which tangibly altered or disturbed their property in some perceptible way. The Order merely temporarily halted Plaintiffs' business operations.

Drama Camp Productions, Inc. v. MT. Hawley Ins. Co., No. 1:20-CV-266-JB-MU, 2020 WL 8018579, at *5 (M.D. Al. Dec. 30, 2020). And the Southern District of Florida said that

And when we examine the language of the insurance policy, "direct physical" modifies both "loss" and "damage." That means that direct and physical modify loss and impose the requirement that the damage be actual.

Graspa Consulting, Inc. v. United Nat'l Ins. Co., 20-23245-CIV, 2021 WL 199980, at *7 (S.D. Fla. Jan. 20, 2021). And the Southern District of Illinois stated that

[T]he court finds that "direct physical loss" under the parties' policy unambiguously requires some form of "tangible" loss or damage to the physical dimension of Plaintiff's property. Mere loss of use or diminishment in value of Plaintiff's business without underlying tangible damage or loss to the business' property or structure is not enough to trigger coverage under the policy.

TJBC, Inc. v. Cincinnati Ins. Co., Inc., No. 3:20-cv-00815, 2021 WL 243583, at *4 (S.D. Ill. Jan. 25, 2021).

Indeed, the list of cases dismissing with prejudice materially identical claims to those Sullivan alleges here is far too long to conveniently include here. But dozens more similar holdings—by no means all of them—are referenced in chronological order in the attached Exhibit C for the court's convenience.

b. Key coverages like Business Income apply only during the “period of restoration.” Intangible losses do not require repair or replacement and, thus, fail to trigger the necessary period of restoration.

As many of the COVID-19 decisions note, other interrelated and mutually dependent Policy provisions reinforce the interpretation described above. In particular, the Policy’s Business Income and Extra Expense coverage and its Dependent Property coverage only provide coverage during the “period of restoration.” Policy (Ex. A) at 29, 34, and 41-42. As defined above, the period of restoration is:

the period of time that begins immediately after the time of direct physical loss or damage caused by or resulting from a **covered cause of loss** to property at the **location** and ends on the earlier of:

- (1) The date when such property at the **location** should be repaired, rebuilt, or replaced with reasonable speed and like kind and quality; or
- (2) The date when business is resumed at a new permanent location.

Id. at 81 (**bold** in original, *italics* added). Likewise, Communicable Disease coverage pays for costs related to “[t]ear out and replace” and “repair or rebuild” property as a result of “direct physical loss or damage” to the property. *Id.* at 44-45.

Interpreting “physical loss or damage to property” to include intangible loss or damage would render the Policy language relating to “repair[], rebuil[d]ing, or replace[ment]” mere surplusage and make the effective period of the Business Income, Dependent Property and Communicable Disease coverages everlasting and nonsensical. As discussed below, no repair, rebuilding, or replacement is alleged by Sullivan, which serves to further underscore that Sullivan has not pleaded non-conclusory facts demonstrating direct physical loss or damage to property. And, in any event, Sullivan seeks to recover lost income without alleging that its business was suspended in order to “repair[], rebuil[d], or replace[]” the property following any physical loss or damage. Numerous COVID-19 decisions concur. *See, e.g., ATCM Optical, Inc. et al. v. Twin City Fire Ins. Co.*, No. 20-4238, 2021 WL 131282, at *5 (E.D. Pa. Jan. 14, 2021) (“We also note that coverage for actual or threatened COVID-

19 contamination makes little sense in connection with the Period of Restoration language, which ties business income coverage eligibility to the period during which the property can be ‘repaired, rebuilt, or replaced.’”); *T & E Chicago LLC v. Cincinnati Ins. Co.*, 20 C 4001, 2020 WL 6801845, at *5 (N.D. Ill. Nov. 19, 2020) (“[T]he provision of coverage for a ‘period of restoration,’ . . . clearly implies a requirement of loss to property rather than loss of property. Defendant’s interpretation is the correct one.”).

2. Sullivan’s few well-pleaded facts do not establish direct physical loss or damage.

a. Sullivan’s allegations about the “probable” physical presence of COVID-19 are mere speculation and would not, even if properly pled, establish direct physical loss or damage.

Even without reviewing the mountain of COVID-19 opinions dismissing complaints just like Sullivan’s, it is obvious that Sullivan’s well-pleaded facts fail to establish coverage here. Sullivan pleads that COVID-19 was spreading in Georgia and South Carolina in March 2020 and, as a result, it is “[m]ore likely than not”—i.e. a 51% chance—that COVID-19 virus particles were present at various restaurant premises “on or about March 11, 2020.” *See* Complaint ¶¶ 41-43, 60-62. March 11 is the date that the WHO declared COVID-19 to be a pandemic, *see* Complaint ¶ 27, meaning that Sullivan is speculating that perhaps someone carrying COVID-19 could possibly have been on its premises when COVID-19 was still in its infancy in the southern states. But that is, of course, just a guess—a mere conclusion founded on bare speculation.

The Policy, however, requires a showing of demonstrable physical alteration or destruction to property, followed by repairs or replacement of the damaged or destroyed fixtures or improvements. Conjecture that the virus may have been present in Sullivan’s restaurants without any stated facts describing physical alteration or destruction of property, constitutes a double dose of wishful thinking. But such conjecture does not begin to establish coverage for actual physical loss or damage to a single fixture or improvement. *See Nemet Chevrolet*, 591 F.3d at 255 (court must

ignore “bare assertions, . . . unwarranted inferences, unreasonable conclusions, or argument”). Sullivan does not allege, for example, that virus particles were actually *detected* on any fixture, improvement, or other personal property at or near any of its restaurants.

The same conclusory allegations have been rejected by numerous federal courts. For example, in *Promotional Headwear Int’l v. The Cincinnati Ins. Co.*, the plaintiff cited similar health studies about virus transmission and data about the number of local infections, leading the plaintiff to hypothesize that COVID-19 must be on its premises. 20-CV-2211-JAR-GEB, 2020 WL 7078735, at *8 (D. Kan. Dec. 3, 2020). The court disagreed:

The fact that the virus travels through the air and was present in the United States sooner than first suspected, does not support the assertion that it ‘likely’ exists on the surfaces of Plaintiff’s property.

Id. And, like Sullivan here, the plaintiff in *Promotional* did not plead that the virus had been detected on the premises or that any “infected individuals were ever present on Plaintiff’s property, or that employees or customers came into contact with someone who was infected before entering the property.” *Id.* The court explained that “[t]o accept Plaintiff’s conclusory assertion would be to accept the proposition that any business located in a community with COVID-19 infections was likely contaminated with the virus. The Court declines to accept this speculative assertion, even at the motion to dismiss stage.” *Id.*; see also *Uncork & Create LLC v. Cincinnati Ins. Co.*, No. 2:20-cv-00401, 2020 WL 6436948, at *5 (S.D. W. Va. Nov. 2, 2020) (“[W]hile factual allegations drive the analysis of a motion to dismiss, courts are not required to set aside common sense”); cf. *West Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Companies*, 220CV05663 VAPDFMX, 2020 WL 6440037, at *4 (C.D. Cal. Oct. 27, 2020) (“Plaintiffs argue that there was physical damage to their property as a result of the physical nature of COVID-19. Plaintiffs’ Complaint, however, lacks the factual allegations needed to lend this theory plausibility. The

Complaint merely states that there was ‘direct physical loss of or damage to the [hotels].’ The Court disregards this conclusory allegation.”).

b. In any event, the presence of COVID-19 is not enough to trigger coverage because the virus does not cause physical loss or damage.

Further, even if Sullivan had adequately pleaded facts that would support an inference that the virus was physically present, its allegation that the presence of the virus causes direct physical loss or damage is wholly conclusory—mere speculation piled on speculation. *See, e.g.*, Complaint ¶¶ 64-65.

The virus clearly can harm humans, although Sullivan does not allege that any human contracted the disease at any of its properties. Regardless, the Policy is a property policy that insures against *property* damage, not harm to people. Yet Sullivan does not allege that a faucet, lamp, wall, chair, dishwasher, countertop, or other personal or real property was broken, torn, or destroyed, or otherwise in need of repair or replacement. Thus, Sullivan’s allegations “[do] not equate [to] physical loss or damage,” particularly since the virus can be cleaned with a disinfectant wipe or inactivated by the passage of time without harming the physical structure of the property. *Universal Image Productions, Inc. v. Fed. Ins. Co.*, 475 Fed. App’x 569, 574 (6th Cir. 2012) (“cleaning . . . with hot water and ‘Lysol type, cleaning, household cleaning things’” does not “constitute physical loss or damage.”); *accord Mama Jo’s*, 2018 WL 3412974, at *9 (“The fact that the restaurant needed to be cleaned more frequently does not mean plaintiff suffered a direct physical loss or damage . . .”).

That is why numerous COVID-19 courts have properly rejected the allegation that COVID-19 can ever, under any circumstances, cause direct physical loss or damage, even if its presence on property were pleaded with plausibility. As one federal court in West Virginia recently explained:

COVID-19 does not threaten the inanimate structures covered by property insurance policies, and its presence on surfaces can be eliminated with disinfectant. Thus, even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property.

Uncork & Create, 2020 WL 6436948, at *5; accord *Bluegrass, LLC. v. State Auto. Mut. Ins. Co.*, 2:20-CV-00414, 2021 WL 42050, at *5 (S.D.W. Va. Jan. 5, 2021) (same). Indeed, “[b]ecause routine cleaning, perhaps performed with greater frequency and care, eliminates the virus on surfaces, there would be nothing for an insurer to cover.” *Uncork & Create*, 2020 WL 6436948, at *5; see also *Zwillo V Corp. v. Lexington Ins. Co.*, 4:20-00339-CV-RK, 2020 WL 7137110, at *6 (W.D. Mo. Dec. 2, 2020) (“Whether the complaint is couched in terms of COVID-19’s presence on the premises or of loss of use of premises due to the stay-at-home orders (or the virus itself), Plaintiff has failed to state a claim upon which relief may be granted because the policy does not cover the alleged claim.”); *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 20 CV 2160, 2020 WL 5630465, at *3 (N.D. Ill. Sept. 21, 2020) (“The coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property. Consequently, plaintiff has failed to plead a direct physical loss—a prerequisite for coverage.”); *Promotional Headwear*, 2020 WL 7078735, at *8 (“Moreover, even assuming that the virus physically attached to covered property, it did not constitute the direct, physical loss or damage required to trigger coverage because its presence can be eliminated. Much like the dust and debris at issue in *Mama Jo’s*, routine cleaning and disinfecting can eliminate the virus on surfaces.”).

c. Social distancing orders likewise do not cause physical loss or damage to property.

Sullivan also appears to allege that the social distancing orders caused it to suffer physical loss or damage. See, e.g., Complaint ¶¶ 46-52, 65-66. This conclusory nature of Plaintiff’s allegations means that they suffer from the same fatal infirmity as the others noted above. That is, Sullivan fails to plead *how* the social distancing orders caused direct physical loss or damage to property. At most, such orders were prophylactic and forward-looking. See, e.g., *United Air Lines, Inc. v. Insurance Co. of the State of Penn.*, 439 F.3d 128, 135 (2d Cir. 2006) (shutdown of airports following 9/11 was not caused by physical damage to property but instead due to government’s prophylactic attempt to

prevent future loss of life and property). As quoted in the Introduction above, the Northern District of Georgia addressed this same issue last October. The court put it this way:

The [social distancing] Order merely recognized an existing threat. It did not represent an external event that changed the insured property. Every physical element of the dining rooms—the floors, the ceilings, the plumbing, the HVAC, the tables, the chairs—underwent no physical change as a result of the Order. The only possible change was an increased public and private perception of the existing threat, which cannot be deemed a physical change that rendered the property unsatisfactory. The Plaintiff's [interpretation] would potentially make an insurer liable for the negative effects of operational changes resulting from any regulation or executive decree, such as a reduction in a space's maximum occupancy.

Henry's Louisiana Grill, 2020 WL 5938755, at *5. Further, Plaintiff has conceded that the orders deemed Sullivan's restaurants essential businesses and allowed them to remain open for takeout. *See* Complaint ¶¶ 36, 37, 48, 50.

3. The small minority of decisions denying motions to dismiss were either incorrectly decided or not subject to *Twombly/Iqbal* plausibility requirements.

In prior briefing, Sullivan argued that a few COVID-19 courts have denied insurers' motions to dismiss. The principal federal case cited by Sullivan in prior briefing (*Studio 417*) has been repeatedly rejected by other courts, including by another judge in the *same district* in Missouri. *Zwillo V Corp.*, 2020 WL 7137110, at *8 ("To the extent this Court's ruling – finding the language in the policy plainly and unambiguously does not cover the claims – conflicts with *Studio 417*, *K.C. Hopps*, and *Blue Springs Dental Care*, this Court respectfully disagrees with those cases."); *Uncork*, 2020 WL 6436948, at *5 (declining to follow *Studio 417*; "[W]hile factual allegations drive the analysis of a motion to dismiss, courts are not required to set aside common sense, and neither *Studio 417*, which relied in part on the allegation of presence of the virus, nor the instant case, involve actual allegations of employees or patrons with infections traced to the business."); *West Coast Hotel*, 2020 WL 6440037, at *4 n.4 (declining to follow *Studio 417*); *T & E Chicago LLC v. Cincinnati Ins. Co.*, 20 C 4001, 2020 WL 6801845, at *4 (N.D. Ill. Nov. 19, 2020) (noting *West Coast Hotel*'s decision not to follow *Studio 417* and following suit); *Catlin Dental v. The Cincinnati Indemnity Co.*, No. 20-

CA-004555, Slip Op. at 10 (Fl. Cir. Ct. Dec. 11, 2020) (“Catlin relies on [*Studio 417* and *North State Deli*] [T]he Court finds that neither of these cases is persuasive or well-reasoned.”).

Further, *Studio 417* and the other authorities previously cited by Sullivan all rely on *Port Auth. of New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) which—even if it were consistent with South Carolina law, which it is not—requires, at a bare minimum, a showing of uninhabitability and unusability. *See, e.g., Studio 417, Inc. v. Cincinnati Ins. Co.*, 20-CV-03127-SRB, 2020 WL 4692385, at *5 (W.D. Mo. Aug. 12, 2020) (“the presence of large quantities of asbestos in the air of a building is such as to make the structure **uninhabitable and unusable** . . .” (quoting *Port Auth.*, 311 F.3d at 236) (emphasis added)). Here, as discussed above, Sullivan’s pleaded allegations about the possible presence of the virus are speculative and mere conclusions and, regardless, its pleaded facts establish that its restaurants were inhabitable and useable.

There are similar problems with Sullivan’s reliance on *North State Deli, LLC, et al., v. Cincinnati Ins. Co., et al.*, Case No. 20-CVS-05269 (N.C. Super. Ct. Oct. 7, 2020), a state court decision from North Carolina that was decided in the insured’s favor. First, it is contrary to the South Carolina precedent discussed above. The *North State Deli* court entertained an interpretation of “direct physical loss or damage to property” that dozens of state and federal courts have already rejected. It also erroneously concluded that “direct physical loss or damage” was ambiguous under North Carolina law. But nearly every court in the country construing the same language has found it to be **unambiguous** in requiring actual tangible harm to property. And, of course, the same Fireman’s Fund language at issue here has already been held to be unambiguous. *Boulevard Carroll*, 2020 WL 7338081, at *2 (“The Policy unambiguously limits its coverage to physical loss or damage to Plaintiff’s commercial property.”); *Water Sports Kauai*, 2020 WL 6562332, at *3 (“I will follow the

overwhelming majority of courts that have determined that the mere threat of coronavirus cannot cause a ‘direct physical loss of or damage to’ covered property as required under the Policy.”).

North State Deli also ignored the first and primary definition of loss in the very dictionary it cited to: “DESTRUCTION, RUIN.” *See* LOSS, Meriam Webster (Online), available at <http://www.Merriam-Webster.com/dictionary/loss> (accessed Nov. 20, 2020). The court also crucially failed to account for the word “physical” as it qualifies both “damage” and “loss” as they are used in the Policy.

And, lastly, the *North State Deli* court ignored the Policy’s period-of-restoration requirement which, like the Policy here, expressly requires repairs or replacement damages in order to qualify for business interruption coverage.

C. There is no Civil Authority coverage here because there is no causal link and because no civil authority has prohibited access to any of Sullivan’s restaurants.

1. No causal link.

For the reasons explained above, Sullivan does not qualify for Civil Authority coverage because it has pleaded no direct physical loss or damage. That ends the inquiry. But, even if that were not the case, Sullivan has failed to plausibly plead that direct physical loss or damage to property *within one mile* of any of its insured locations *caused* the government to issue its social distancing orders. As quoted above, Civil Authority coverage requires a

necessary **suspension** of your **operations** caused by action of civil authority that prohibits access to a **location**. Such prohibition of access to such **location** by a civil authority must:

- (1) Arise from direct physical loss or damage to property other than at such **location**; and
- (2) Be caused by or result from a **covered cause of loss**; and
- (3) Occur within the number of miles stated in the Declarations from such **location**.

Policy (Ex. A) at 41 (**bold** in original; *underline italics* added); *see also id.* at 20 (Declarations page stating the distance as “1 Mile”). That causal link is crucial. Without it, Sullivan cannot state a claim. *See Dickie Brennan & Co., Inc. v. Lexington Ins. Co.*, 636 F.3d 683, 687 (5th Cir. 2011) (The “policy requires proof of a causal link between prior damage and civil authority action.”); *United Air Lines*, 439 F.3d 128 at 134 (same).

2. Access was not prohibited.

Further, Civil Authority coverage is unavailable because no civil authority *prohibited* access to Sullivan’s location, which is essential to trigger civil authority coverage. *See* Policy (Ex. A) at 41.

There is no prohibition alleged here. Indeed, quite the opposite is true. Although Sullivan pleaded that various orders were issued by state and local officials, it conceded that its restaurants were allowed to remain open for takeout and delivery.⁵ *See* Complaint ¶¶ 36, 37, 48, 50. Accordingly, by definition, access to the restaurants wasn’t prohibited and, therefore, Civil Authority coverage

⁵ The relevant orders, which are publicly available, also make that fact plain. The Court can take judicial notice of these orders, as they “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201.

- SC Exec. Order 2020-10 at p. 3, *available at* <https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-03-17%20FILED%20Executive%20Order%20No.%202020-10%2020Directing%20Additional%20Emergency%20Measures%20re%20COVID-19.pdf> (stating that restaurants shall suspend “on-premises or dine-in consumption” but the state “permit[s] and encourage[s] restaurants to prepare, produce, or otherwise offer or sell food or beverages for off-premises consumption.”);
- Charleston Emergency Ordinance 2020-048 p. 4, *available at* <https://www.charleston-sc.gov/DocumentCenter/View/26251/Emergency-Ordinance-Stay-at-Home> (stating that bars and restaurants “shall be prohibited from permitting dine in or on premises consumption of food or beverages...[but may] continue to offer pickup, take out or delivery services for consumption off premises.”);
- City of Augusta Executive Order No. 2020-005 at p. 3, *available at* <https://www.augustaga.gov/DocumentCenter/View/13321/2020-3-21-Executive-Order-2020-005-re-Business-Closures?bidId=> (stating that restaurants shall be open for “drive-through or curbside service” but not dine-in service).

does not fit the facts. As a court in the Western District of Pennsylvania explained last month in a virtually identical case:

Here, the restaurant remained open for takeout and delivery services, and employees had access to the business to service customers. [Pennsylvania] Governor Wolf's orders do not constitute direct physical loss of or damage to any property and, as such, cannot implicate Civil Authority coverage. [Further, Plaintiff] was not denied access to its facilities. The Court holds that the Civil Authority coverage is not implicated under these facts.

I S.A.N.T., Inc. v. Berkshire Hathaway, Inc., 2:20-CV-862, 2021 WL 147139, at *7 (W.D. Pa. Jan. 15, 2021). The same results have been reached by numerous courts. *See, e.g., Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, CV 20-1869, 2020 WL 7395153, at *1 (E.D. Pa. Dec. 17, 2020) (same); *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.*, 20-CV-907-CAB-BLM, 2020 WL 5500221, at *6 (S.D. Cal. Sept. 11, 2020) (“[T]he complaint must, at a minimum, allege that the government (1) prohibited Plaintiffs from accessing their premises (2) due to direct physical loss of or damage to property elsewhere.”); *accord S. Hosp., Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1140 (10th Cir. 2004) (finding no coverage under hotel’s civil authority provision because FAA order prohibiting airplanes from flying did not prohibit all access to hotel operations); *Paradies Shops, Inc. v. Hartford Fire Ins. Co.*, 1:03-CV-3154-JEC, 2004 WL 5704715, at *7 (N.D. Ga. Dec. 15, 2004) (with respect to civil authority coverage, “the term ‘prohibit’ is unambiguous” and means “to forbid by authority or command.”).

D. Business Access coverage does not apply because there is no causal link and because access to Sullivan’s restaurants was not impaired or obstructed.

Business Access coverage—like all coverages Sullivan presumably relies on—requires direct physical loss or damage. For the reasons explained above, there has been none. But, even if there had been, Sullivan’s claim for Business Access coverage—to the extent that Sullivan is alleging such a claim—suffers from similar flaws as its claim for Civil Authority coverage.

1. No causal link.

First, Business Access coverage requires a similar nexus between off-site direct physical loss or damage and an impairment or obstruction to access to its restaurants. That is, direct physical loss or damage within one mile of a given restaurant must have led to an impairment or obstruction of access. *See* Policy (Ex. A) at 41 (“Such impairment or obstruction must: (1) Arise from direct physical loss or damage to property other than at such location; and . . . (3) Occur within the number of miles stated in the Declarations from such **location**.”); *see also id.* at 20 (Declarations page stating the distance as “1 Mile”). Sullivan has not plausibly pleaded any such loss or damage within one mile of any Sullivan restaurant, nor has it explained how or why it led to an impairment or obstruction of access. *Cf. Dickie Brennan*, 636 F.3d at 687 (causal link required).

2. Access was not impaired or obstructed.

Second, Sullivan has not pleaded any facts whatsoever that suggest access to any of its restaurants was obstructed or impaired at any time, nor that any suspension of operations was caused by such obstruction or impairment. To the contrary, Sullivan’s restaurants were allowed to remain open so it could serve customers with takeout as noted above. Accordingly, Sullivan has failed to plead facts that establish a plausible claim for Business Access coverage.

E. Communicable Disease coverage does not apply because there was no communicable disease event and because the Sullivan alleges no covered damages.

Communicable Disease coverage—like all the others—requires “direct physical loss or damage” which, as explained above, Sullivan has not alleged.⁶ Policy (Ex. A) at 44-45. For that reason alone, there is no coverage. But Communicable Disease coverage is also unavailable here because there has been no “communicable disease event” and because Sullivan has suffered no

⁶ Although Communicable Disease coverage does not require physical loss or damage as a prerequisite like the other coverages, it covers only *physical* harm caused by the covered communicable disease event as discussed in more detail below.

covered damages. Indeed, *Boulevard Carroll*, *Water Sport Kauai*, and *Saddle Ranch* all contained materiality identical language. In each case, the claims were dismissed in favor of Fireman’s Fund.

1. No communicable disease event.

A “communicable disease event” is defined as “an event in which a public health authority has ordered that *a location* be evacuated, decontaminated, or disinfected due to the outbreak of a communicable disease *at such location*.” Policy (Ex. A) at 75 (emphasis added). Here, Sullivan has not alleged that any of the social distancing orders resulted from an outbreak at Sullivan’s restaurants or that any of the restaurants were ordered to be “evacuated, decontaminated or disinfected.” To the contrary, Sullivan does not contest that its restaurants were deemed essential businesses and permitted to remain open for takeout and delivery. *See* Complaint ¶ 51; *see also* Orders cited above at fn. 5.

Further, “public health authority” is narrowly defined in the Policy as a “government authority having jurisdiction over your operations relative to health and hygiene standards necessary for the protection of the public.” Policy (Ex. A) at 82. Thus, none of the orders listed in Sullivan’s Complaint applies here. But, even if they did, all of the government orders were general and prophylactic. Sullivan does not identify any order from a health department identifying an outbreak of COVID-19 at any of its restaurants or ordering any of its restaurants to be “evacuated, decontaminated or disinfected” as a result of an outbreak detected there. Accordingly, there has been no communicable disease event.

2. No covered damages.

Communicable Disease coverage pays for a narrow set of “necessary costs” directly caused by a communicable disease event identified in the Communicable Disease provision, such as charges to (a) tear out and replace property to gain access, (b) repair or rebuild damaged or destroyed property, and (c) other mitigation costs associated with property damage. Policy (Ex. A) at 44-45.

Sullivan does not allege that it has incurred any of these costs, which makes sense since it has not suffered a communicable disease event or any physical loss or damage to property.

F. Alternatively, most coverage is barred by the virus exclusion.

Regardless, all coverage is barred by the Policy's express exclusions, which exclude coverage for "direct physical loss, damage, or expense caused by or resulting from . . . Mortality, death by natural causes, disease, sickness, any condition of health, bacteria, or *virus*." Policy (Ex. A) at 30-31. The exclusion is applicable to all coverages except Communicable Disease. *Id.* Fireman's Fund "will not pay for [any coverage] for any loss, damage, or expense caused directly or indirectly by or resulting from any of the following excluded causes of loss" *Id.* Thus, as the *Boulevard Carroll* court the District of New Jersey concluded last December, "the Policy clearly excludes coverage for damage, loss or expense arising from a virus." *Boulevard Carroll*, 2020 WL 7338081, at *2; *Chattanooga Prof'l Baseball LLC v. Nat'l Cas. Co.*, CV-20-01312-PHX-DLR, 2020 WL 6699480, at *3 (D. Ariz. Nov. 13, 2020) (dismissing on virus exclusion); *10E, LLC v. Travelers Indem. Co. of Connecticut*, 2:20-CV-04418-SVW-AS, 2020 WL 6749361, at *2 (C.D. Cal. Nov. 13, 2020) ("the Court now concludes that the virus exclusion provides an independent basis for granting the motion to dismiss as to Business Income, Extra Expense, and Civil Authority coverage").

G. Sullivan's bad faith claim fails because the denial of coverage was objectively reasonable.

An insured may recover damages for a bad faith denial of coverage only "if he or she proves there was *no reasonable* basis to support the insurer's decision to deny benefits under a mutually binding contract." *See Episcopal Church in South Carolina v. Church Ins. Co of Vermont*, 993 F. Supp. 2d 581, 593 (D.S.C. 2014) (emphasis added). "[I]f there is an objectively reasonable ground for contesting an insurance claim, there is no bad faith in the denial of it." *Id.* (citing *State Farm Fire & Cas. Co. v Burton*, 897 F.2d 729 (4th Cir. 1990)). If there is no coverage, then there can be no bad faith in denying coverage. *See Helene Chem Co. v. Allianz Underwriters Ins. Co.*, 594 S.E. 2d 455,

462 (S.C. 2004) (where the court held that there could be no bad faith refusal to pay where a claim is not covered.); *see also BMW of North America, LLC v. Complete Auto Recon Servs., Inc.*, 731 S.E. 2d 902, 907 (S.C. Ct. App. 2012) (same); *Cock-n-bull Steak House v. Generali Ins. Co.*, 466 S.E. 2d 727, 730 (S.C. 1996) (same).

For the reasons described above, there is no coverage for Sullivan’s claim. Or, at a minimum, Fireman’s Fund had an objectively reasonable basis to deny coverage. For those reasons, Sullivan’s claim for bad faith fails as a matter of law. *See, e.g., Boulevard Carroll*, 2020 WL 7338081, at *2 (dismissing bad faith claims because no coverage); *Diesel Barbershop. v. State Farm Lloyds*, No. 5:20-CV-461, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020) (same).

H. Sullivan’s declaratory judgment claim fails.

Sullivan seeks a declaratory judgment that the Policy covers its alleged losses. For the reasons described at length above, it does not. Accordingly, its claim must be dismissed.

Further, Sullivan’s claim for declaratory judgment is improper anyway because it is wholly duplicative of its breach-of-contract claim. *See Hawkins v. Bruno Yacht Sales, Inc.*, 536 S.E.2d 698, 698 n.1 (S.C. Ct. App. 2000) (“Although the underlying complaint is styled as a declaratory judgment action, it is actually an action to void a tax sale and as such is not transformed into one for declaratory judgment solely by invoking the Declaratory Judgment Act.”)

I. AGR US has nothing to do with this lawsuit. Sullivan’s complaint does not plausibly allege any basis for having sued AGR US.

AGR US, Fireman’s Fund’s parent company, has absolutely nothing to do with this case. The Policy was issued by Fireman’s Fund alone. Sullivan knows that. It’s obvious from the face of the Policy. *See, e.g., Policy (Ex. A)* at 2 (“Issuing Company: Fireman’s Fund Insurance Company (AN ALLIANZ COMPANY)”).

Under South Carolina law, “[o]nly parties to a contract may be sued for breach of contract cause of action.” *DeFeo v. Blackboard Ins. Co.*, 2019 WL 3206133, at 3 (D.S.C. July 16, 2019).

Sullivan has no plausible basis to allege that it has a Policy issued by AGR US simply because AGR US acts as a claims administrator or because the Allianz logo appears on the Policy. This Court has rejected materially similar allegations because they are wrong as a matter of law. *DeFeo v. Blackboard Ins. Co.*, 4:19-CV-01583-RBH, 2019 WL 3206133, at *3 (D.S.C. July 16, 2019) (“While Plaintiffs allege York breached its contract with Plaintiffs by denying their claim, the policy clearly indicates Blackboard, not York, was the insurance provider. . . . Accordingly, Plaintiffs may not maintain a breach of contract claim against York, who was not a party to the insurance policy.”). The same result is warranted here because Sullivan has not plausibly alleged a cause of action against AGR US.

J. The Court should dismiss with prejudice. Any amendment would be futile.

As explained above, there is no coverage under the Policy for Sullivan’s property insurance claim. In light of Sullivan’s admissions that it suffered only economic harm, any attempt to amend the Complaint would be futile. Thus, this Court should follow the more than 100 other COVID-19 courts to have addressed these issues and dismiss Plaintiff’s complaint with prejudice.

IV. CONCLUSION

For the reasons detailed above, Defendants are entitled to dismissal with prejudice on each of Sullivan’s claims. Accordingly, they respectfully request that the Court afford them that relief and any other relief to which they show themselves entitled.

SIGNATURE PAGE ATTACHED

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Columbia, South Carolina

February 16, 2021

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Sullivan Management, LLC,	)	Case No. 3:20-cv-02275-MGL
	)	
Plaintiff,	)	REPLY IN SUPPORT OF FIRST
	)	AMENDED MOTION TO
vs.	)	DISMISS SULLIVAN’S
	)	COMPLAINT FOR FAILURE TO
Fireman’s Fund Insurance Company and Allianz	)	STATE A CLAIM
Global Risks US Insurance Company,	)	
	)	
Defendants.	)	
	)	

Fireman’s Fund Insurance Company (“Fireman’s Fund”) and Allianz Global Risks US Insurance Company (“AGR US”) (together, “Defendants”), submit this reply in support of their First Amended Motion to Dismiss the Complaint of Plaintiff Sullivan Management, LLC’s (“Sullivan”) for failure to state a claim upon which relief can be granted.

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I. INTRODUCTION

Sullivan’s claim can be summed up as follows: (1) COVID is everywhere so the court should assume that it must have been at Sullivan’s restaurants; (2) social distancing orders were issued that reduced patronage; (3) Sullivan was allowed to operate its restaurants but lost money due to reduced patronage; and (4) coverage applies here because the phrase “direct physical loss or damage” is ambiguous and thus need be neither direct nor physical but, instead, any partial loss of use will do.

Sullivan’s arguments have been rejected by over 165 courts around the country. Sullivan cannot escape the core principle underpinning all of those cases: “physical loss or damage to property” requires some ***physical alteration*** to the property. In fact, earlier this week the U.S. District of Massachusetts held the same Fireman’s Fund Policy language at issue here to be unambiguous and dismissed with prejudice materially similar claims. As the court explained:

Taken together, [the words direct physical loss or damage] require[s] some enduring impact to the actual integrity of the property at issue. In other words, the phrase “direct physical loss of or damage” does not encompass transient phenomena of no lasting effect, much less real or imagined reputational harm.

American Food Systems, Inc. v. Fireman’s Fund Ins. Co., No. 20-11497-RGS, Slip Op. at *7-8 (D. Mass Mar. 24, 2021) (copy attached as Exhibit B). In other words, temporary loss of use due to social distancing order—which is all Sullivan alleges—is not enough. Even where the insured pleaded (like Sullivan did here) that the virus “might be” or “must be” on the premises, courts routinely grant dismissal because (1) the allegations are conclusory, and (2) the virus injures people, but does not physically damage or destroy property. The few cases denying motions to dismiss cited by Sullivan are clear outliers and have been roundly criticized by most courts.

As to the other issues, other courts—including the District of New Jersey construing the identical Fireman’s Fund virus exclusion found here—have held that it applies and bars Sullivan’s claims. Further, Sullivan has not plausibly pleaded a bad faith denial of coverage in light of the lack of coverage. And, lastly, its claim that AGR US was a “joint issuer” of the Policy has been expressly

rejected by a court in this district earlier this month. This Court should grant Fireman's Fund's motion to dismiss.

II. ARGUMENT AND AUTHORITIES

A. Sullivan's allegations do not plausibly establish direct physical loss or damage to property. Thus, there is no coverage under *any* Policy provision.

1. A note on "all risks" policies.

At the outset, Fireman's Fund notes that Sullivan repeatedly refers to the Policy as an "all risks" policy. Sullivan appears to imply that an all-risks policy is really an "all loss" policy. It is not.

First, the words "All Risks" are not used in the Policy. That alone ends the discussion.

Second, as one (of many) COVID-19 courts explained in rejecting the same argument: "Plaintiff's claim that the loss is covered because its policy is an 'all-risks' policy lacks merit. . . . Although the term 'all-risk' is afforded a broad, comprehensive meaning, an 'all-risk' policy is not an 'all loss' policy, and thus does not extend coverage for every conceivable loss. Rather, the loss must be one that is covered based on a reasonable construction of all the terms of the policy." *Prime Time Sports Grill, Inc. v. DTW 1991 Underwriting Ltd.*, 8:20-CV-771-T-36JSS, 2020 WL 7398646, at *4 (M.D. Fla. Dec. 17, 2020) (internal citations and quotation marks omitted).

That means that an "all risks" property policy is construed just like any other. *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 701 S.E.2d 33, 35 (S.C. 2010) (construing all-risks commercial property policy provision "in accordance with its plain, ordinary, and popular meaning"); *see also South Carolina Ins. Co. v. White*, 390 S.E. 2d 471, 474 (S.C. Ct. App. 1990) (insurer's obligation is "defined by the terms of the policy itself and cannot be enlarged by judicial construction").

2. The Policy is not ambiguous. "Physical . . . loss to property" does not mean temporary, partial loss of use.

Sullivan argues that the Policy is "subject to at least two reasonable constructions." Opposition at 4. It is not. More than 165 courts have explicitly or implicitly considered and rejected

the same argument—several just in the past few days alone.

- *Skillets, LLC v. Colony Ins. Co.*, 3:20CV678-HEH, 2021 WL 926211, at *4 (E.D. Va. Mar. 10, 2021) (Policy language at issue here is “[p]lain and unambiguous”);
- *B Street Grill & Bar LLC, v. Cincinnati Ins. Co.*, CV-20-01326-PHX-SMB, 2021 WL 857361, at *5 (D. Ariz. Mar. 8, 2021) (“The policy language is unambiguous.”);
- *Summit Hosp. Group, Ltd. v. Cincinnati Ins. Co.*, 5:20-CV-254-BO, 2021 WL 831013, at *3 (E.D.N.C. Mar. 4, 2021) (“These provisions are not ambiguous.”);
- *Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Ins. Co.*, 1:20-CV-02248-JPB, 2021 WL 778728, at *5 (N.D. Ga. Mar. 1, 2021) (“In this case, although the phrase ‘direct physical loss’ is not defined in the Policy, the Court finds that its plain and literal meaning (based on certain related definitions in the Policy and applicable case law) requires actual, physical damage to the covered premises. This meaning is clear and unambiguous, and the Court therefore ends its inquiry at this step.”).

Sullivan argues that Fireman’s Fund construction renders the term “loss” mere surplusage.

Opposition at 6-7. But direct physical *loss* to property is obviously different from direct physical *damage* to property.¹ As a court in the Northern District of Ohio explained:

“Loss” is modified by the terms “direct” and “physical.” When “direct,” “physical,” and “loss” are read together with their ordinary meanings, the Court concludes that the Business Income (and Extra Expense) Coverage Form unambiguously covers an immediate material, perceptible harm that leads either to complete destruction or deprivation (“direct physical loss”) or partial destruction (“direct physical damage”).

Equity Planning Corp. v. Westfield Ins. Co., 1:20-CV-01204, 2021 WL 766802, at *9 (N.D. Ohio Feb. 26, 2021) (emphasis in original).

a. Sullivan’s alternative construction is not reasonable.

(1) The loss *itself* must be physical.

Sullivan’s alternative construction is unreasonable. First, it fails to address the Policy’s requirement that any “loss” itself be “physical.”² As a court in the U.S. District of Massachusetts

¹ This distinction was ignored by the *Nautilus Group* court. See Opposition 6 n.1. As explained above, COVID-19 courts have recognized that damage and destruction are different things.

² And, contrary to Sullivan’s argument, *Couch on Insurance* recognizes Sullivan’s position as an outlier. “The requirement that the loss be ‘physical,’ given the ordinary definition of that term, is

recently explained: “The spread of the coronavirus is of course ‘physical’ in the sense that the virus is a submicroscopic organism, but under the plain language of the policy, it is the ***loss or damage itself*** that must be ‘physical.’” *Kamakura, LLC v. Greater New York Mut. Ins. Co.*, No. 20-11350-FDS, Slip Op. at *11-12 (D. Mass. Mar. 9, 2021) (holding policy language unambiguous) (emphasis added) (copy attached as Exhibit C); *accord Grasp Consulting, Inc. v. United Nat’l Ins. Co.*, 20-23245-CIV, 2020 WL 7062449, at *7 (S.D. Fla. Nov. 17, 2020) (“‘[D]irect physical’ modifies both ‘loss’ and ‘damage.’ That means that ‘[d]irect and physical modify loss and impose the requirement that the damage be actual.’”). Stated another way:

The critical policy language here—“direct physical loss”—unambiguously requires some form of actual, physical damage to the insured premises to trigger coverage. The words “direct” and “physical,” which modify the word “loss,” ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons extraneous to the premises themselves, or adverse business consequences that flow from such closure.

Sandy Point Dental, PC v. Cincinnati Ins. Co., 20 CV 2160, 2020 WL 5630465, at *2 (N.D. Ill. Sept. 21, 2020). Just last week, a court in the Western District of Kentucky echoed Fireman’s Fund’s Brief:

The primary [*Merriam Webster*] dictionary definition of loss is “destruction” or “ruin”. Thus, in context, “physical loss” would mean destruction or ruin produced by the forces or operation of physics. In this light, “physical loss” would apply to property destroyed by some force, contrasted with “physical damage” which would cover a lesser extent of harm short of destruction or ruin. Thus, the policy would extend to the continuum of harm from total (loss) to partial (damage) resulting in alteration to an insured property.

Bluegrass Oral Health Center, PLLC v. Cincinnati Ins. Co., No. 1:20-cv-00120, Slip Op. at *7 (W.D. Ky. Mar. 18, 2021) (copy attached as Exhibit D). And the *American Food Systems* court interpreting Fireman’s Fund’s Policy earlier this week concurred:

Attempting to differentiate “physical loss” from “damage to,” plaintiffs reason that the preposition “or” separating these terms in the Policy broadens the reach of the

widely held to *exclude* alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.” 10A Couch on Ins. § 148:46 (3d ed. 2020) (footnotes omitted; emphasis added).

phrase “physical loss,” otherwise it would be void as surplusage of the term “damage to.” The court disagrees. Because the phrase at issue consists of a sequence of related terms, a proper grammatical reading gives a parallel construction to the adjective “physical,” meaning that it modifies both “loss of” and “damage to.”

Am. Food Sys., Inc., No. 20-11497-RGS, Slip Op. at *9.

(2) The physical loss must be *to* property.

Second, the direct physical loss must be “to property.” That is because the loss of use of property without any physical change to that property cannot constitute direct physical loss or damage to the property. *See, e.g., Ceres Enterprises, LLC v. Travelers Ins. Co.*, 1:20-CV-1925, 2021 WL 634982, at *6 (N.D. Ohio Feb. 18, 2021) (“[T]he policy does not protect against the ‘physical loss of *use* or damage to’ property. And the policy unambiguously means that losing the intended use of the property, without a material deprivation of or change **to the property itself**, is not a covered loss.” (italics in original, bold added)).

(3) Coverage is only available while the physically lost or damaged property is being repaired, rebuilt, or replaced.

And third, Sullivan fails to adequately address the Policy’s limitation of coverage to the “period of restoration.” Instead, Sullivan argues that the Policy’s coverage for the presence of fungus—a category of coverage not at issue here—also triggers coverage for business income during the period of restoration. *See* Opposition at 31-32. But that argument makes little sense. Coverage triggered by the presence of fungus necessarily assumes that the damaged object needs to be repaired, rebuilt, or replaced. Sullivan’s analogy is accordingly misplaced. “COVID-19 damages lungs, not property.” *Sharde Harvey, DDS, PLLC v. Sentinel Ins. Co., Ltd.*, 20CV3350PGGRWL, 2021 WL 1034259, at *9 (S.D.N.Y. Mar. 18, 2021).

Further, interpreting “physical loss or damage to property” to include the alleged presence of a substance that does not harm property and that can be cleaned with Lysol wipes or soap and water would render the Policy language relating to “repair[], rebuil[d]ing, or replace[ment]” mere

surplusage. It would also make the effective period of the key coverages everlasting and nonsensical.

Numerous COVID-19 courts agree. *See, e.g.,*

- *Selery Fulfillment, Inc. v. Colony Ins. Co.*, 4:20-CV-853, 2021 WL 963742, at *7 (E.D. Tex. Mar. 15, 2021) (“[T]he [period of restoration] provision implies that some kind of structural damage occurred because it mentions the property itself undergoing physical processes like rebuilds, repairs, or replacements.”);
- *TAQ Willow Grove, LLC v. Twin City Fire Ins.*, No. 20-3863, 2021 WL 131555, at *6 (E.D. Pa. Jan. 14, 2021) (“[M]ere loss of use counting as ‘direct physical loss of’ property makes no sense when read with the ‘period of restoration’ language.”);
- *Wellness Eatery La Jolla LLC v. Hanover Ins. Group*, 20CV1277-AJB-RBB, 2021 WL 389215, at *6 (S.D. Cal. Feb. 3, 2021) (“[T]erms such as ‘period of restoration’ and ‘repaired, rebuilt, or replaced’ . . . strongly indicate that the ‘physical loss’ contemplated by the Policy requires . . . physical alteration of the property.”);
- *West Coast Hotel Management, LLC v. Berkshire Hathaway Guard Ins. Cos.*, No. 2:20-cv-05663, 2020 WL 6440037, at *3 (C.D. Cal. Oct. 27, 2020) (“[T]he Policy . . . plainly requires, at minimum, that the loss or damage be physical in nature. Indeed, the Policy contemplates a ‘period of restoration’ after such loss or damage during which property is ‘repaired, rebuilt, or replaced.’”);
- *Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2:20-CV-03342-JDW, 2020 WL 7024287, at *3–4 (E.D. Pa. Nov. 30, 2020) (“The Policy only pays Business Income coverage during a period of restoration. . . . These provisions make clear that there must be some sort of physical damage to the property that can be the subject of a repair, rebuilding, or replacement. The Covid-19 pandemic does not fall within that definition.”);

b. Sullivan’s pre-COVID loss-of-use cases are not the law. Even if they were, they are inapposite because none of Sullivan’s restaurants was rendered physically uninhabitable or completely unusable.

Sullivan next cites various pre-COVID-19 cases dealing with gas, smoke, pesticide, asbestos, odors, and spiders.³ It argues that those cases stand for the proposition that loss of use is sufficient to trigger coverage. *See* Opposition at 11-17. None of those cases reflect South Carolina law. In fact,

³ Sullivan also takes issue with Fireman’s Fund’s characterization of pre-COVID South Carolina authorities. Fireman’s Fund stands by its description of those authorities. They show clearly that South Carolina has never entertained anything like the far-fetched construction Sullivan urges here where direct physical loss to property need not be direct nor physical nor a loss to property.

they represent a minority view generally, and many have been explicitly rejected in the context of COVID-19. Further, none addresses the Policy language referenced above that requires direct physical loss “to property.” And, finally, unlike here, in each of those cases there was some actual, demonstrable physical intrusion on the property that led to the property becoming uninhabitable, unusable, or useless, thus necessitating either repair or replacement. *See* Opposition at 11-17 (quoting each case).

Further, even if this Court were inclined to construe the “loss to” language to mean “loss of,” “caselaw has made clear that when modified by the terms ‘direct’ and ‘physical,’ coverage is triggered [only] when there is either ‘permanent dispossession’ of the property, or where the property itself becomes unusable or uninhabitable due to a material intrusion.” *Promotional Headwear Int’l v. The Cincinnati Ins. Co.*, 20-CV-2211-JAR-GEB, 2020 WL 7078735, at *7 (D. Kan. Dec. 3, 2020) (explaining why, even if the court were to employ plaintiff’s interpretation which the court rejected, plaintiff could not prevail); *accord Long Affair Carpet & Rug, Inc. v. Liberty Mut. Ins. Co.*, SACV2001713CJCJDEX, 2020 WL 6865774, at *3 (C.D. Cal. Nov. 12, 2020) (“loss of” requires “the permanent dispossession of something”).

Indeed, the cases Sullivan cites all require permanent dispossession, uninhabitability, or uselessness. For example, as a federal court in Pennsylvania noted when it rejected the same loss-of-use arguments Sullivan makes here, *Hardinger* and similar cases require that the functionality of the property in question be “nearly eliminated or destroyed” or the “property [be] made useless or uninhabitable.” *See Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, CV 20-3198, 2020 WL 6545893, at *3 (E.D. Pa. Nov. 6, 2020). The *Handel* court noted that “no order by either the Governor or the Department of Health ever required dental offices such as plaintiff to close completely. Instead, plaintiff was able to remain open for emergency procedures.” *Id.* “Thus, plaintiff’s property remained inhabitable and usable, albeit in limited ways. Plaintiff has failed to plead plausible facts that

COVID-19 caused damage or loss in any physical way to the property so as to trigger coverage as set forth in *Hardinger*.” *Id.*

Similarly, a court in the Southern District of Alabama rejected *Oregon Shakespeare Festival*. See *Hillcrest Optical, Inc. v. Cont’l Cas. Co.*, 1:20-CV-275-JB-B, 2020 WL 6163142, at *5 (S.D. Ala. Oct. 21, 2020). The court in *Hillcrest* concluded that “loss of usability did not result from an immediate occurrence which tangibly altered its property.” *Id.* at *7. The court explained that the plaintiff “was only temporarily precluded from performing routine medical procedures while the Order was in effect.” *Id.* The court cautioned that adopting Sullivan’s position here would “potentially make an insurer liable for the negative effects of operations changes resulting from any regulation or executive decree, such as a reduction in a space’s maximum occupancy.” *Id.*; see also *Plan Check Downtown III, LLC v. Amguard Ins. Co.*, CV 20-6954-GW-SKX, 2020 WL 5742712, at *6 (C.D. Cal. Sept. 10, 2020) (adopting Sullivan’s interpretation would mean that “potentially any regulation that limits a business’s operations would trigger coverage.”).

Here, Sullivan does not even meet its own proposed loss-of-use test. None of Sullivan’s restaurants was ever rendered uninhabitable or completely unusable. To the contrary, Sullivan conceded that its restaurants were allowed to remain open for takeout and delivery. See Complaint ¶¶ 36, 37, 48, 50 (social distancing orders permitted restaurants to remain open) and Opposition at 1-2 (restaurants remained open for take-out). Sullivan has not pleaded—and cannot plead—that any of its premises were rendered unusable or uninhabitable.⁴

⁴ COVID-19 does not make property physically uninhabitable or unusable. See, e.g., *Uncork & Create LLC v. Cincinnati Ins. Co.*, 2:20-CV-00401, 2020 WL 6436948, at *5 (S.D.W. Va. Nov. 2, 2020) (“COVID-19 poses a serious risk to people gathered in proximity to one another, and the governmental orders closing certain businesses were designed to ameliorate that risk. **Property . . . is not physically damaged or rendered unusable or uninhabitable.**” (emphasis added)); *Am. Food Sys., Inc.*, No. 20-11497-RGS, Slip Op. at *9 (“Unlike an unpleasant odor, however, COVID-19 is imperceptible; it does not endure beyond a brief passage of time or a proper cleaning, let alone render the property permanently uninhabitable or unusable.”).

c. Sullivan’s few COVID-19 decisions are unpersuasive or irrelevant and have been roundly criticized and rejected.

Studio 417. As explained in Fireman’s Fund’s Motion, *Studio 417* has been rejected or distinguished by dozens of other courts, including by a judge in the **same district** in Missouri. *Zwillo V Corp. v. Lexington Ins. Co.*, No. 4:20-00339, 2020 WL 7137110, at *8 (W.D. Mo. Dec. 2, 2020) (“To the extent this Court’s ruling – finding the language in the policy plainly and unambiguously does not cover the claims – conflicts with *Studio 417*, *K.C. Hopps*, and *Blue Springs Dental Care*, this Court respectfully disagrees with those cases.”); *see also, e.g., St. Julian Wine Co., Inc. v. Cincinnati Ins. Co.*, 1:20-CV-374, 2021 WL 1049875, at *4 (W.D. Mich. Mar. 19, 2021) (“[S]ubsequent case law has not supported [the *Studio 417*] decision.”); *Uncork*, 2020 WL 6436948, at *5 (declining to follow: “[C]ourts are not required to set aside common sense”); *West Coast Hotel*, 2020 WL 6440037, at *4 n.4 (declining to follow); *T&E Chicago LLC v. The Cincinnati Insurance Co.*, 20-C-4001, 2020 WL 6801845, at *4 (N.D. Ill. Nov. 19, 2020) (same); *Catlin Dental v. The Cincinnati Indemnity Co.*, No. 20-CA-004555, 2020 WL 8173333, at *5 (Fl. Cir. Ct. Dec. 11, 2020) (“Catlin relies on [*Studio 417* and *North State Deli*] [T]he Court finds that neither of these cases is persuasive or well-reasoned.”).

Further, as the *St. Julian Wine* court correctly noted, even *Studio 417*’s flawed reasoning still requires that the property be “uninhabitable or unusable for its intended purpose.” *St. Julian Wine*, WL 1049875, at *4. And, just like Sullivan here, the plaintiff in that case was able to continue selling goods for pickup. *Id.* In light of that fact, the court noted that “the rationale in *Studio 417* does not apply.” The same, of course, is true here.

Elegant Massage. In *Elegant Massage*, the court held that a “wide spectrum” of interpretations of “direct physical loss” in Virginia case law created an ambiguity in that policy’s terms. There is no comparable spectrum of interpretations in South Carolina law. Moreover, *Elegant Massage*, like *Studio 417*, has been rejected by a number of other courts. *See, e.g., Bluegrass, LLC.*

v. State Auto. Mut. Ins. Co., 2:20-CV-00414, 2021 WL 42050, at *5 (S.D.W. Va. Jan. 5, 2021) (“I find no such spectrum of interpretation in West Virginia law and therefore there is no such ambiguity in this case. West Virginia law requires me to give the language in an insurance contract its plain and ordinary meaning.”); *LJ New Haven LLC v. AmGUARD Ins. Co.*, 3:20-CV-00751 (MPS), 2020 WL 7495622, at *7 (D. Conn. Dec. 21, 2020) (distinguishing *Elegant Massage*); *Eye Care Ctr. of New Jersey, PA v. Twin City Fire Ins. Co.*, CV2005743KMESK, 2021 WL 457890, at *4 (D.N.J. Feb. 8, 2021) (same); *Protege Rest. Partners LLC v. Sentinel Ins. Co., Ltd.*, 20-CV-03674-BLF, 2021 WL 428653, at *5 (N.D. Cal. Feb. 8, 2021) (rejecting *Elegant Massage* as “unpersuasive”). The *Elegant Massage* court is currently considering a motion to reconsider or certify for interlocutory appeal.

North State Deli. The state court in *North State Deli* entertained a construction of “direct physical loss or damage to property” that the overwhelming majority of courts have rejected, which led the court to conclude the phrase was ambiguous. Like *Studio 417*, *North State Deli* is a widely rejected outsider. See, e.g., *Catlin Dental*, 2020 WL 8173333, at *5 (“Catlin relies on [*Studio 417* and *North State Deli*] [T]he Court finds that neither of these cases is persuasive or well-reasoned.”); *Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co., Ltd.*, 20-CV-04783-SK, 2021 WL 141180, at *5 n.1 (N.D. Cal. Jan. 13, 2021) (“Due to its lack of analysis and the vast majority of courts contradicting this finding, the Court finds *North State Deli* is not persuasive.”). And, as discussed above, we know the Policy language here is unambiguous and that the *North State Deli* court failed to account for the period of restoration. Yet Sullivan nonetheless urges the court to adopt the same erroneous reasoning.

The Rest. Sullivan’s other cases relied on the flawed reasoning of *Studio 417*. They are unpersuasive and inapplicable for that reason alone. Further, they were also decided under state-court gatekeeping standards that are far less stringent than *Twombly/Iqbal*.

3. Sullivan failed to plead non-conclusory facts that, if true, give rise to coverage even under its own flawed test.

a. Sullivan’s allegations about the possible presence of the COVID-19 virus are conclusory.

Sullivan argues that it has plausibly alleged direct physical loss or damage sufficient to trigger coverage. *See* Opposition at 27-29. But Sullivan’s allegations are insufficient for the reasons explained in Fireman’s Fund’s Brief—namely that it has failed to plead facts that, if true, establish a reasonable inference that Sullivan has sustained direct physical loss or damage to property, which is a requirement under every coverage it seeks. Sullivan does not even attempt to explain how it is reasonable to draw the inference needed to connect the pleaded factual allegation that *some* people in South Carolina and Georgia have COVID-19 with the *conclusion* that virus particles were present at each of Sullivan’s restaurants or within 1,000 feet of them. Nor does it attempt to explain the basis for its conclusion that the presence of the virus causes direct physical loss or damage. Rather, Sullivan merely pleads the elements of coverage as conclusory facts.

Federal courts have rejected similar conclusory allegations about the presumed presence of the virus on an insured’s property. *See, e.g., Promotional Headwear Int’l*, 2020 WL 7078735, at *8. In *Promotional*, as here, the plaintiff cited health studies about virus transmission and the number of local infections. *Id.* The *Promotional* court explained that the same facts Sullivan pleaded here did not support the plaintiff’s conclusions.

The fact that the virus travels through the air and was present in the United States sooner than first suspected, does not support the assertion that it ‘likely’ exists on the surfaces of Plaintiff’s property.

Id. Like Sullivan, the plaintiff in *Promotional* did not plead that the virus had been detected on the premises or that any “infected individuals were ever present on Plaintiff’s property, or that employees or customers came into contact with someone who was infected before entering the property.” *Id.* The court explained that “[t]o accept Plaintiff’s conclusory assertion would be to

accept the proposition that any business located in a community with COVID-19 infections was likely contaminated with the virus. The Court declines to accept this speculative assertion, even at the motion to dismiss stage.” *Id.* As previously briefed, numerous other courts concur.⁵ *See* Brief (Dkt. 45-1) at 18-19.

b. The presence of COVID-19 is irrelevant because it does not threaten inanimate structures covered by property insurance policies.

But even if COVID-19 were present, “COVID-19 does not threaten the inanimate structures covered by property insurance policies, and its presence on surfaces can be eliminated with disinfectant. Thus, even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property.” *Uncork*, 2020 WL 6436948, at *5. *See also, e.g.,*

- *Karmel Davis and Associates, Attorneys-At-Law, LLC v. Hartford Fin. Servs. Group, Inc.*, No. 1:20-cv-02181, 2021 WL 420372, at *4 (N.D. Ga. Jan. 26, 2021) (“Here, the ‘likely’ presence of COVID-19 cannot be regarded as a physical change, as it does not and has not physically altered the insured property.”);
- *Sandy Point Dental*, 2020 WL 5630465, at *3 (“The coronavirus does not physically alter . . . property. Consequently, plaintiff has failed to plead a direct physical loss”);
- *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, CV 20-10850-NMG, 2021 WL 858378, at *3 (D. Mass. Mar. 5, 2021) (“The COVID-19 virus does not impact the structural integrity of property in the manner contemplated by the Policy and thus cannot constitute ‘direct physical loss of or damage to’ property. A virus is incapable of damaging physical structures because the virus harms human beings, not property.” (internal citations omitted)).
- *Mama Jo’s Inc. v. Sparta Ins. Co.*, 823 Fed. Appx. 868, 879 (11th Cir. 2020) (“[A]n item or structure that merely needs to be cleaned has not suffered a ‘loss’ which is both ‘direct’ and ‘physical.’”)⁶;

⁵ Sullivan also argues that it has alleged a “potential covered loss” under Loss Avoidance or Mitigation Coverage. *See* Opposition at 37. Ignoring that Sullivan failed to plead that such coverage applies, in order to have a *covered* loss—potential or otherwise—logically the loss must be a direct physical loss to property. After all, those are the only losses covered. Sullivan has no such loss.

⁶ Sullivan argues that *Mama Jo’s* is unpersuasive because it was pre-COVID and decided on summary judgment. *See* Opposition at 18. But, as numerous COVID-19 courts recognize, the matter-of-law construction of the contract in *Mama Jo’s* is perfectly adaptable to COVID-19 motions to dismiss. More to the point, Sullivan does not plead any facts that would give rise to a reasonable

Sullivan offers no meaningful rebuttal.⁷

4. COVID-19 authorities are overwhelmingly in favor of Fireman’s Fund’s position.

Since Fireman’s Fund filed its Amended Motion to Dismiss, dozens more courts have dismissed with prejudice materially identical claims to those Sullivan alleges here. A bullet-point list of newly decided cases not otherwise cited in this Reply is attached as Exhibit A.

B. No Civil Authority or Business Access coverage triggered because there is no link between the orders and Sullivan’s restaurants, and because access was not restricted.

Sullivan argues that its allegations meet the additional requirements to establish Civil Authority and Business Access coverage. They do not. The policy requires proof of a causal link between prior damage and civil authority action. *Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co.*, 440 F. Supp. 3d 520, 528 (D.S.C. 2020) (“Here, the language ‘because of’ unambiguously requires a link between the issuance of the civil authority order and the property damage.”). In other words, specific direct physical loss or damage to property within one mile of each restaurant must have *caused* the action of civil authority that prohibited access to that restaurant. *Id.* There are no well pleaded facts in Sullivan’s complaint establishing such a link, only conclusory allegations. Further, Sullivan conceded that although patrons could not enter the restaurants, staff used the premises, and the restaurants remained open for takeout and delivery. If access is allowed in part,

inference that COVID-19, like the dust in *Mama Jo’s*, cannot be cleaned with a Lysol wipe or that it physically alters inanimate objects.

⁷ Sullivan also argues that it has alleged direct physical loss or damage within 1,000 feet of its locations. *See* Opposition at 37 n.24. But it alleges such “loss or damage” only as mere conclusions. And, as explained above, COVID-19 cannot cause damage to property—whether that property belongs to Sullivan or is simply nearby. *Town Kitchen LLC v. Certain Underwriters at Lloyd’s, London*, 20-22832-CIV, 2021 WL 768273, at *5 (S.D. Fla. Feb. 26, 2021) (“Lastly, the deadly coronavirus is surely an order of magnitude more dangerous than construction debris [in *Mama Jo’s*]. However, to the extent this argument is about the danger each poses while resting on surfaces, they are both eliminated in the same way—with Lysol and a rag. At this point in the pandemic, it is widely accepted that life can go on with hand sanitizer and disinfecting wipes.”).

then access has been limited, not prohibited. *See, e.g., El Novillo Rest. v. Certain Underwriters at Lloyd's, London*, 1:20-CV-21525-UU, 2020 WL 7251362, at *7 (S.D. Fla. Dec. 7, 2020) (The orders “merely restricted access to indoor dining, while the restaurants remained open for delivery and takeout. . . . [Thus] Plaintiffs fail to allege coverage under [Civil Authority coverage].”).

C. No Communicable Disease coverage because there was no communicable disease event.

There can be no communicable disease coverage because Sullivan fails to identify a communicable disease event. A “communicable disease event” is defined as “an event in which a public health authority has ordered that *a location* be evacuated, decontaminated, or disinfected due to the outbreak of a communicable disease *at such location*.” Policy at 75 (emphasis added). Sullivan has not alleged that the relevant health authorities identified an outbreak of communicable disease in any of *its restaurants*. Further, it is undisputed that the orders on which Sullivan relies were issued by *civil* authorities, not public health authorities, *see* Policy at 85 (defining “public health authority”), were prophylactic, and apply generally to every similar business in the state regardless of whether there was any evidence of a disease outbreak at any specific location. Accordingly, they do not meet the definition of a communicable disease event. Nor has Sullivan sustained any of the limited and specifically enumerated types of damages that are reimbursable by such coverage.

D. All damages caused by a virus are excluded.

Sullivan argues that the language in the virus exclusion is limited to mortality or death caused by a virus. The Plaintiff in *Boulevard Carroll* made the same unsuccessful argument. *See Boulevard Carroll*, 2020 WL 7338081, at *2 (“In addition, the Policy clearly excludes coverage for damage, loss or expense arising from a virus.”). As Fireman’s Fund explained in that case, the exclusion states that it is “Applicable to all Coverages” and provides that “[r]egardless of how the cause of loss occurs, we will not pay for direct physical loss, damage, or expense caused by or resulting from the following causes of loss: . . . Mortality, death by natural causes, disease, sickness, any condition of

health, bacteria, or virus.” *Id.* The plain language of the exclusion clearly applies here and is patently not limited, as Sullivan claims, to livestock.

E. There is no bad faith here.

Sullivan argues that a bad-faith claim can exist absent coverage. Even if that were correct, Sullivan does not explain how its pleaded allegations could possibly arise to bad faith here. All it alleges is that Fireman’s Fund denied coverage to a claim that is clearly not covered based on a plain-meaning construction of the policy. Viewed even in the light most favorable to Sullivan, those allegations do not allege bad faith. *See Episcopal Church in South Carolina v. Church Ins. Co of Vermont*, 993 F. Supp. 2d 581, 593 (D.S.C. 2014) (“[I]f there is an objectively reasonable ground for contesting an insurance claim, there is no bad faith in the denial of it.”).

F. AGR US did not issue the Policy. That is self-evident.

As already explained, the Policy clearly defines the “Issuer” as Fireman’s Fund. Fireman’s Fund has the same address as AGR US, so it is no surprise that the Policy instructions questions to be sent to “the company issuing the policy listed on your Declarations page” care of AGR US. *See* Opposition at 39. That company is Fireman’s Fund. Further, earlier this month, Judge Hendricks in the Charleston Division dismissed two insurance defendants for lack of Article III standing on materially similar facts. *Black Magic, LLC v. Hartford Fin. Servs. Group, Inc.*, No. 2:20-cv-1743-BHH, Slip Op. at *8 (D.S.C. Mar. 12, 2021) (copy attached as Exhibit E). As explained, “a plaintiff cannot sue insurers with which it has no contract.” *Id.* Similarly, Sullivan is unable to “fairly trace” the injury it alleges here to AGR US to have standing. *Id.* Accordingly, AGR US must be dismissed.

III. CONCLUSION

For the reasons detailed above, Defendants are entitled to dismissal on each of Sullivan’s claims. Fireman’s Fund’s initial motion to dismiss was filed in July 2020. Since then, there have been more than 165 COVID-19 coverage decisions. If Sullivan had wished to replead, it had ample

opportunity. At this stage, no amount of repleading could establish the predicate requirements for coverage to attach or for bad faith to emerge. Accordingly, Fireman's Fund and AGRUS respectfully request that the Court afford them all relief to which they show themselves entitled.

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ADDENDUM 1

BUSINESS INSURANCE

US commercial property pricing up 22% in Q2

Posted On: Aug. 10, 2020 12:11 PM CST

Matthew Lerner

Commercial property insurance average pricing in the U.S. increased 22% in the second quarter of 2020, according to the Global Insurance Market Index released Monday by Marsh LLC.

Commercial casualty insurance pricing in the U.S. increased 8% in the second quarter of 2020 as commercial excess liability insurance pricing increased 21%. Commercial auto insurance pricing increased 10% during the second quarter, while worker's compensation pricing decreased 2%, Marsh data showed.



Commercial financial and professional liability insurance average rates in the U.S. increased 30%, as pricing in the directors and officers market was up 59%, with more than 90% of clients experiencing an increase, Marsh said.

Commercial employment practices liability insurance average pricing rose 8%, and cyber insurance average pricing rose 7%, Marsh said.

The report Monday also noted a “trend toward higher retentions and reduced limits.”

Global average commercial insurance prices increased 19% in the second quarter of 2020.

The increase is the largest since the index was launched in 2012, Marsh said. Global average commercial insurance prices saw year-over-year increases of 14% in the first quarter of 2020 and 11% in the fourth quarter of 2019, Marsh said.

Global property insurance pricing rose 19% year over year in the second quarter after rising 15% in the first quarter, data from the report showed.

Global casualty pricing increased 7% on average in the second quarter of 2020 after rising 5% in the first quarter, the data showed.

Global financial and professional lines commercial insurance pricing jumped 37% in the second quarter of 2020 after rising 26% in the first quarter.

Geographically, composite pricing increased across all regions for the seventh consecutive quarter, Marsh said. The increases were led by the U.K. and Pacific regions at 31% each, followed by the U.S. at 18%, Continental Europe at 15%, Asia at 9%, and Latin America and the Caribbean at 8%, report data showed.

Pricing increases are expected for the remainder of the year, according to Dean Klisura, president, global placement and advisory at Marsh. “As insurers continue to work through claims in property and D&O, and with the full cost of COVID-19 still developing, upward pressure on pricing is anticipated for the balance of 2020,” he said in the statement.

More insurance and risk management news on the coronavirus crisis [here](#).



BUSINESS INSURANCE

Commercial rate hikes near double digits in Q2: Willis

Posted On: Sep. 8, 2020 2:07 PM CST

Claire Wilkinson

U.S. commercial insurance rate increases were close to double digits in the second quarter with excess/umbrella and directors and officers liability seeing the biggest spike, according to Willis Towers Watson PLC's commercial lines insurance pricing survey released Monday.

The aggregate increase for all lines reported by insurers was just under 10%, up from 3% in the prior-year second quarter, the survey found.

Specialty lines increases were well into the double digits, driven by D&O and medical professional liability lines, Willis Towers Watson said.

By line of business, excess/umbrella and D&O liability lines saw a 20% rate increase for the second consecutive quarter.

Rate increases for commercial auto were near or above double digits and property rate increases were well into the double digits, Willis Towers Watson said.

Only workers compensation saw rate decreases, though they continue to slowly lessen in magnitude, the survey found.

Increases also varied by size, with large accounts seeing increases well above double digits, mid-market accounts at double digit, and small commercial rising by mid-single digits, Willis Towers Watson said.

"The combination of social inflation, civil unrest, the economy and uncertainty around COVID-19 has created an increasingly cautious industry," Jeffrey Carlson, director, of the insurance consulting and technology division at Willis Towers Watson.

More insurance and risk management news on the coronavirus crisis [here](#).





BUSINESS INSURANCE

Most commercial lines see rate hikes in August: Ivans

Posted On: Sep. 8, 2020 1:26 PM CST

Matthew Lerner

Most lines of commercial insurance saw year-over-year increases in average premium renewal rates during August except workers compensation, which saw a negative change in premium, according to insurance exchange Ivans Insurance Services, a division of Tampa-based Applied Systems Inc.

General liability, commercial property, business owners policy, umbrella and workers compensations all saw positive month-over-month renewal rate change in August while commercial auto was down.



By line of business, premium renewal rate changes for August 2020 included business owners policies rising 5.00% in August, up from 4.38%; general liability increasing 3.61%, up from 3.45% last month; commercial property rising 5.48%, up from 5.42%; umbrella increasing 3.27%, up from 3.23%; workers compensation falling 2.51%, up from a 2.66% decrease; and commercial auto's increase slipped to 3.2%, compared with 5.01% last month.

“As the pandemic progresses, we continue to see a hardening in the market across all lines of business, but August showed a noticeable downshift in commercial auto as compared to July and will be a line of business to watch closely,” Brian Wood, vice president of data products group for Ivans, said in the statement, adding “... data shows that rates are likely to stay up year over year and offset other negative impacts on the industry.”

Ivans Index analyzes more than 120 million data transactions, from more than 32,000 agencies and 400 insurers and MGAs.

BUSINESS INSURANCE

Commercial insurance rates up across the board in Q3: Report

Posted On: Oct. 5, 2020 1:43 PM CST

Claire Wilkinson

Commercial insurance buyers in the U.S. were hit with rate increases on every line of coverage and industry class in the third quarter, with directors and officers and umbrella liability seeing the largest rate hikes, online insurance exchange MarketScout Corp. said Monday.

D&O rates increased by 11.5 percent, followed by umbrella and excess liability up 8.5 percent in a quarter in which the average rate increase was 6.25%, MarketScout said in a statement. The average rate increase in the [second quarter](#) was 4.8%.



Workers compensation rates rose by 0.5% — the first increase this line of business has seen in over five years.

“We expect the fourth quarter of 2020 will reflect continued aggressive rate increases in property, D&O and umbrella/excess liability coverages,” MarketScout CEO Richard Kerr said in the statement.

Commercial auto rates increased by 8% in the third quarter, while professional liability increased by 7.5% and commercial property rates were up 7%.

All other lines showed smaller increases, according to Dallas-based MarketScout.

By industry class, transportation and habitation saw the highest average rate increases in the quarter at 10.5% and 8%, respectively.

Large accounts, those with \$250,001 to \$1 million in premium, and medium accounts, from \$25,001 up to \$250,000 in premium, saw the largest rate hikes, up 7%.

BUSINESS INSURANCE

Most policyholders see rates hikes across multiple lines: Report

Posted On: Oct. 26, 2020 1:13 PM CST

Matthew Lerner

Uncertainty surrounding the COVID-19 pandemic and its economic fallout has driven the U.S. commercial insurance market into a “recalibration,” Arthur J. Gallagher & Co. said Monday in a fall insurance market update.

Most major lines of coverage except for workers compensation saw second-quarter increases and even comp rates are beginning to turn, the report said.

According to the report, all Gallagher clients buying directors and officers liability insurance coverage saw increases in the second quarter.

The sector “has been distressed for several quarters now, as average claims have increased substantially in recent years,” the report said.

The market for privately held companies, however, is not nearly as hard as that for the publicly traded.

Insurers are often reducing capacity for D&O risks and some have a moratorium on new business, Gallagher said.

According to the report, 89% of Gallagher clients saw rate increases for property insurance coverage, the highest number recorded since the early 2000s.

“The pace of change in the property marketplace continues to accelerate beyond most other lines of coverage,” the report said.

Large national property clients, particularly those with total insurable values of more than \$150 million, saw average rate increases of 22%. Changes in coverage terms and conditions in the property market have included increased deductibles and lower sub-limits, the report said.

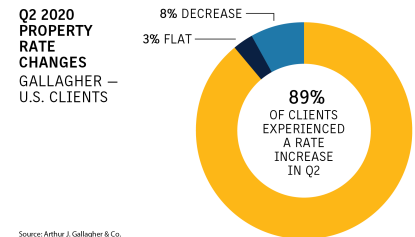
78% of Gallagher clients saw increases for auto liability coverage. Rates continued to increase in the second quarter despite a drop in claims frequency due to the pandemic. Average state auto accident frequency dropped 51% in April, according to the report, but by July were down only 11% as shutdown orders were lifted.

In addition, loss costs are rising as new technologies make vehicles more expensive to repair, the report said.

In umbrella/excess liability, 76% of Gallagher clients experienced a rate increase in the second quarter. “Second-quarter rates continued to climb to their highest levels in recent years,” the report said.

Insurers are also restricting the amount of limit they are willing to offer or repositioning their capacity at a higher level. For example, insurers that have historically offered \$25 million lead umbrella policies are limiting their lead positions to \$10 million or less, said the broker.

For general liability coverage, 65% of clients saw a second-quarter rate increase.



“The frequency of large judgments, increases in litigation financing and an empowered plaintiff bar continue to challenge our industry,” Gallagher said, adding that the median average verdict for the top 50 cases in the U.S. has doubled in the past four years.

Insurers are beginning to introduce or tighten communicable disease exclusions in response to COVID-19, the report said.

For cyber liability insurance, 47% of Gallagher clients had a rate increase in the second quarter, the report said.

“Increases in the frequency and severity of ransomware claims continues to drive the hardening of the cyber market,” Gallagher said.

In the second quarter, 56% of clients experienced workers comp rate decreases, however, July showed the first positive rate change in any single month since 2014, the report said.

BUSINESS INSURANCE

Chubb reports gains in Q3 profit, net premium written

Posted On: Oct. 28, 2020 10:36 AM CST

Claire Wilkinson

Chubb Ltd. benefited from a continuously improving commercial property/casualty pricing environment in the third quarter, Chairman and CEO Evan G. Greenberg told analysts Wednesday after the insurer reported higher profit and growth in net premium written.

Rate increases averaged 15% in North America commercial property/casualty and 16% in the insurer's international general insurance operations.

Chubb reported net income of \$1.19 billion, up 9.4% from \$1.09 billion in the same period last year, despite the pandemic and higher catastrophe losses, the insurer said in a statement late Tuesday.

"The quarter was marked by continued insurance market hardening, an economy struggling to reopen globally and a very active period for catastrophes," Mr. Greenberg said during the call.

Net catastrophe losses were \$797 million after tax, compared with \$191 million in the prior-year period, and were mainly due to severe weather-related events globally and the California wildfires, Chubb said.

Its property/casualty combined ratio deteriorated to 95.2% from 90.2% in the prior-year third quarter, Chubb said.

However, there were "no changes" to previously reported aggregate COVID-19 losses from June 30, the insurer said.

Chubb tracked more than 40 separate catastrophe events globally in the third quarter, a "very high frequency," Mr. Greenberg said.

"Where we can get paid adequately for volatility and uncertainty we will maintain and even grow our exposures; where we cannot we shrink. And, in either case, we shape our portfolio according to our risk appetite," he said.

Net premiums written in the third quarter were \$9.08 billion, up 5.3% from the prior-year period, while property/casualty net premiums written were \$8.47 billion, up 5.7%, Chubb said.

North America commercial property/casualty net premiums written grew over 11% in the quarter, even including a 5-point reduction in growth due to reduced exposures from the decline in economic activity, Mr. Greenberg said.

Chubb continued to experience a strong pricing environment in the quarter.

In North American commercial property/casualty, major accounts, risk management and casualty rates were up 6.5%, Mr. Greenberg said. General casualty was up 31%, property rates were up 22% and financial lines were up about 23%, he said.



EVAN GREENBERG

In excess and surplus wholesale business, property rates were up 21%, casualty up almost 32% and financial lines up about 25.5%, he said.

In Chubb's middle-market U.S. business, property rates were up 16%, casualty was up over 11% — excluding workers compensation, which was down 1.2% — and financial lines rates were up over 17%, he said.

In Chubb's international general insurance operations rates were up 15% in international retail and 32% in London wholesale, he said.

“We are in a hard market or firming market for commercial property/casualty depending on where you are in the world, cohort of business, and it is spreading,” Mr. Greenberg said.

Mr. Greenberg declined to comment on mergers and acquisitions in response to an analyst's question during the call citing American International Group Inc.'s [recently announced](#) decision to spin off its life insurance business.

“I'm not commenting on M&A and Chubb's appetite and whether we're entertaining this or that,” Mr. Greenberg said.

For the nine months ended Sept. 30, Chubb's net income fell 66% to \$1.12 billion, compared with \$3.28 billion for the same period last year. The property/casualty combined ratio was 98.9%, compared with 89.9% for the first nine months of 2019.

BUSINESS INSURANCE

CNA reports higher net income despite cat losses

Posted On: Nov. 2, 2020 2:05 PM CST

Angela Childers

CNA Financial Corp. on Monday reported third-quarter net income of \$213 million, up from \$107 million for the same period in 2019, despite sustaining \$160 million in pre-tax net catastrophe losses.

Chicago-based CNA's property/casualty combined ratio rose to 100.9% in the quarter, compared with 97.6% in the third quarter of 2019. This year's third-quarter ratio included 8.7 points of catastrophic loss from Hurricanes Laura, Sally and Isaias and the Midwest derecho, CNA said in a statement.



DINO ROBUSTO

CNA reported net written P/C premiums of \$1.82 billion for the quarter, up 7% from the year-earlier period due primarily to non-catastrophe underwriting results and favorable net prior year loss reserve development. The insurer's commercial line reported a 4% improvement to \$804 million, and specialty saw an increase of 9% to \$798 million due to strong rate and higher new business.

"We expected only a relatively modest impact from loss frequency benefit because a substantial portion of our portfolio consists of insureds in essential industries such as construction, health care and manufacturing that were not subject to shelter-in-place restrictions," CNA Chairman and CEO Dino Robusto said in an earnings call. "And we continue to assume a potential for higher severity in casualty lines like auto and general liability as the economy is restored over time, so we believe it's still early to react too favorably to the short-term trends."

The insurer's expense ratio improved to 31.8% in the quarter, compared with 32.5% in the year-earlier period.

"The ability for us to work in this remote environment does generate an ability for us to say, going forward, we think there's probably going to be less overall travel and expenses," Mr. Robusto said, but he noted that travel and expenses are not a large component of its underwriting expense ratio.

Mr. Robusto said the insurer continues to feel the impact of social inflation, particularly in its aging services and auto portfolios.

"It's clear that, as the market continues to harden, we will get a lot of benefits" in terms and conditions beyond pricing, with more restrictive policy terms, higher deductibles and added exclusions.

CNA has experienced losses related to medical malpractice in its aging services line, according to its Q10 filing, though it received fewer claims in the third quarter than in the second, Mr. Robusto said.

BUSINESS INSURANCE

Insurance prices increased sharply in third quarter: Marsh

Posted On: Nov. 5, 2020 10:09 AM CST

Claire Wilkinson

U.S. commercial insurance prices increased 18% in the third quarter, driven mainly by higher rates for property exposures and financial and professional lines, according to a report released by Marsh LLC Thursday.

Commercial property rates in the U.S. increased by 24% in the third quarter, which is the largest reported increase in eight years, Marsh said.

Some 85% of renewing clients saw an increase, and large clients with more than \$1 million in premium experienced property price increases of 35% on average, versus 20% for smaller clients, Marsh said in its Global Insurance Market Index report.

Financial and professional liability insurance prices in the U.S. increased 28%, driven by directors and officers liability rate hikes of more than 50% for public companies, the report said.

More than 90% of Marsh's U.S. public company D&O clients saw an increase and pricing rose even as many clients increased retentions and reduced limits.

Casualty pricing in the U.S. increased 8% in the third quarter with large and complex umbrella excess risks seeing increases in the range of 30% to 60% and sometimes higher, the report said.

Commercial auto insurance pricing increased 7% in the third quarter, while workers compensation pricing was down 3%.

Employment practices liability insurance average pricing was up 10% in the quarter, with increases tied to COVID-19 issues, and cyber pricing increased 11%, the largest increase since 2016, Marsh said. More than 15% of cyber clients increased limits.

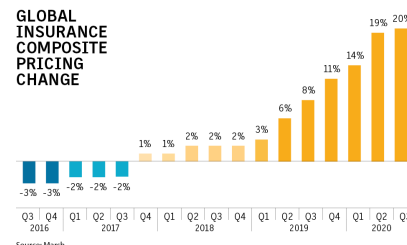
Ongoing pricing challenges in the marketplace led many Marsh clients to adjust programs by increasing retentions, reducing limits, and/or modifying policy terms, according to the report.

Global commercial insurance prices increased 20% on average in the third quarter, compared with 19% in the second quarter and 14% in the first quarter. This was the largest increase since the index was launched in 2012, Marsh said.

Global property insurance pricing was up 21% while global financial and professional lines were up 40% on average, both greater than the increases reported in the second quarter, Marsh said.

Casualty pricing was up 6% on average, a slight decline from the 7% increase reported for the prior quarter.

All regions except Latin America reported double-digit pricing increases, led by the United Kingdom at 34%, Pacific at 33% and then the U.S. at 18%.



International public company directors and officers coverages continued to see large increases, with pricing in the U.K. and Australia up more than 100%, Marsh said.

“Based on current conditions, we expect the pricing environment to remain challenging in most regions and across most products, with the firming market extending through the first half of 2021,” Marsh said in the report.

More insurance and risk management news on the coronavirus crisis [here](#).

BUSINESS INSURANCE

Some commercial rate changes rise in October: Ivans

Posted On: Nov. 10, 2020 12:14 PM CST

Matthew Lerner

October premium rate changes rose in general liability, commercial property and umbrella while rate changes for commercial auto, business owner's policy and workers compensation declined, according to insurance exchange Ivans Insurance Services, a division of Tampa-based Applied Systems Inc.



In October, premium renewal rates for commercial property rose 5.52%, an increase from the 5.01% rise in September, Ivans said Tuesday.

October premium renewal rates for umbrella coverage rose 3.78%, an increase from 2.78% in September. Renewal rates for general liability rose 3.38% in October, up from September's 3.25%, Ivans data showed.

Premium renewal rates in October 2020 for commercial auto rose 4.43%, a decline from September's 5.08% increase.

October premium renewal rates for business owner's policy rose 4.39%, less than the 4.89% at the end of September. Renewal rates for workers compensation slipped 2.78%, greater than September's 2.07% decline.

Kathy Hrach, vice president of product management for Ivans, said the rate movements showed "some slight softening of premium renewal averages as compared to months prior."

Ivans Index analyzes more than 120 million data transactions, from more than 32,000 agencies and 400 insurers and managing general agents.



Commercial property buyers face risk selection and higher rates at renewal, warns FM Global

By Sarah Jolly on November 11, 2020



Credit: iStock/marchmeena29

Commercial property insurance buyers facing higher prices at renewals can help themselves by strengthening risk mitigation and increasing resilience to potential losses, said FM Global in advice to buyers as the market toughens up in response to Covid-19.

“Appropriate risk management could affect rates offered by insurers,” said James Galloway, executive vice-president at FM Global, with insurers expected to push through further rate increases to recover profitability. A more disciplined insurance market has also become more selective on risk.

“In light of the pandemic, the value of investing in risk mitigation should be more apparent than ever. Resilient businesses are more likely to prevent property loss from occurring in the first place and recover more swiftly should a loss occur,” Mr Galloway said, adding that key sites out of operation because of fire or flood will weigh on a firm’s bottom line.

“Resilience is a choice. Review your risk improvement strategy,” FM Global said.

Buyers nearing renewals on commercial insurance policies should start the process early, FM Global added, noting that buyers should also manage the expectations of the board and provide accurate risk data to underwriters, particularly values reporting, to avoid underwriters applying worst-case scenarios or declining the risk.

◆ COVID-19



BUSINESS INSURANCE

Commercial prices rise in Q3: CIAB

Posted On: Nov. 16, 2020 1:44 PM CST

Judy Greenwald

Commercial insurance rates continued to rise, with an 11.7% average hike across all lines, according to the pricing survey released by the Council of Insurance Agents & Brokers on Monday.

The third-quarter increase compared with 10.8% in the [second quarter](#) and a 9.3% hike in the first quarter.

For the third quarter, the impact was greatest for large and medium-sized accounts, which recorded increases of 15.3% and 12.7%, respectively, according to the report. Small accounts reported an average 7.1% increase, compared with the 7.3% hike reported in the second quarter.

All lines of business reported increases, with umbrella posting the biggest increases, at 22.9%, compared with a 20% increase in the second quarter.

Directors and officers liability insurance had the second-highest increase at 16.1%, down from 16.8% in the second quarter. It was followed by commercial property, with a 14.2% increase, compared with a 13.3% increase in the second quarter.

Among other lines of business, employment practices liability rates rose 10.1%, compared with 9.4% in the second quarter; business interruption increased 9.6%, down slightly from 9.7% in the second quarter; construction increased 7.9%, compared with 6.8% in the second quarter; and cyber liability rates increased 7.7%, compared with a 6.5% second-quarter increase.



BUSINESS INSURANCE

Continued rate increases expected: Willis

Posted On: Nov. 19, 2020 1:04 PM CST

Judy Greenwald

Hardening market conditions will continue throughout 2021, although property increases will begin to moderate by midyear, and umbrella and directors and officers liability rates will become more predictable by then, although rates will continue to climb, Willis Towers Watson PLC says in a report issued Thursday.

Capacity from new ventures now coming online will have some moderating impact on these lines by mid-2021, especially D&O, says Joseph C. Peiser, Willis' global head of broking in the introduction to the report, Insurance Marketplace Realities Overview, 2021.

Buyers can expect increases in all lines except kidnap and ransom, where exposures have abated because of pandemic-related travel restrictions, according to the report.

Among the report's predictions:

- Property rates for non-challenged occupancies will increase 15% to 25% next year, up from 10% to 20% in the spring.
- General liability rates will increase 7.5% to 15%, from 2.5% to 7.5%.
- Umbrella/excess rates will increase from 30% for low/moderate hazard umbrella to 150% for high hazard excess.
- Workers compensation rate decreases are flattening, with slight increases in response to high severity/excess losses.
- Auto rates will increase 8% to 15%, from 6% to 12%.
- D&O rates will increase up to 70%.
- Cyber insurance rates will increase 10% to 30%, up from 10% to 15%.



BUSINESS INSURANCE.

SCOR CEO sees double-digit reinsurance rate rises

Posted On: Nov. 25, 2020 9:29 AM CST



REUTERS

Thomson Reuters

(Reuters) — Reinsurance rates are likely to rise in the double-digit percentage point range at key contract renewals in January, Denis Kessler, chairman and CEO of French reinsurer SCOR, said Wednesday.

SCOR, one of the world's largest reinsurers, has faced large claims due to the coronavirus pandemic as well as losses from hurricanes in the United States. That is expected to allow reinsurers to charge their customers more.

Kessler, speaking at the Reuters Events Future of Insurance Europe conference, said that the pandemic, a series of mid-sized storms during 2020, consecutive years of high losses, and low interest rates all speak in favor of higher prices.

"All conditions are met today for rate increases," he said.

Mr. Kessler said the cost of the pandemic was mostly already accounted for in the reinsurer's previously published loss estimates. If there was a third wave the company would revise its assumptions, he added.

More insurance and risk management news on the coronavirus crisis [here](#).



DENIS KESSLER/ REUTERS

BUSINESS INSURANCE

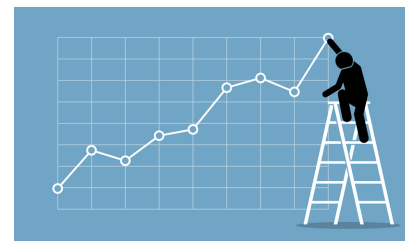
Q3 commercial rate increases close to double digits: Willis

Posted On: Dec. 7, 2020 1:53 PM CST

Claire Wilkinson

U.S. commercial insurance third-quarter rate increases were close to double digits for the second consecutive quarter, according to Willis Towers Watson PLC's commercial lines insurance pricing survey released Monday.

The aggregate increase for all lines reported by insurers was just under 10%, up from 5% in the prior-year third quarter, the survey found. The second-quarter aggregate increase was also just under 10%.



Excess/umbrella and directors and officers liability showed the biggest third-quarter spike, as both coverages saw prices accelerate significantly over the previous five quarters, Willis Towers Watson said.

Specialty lines price increases in aggregate were well into double digits, driven by D&O and medical professional liability lines, Willis Towers Watson said.

Commercial auto also saw price increases near or above double digits for the 12th consecutive quarter, while property rate increases were near or above double digits for the sixth consecutive quarter.

Workers compensation continued to be the outlier with modest price decreases, though these continue to slowly lessen in magnitude, Willis Towers Watson said.

Increases also varied by account size, with large accounts seeing increases well into double digits, mid-market accounts near double digits and more muted increases for small commercial.

“While commercial insurance prices continued to rise this quarter at a significant rate, CLIPS data indicate the acceleration in prices observed in recent quarters stabilized somewhat,” Yi Jing, director, insurance consulting and technology at Willis Towers Watson, said in a statement.

“The price change level holding steady occurs despite the tethering impact of past workers compensation price reductions waning.”

BUSINESS INSURANCE

Premium renewal rates rise across major commercial lines: Ivans

Posted On: Dec. 9, 2020 10:45 AM CST

Matthew Lerner

Premium renewal rates increased month over month in November for business owners policy, general liability, commercial property and workers compensation coverages, while rates decreased for commercial auto and umbrella, according to a report Wednesday from Ivans Insurance Services, a division of Tampa, Florida-based Applied Systems Inc.



Commercial property renewal rates rose 5.66% in November, up from 5.52% in October. Business owners policy rates rose 4.68%, up from 4.39% in October, according to Ivans.

General liability rates rose 3.43% in November, up from 3.38% in October. Workers compensation rates declined by 1.90%, compared with a decline of 2.78% in October.

Commercial auto rates rose 3.93%, compared with 4.43% the previous month. Umbrella rates increased 2.82% after rising 3.78% in October.

“The Ivans Index continues to show hardening rates across major lines of business, but with slight softening of rates relative to months prior for commercial auto and umbrella,” Kathy Hrach, vice president of product management at Ivans, said in a statement.

Ivans tracks more than 120 million data transactions and includes more than 32,000 agencies and 400 insurers and managing general agents in its monthly analysis.

BUSINESS INSURANCE

Insurance rates increasing, capacity tightens: USI

Posted On: Dec. 14, 2020 10:44 AM CST

Matthew Lerner

Commercial insurance markets are seeing rate increases, capacity reductions and tighter underwriter scrutiny as an already hardening market reacts to the impacts of COVID-19-related losses, according to a report Monday from USI Insurance Services LLC.



Most lines, therefore, are expected to see continuing rate increases in the fourth quarter.

Property lines are seeing rate increases from 5% to 30% or more depending on loss history and catastrophe exposure.

Primary general casualty and product liability are up 10% to 20% while umbrella and excess liability are up as much as 25% for middle market accounts but as much as 75% for large accounts.

Primary auto liability for fleets over 200 are up 10% to 20%. Auto liability for smaller fleets is flat after seeing double-digit increases in the first half of 2020.

Public company directors and officers coverage can be up as much as 100% while private company and not-for-profit D&O is seeing smaller rises of 10 to 60%.

Executive and professional risk markets are seeing increases of 5% to 20%. Workers compensation coverage ranges from flat to down 10%, USI said.

A variety of factors is contributing to continued upward rate pressure, USI said.

“Continued uncertainty from potential COVID-19 related cases, higher than normal judgments, developing catastrophe losses, and additional factors have insurers raising rates, lowering capacity, limiting or transferring risk, and taking a harder look at risk profile,” USI said. “Even insureds with a lower risk profile are facing much closer underwriter scrutiny as well as higher rates and retentions.”

The rising market is forecast to extend into next year, USI said. “As the full extent of claims related to COVID-19 and other events remain to be seen, these market trends will continue through Q4 and likely well into 2021.”

More insurance and risk management news on the coronavirus crisis [here](#).

BUSINESS INSURANCE

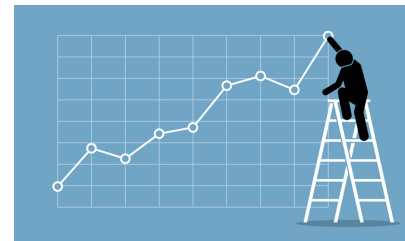
Alera predicts 2021 rate increases across several commercial lines

Posted On: Dec. 16, 2020 2:39 PM CST

Matthew Lerner

Alera Group Inc. forecasts rate increases across several lines of commercial insurance in its Property & Casualty 2021 Market Outlook released Wednesday.

The broker said that in addition to broadly higher rates, “insurance buyers can expect to see increases in coverage exclusions along with higher retentions and deductibles.” In addition, renewals will likely take longer as insurers ask more questions and require additional data.



Among major lines, property coverage rates are forecast to rise 13.6% in 2021. Underwriters will prefer risks seen as having lower than average catastrophe exposure while those seen as “higher risk” should expect larger than average price increases as well as lower limits, Alera said.

General liability is projected to rise 11.3% for “virtually all businesses,” Alera said. Tighter underwriting standards are likely and some classes of business, including contractors, municipalities, public utilities, manufacturers of “difficult products,” chemicals and habitational real estate, may be offered less capacity.

Directors and officers liability coverage is forecast to rise 13.2%, although rates could increase as high as 70% for some classes. Substantial losses and the threat of increasing numbers of lawsuits resulting from COVID-19 are “exacerbating an already difficult market for buyers and underwriters,” Alera said.

Professional liability is expected to increase 11.7%, but this varies based on sectors, account size and individual risks. Insurers are said to be interested in avoiding large and small organizations and are focusing instead on the middle market.

Commercial auto is forecast to rise 14.2% as fleet rates are expected to increase between 10% and 20%, with large fleets facing greater increases, higher deductibles and lower limits.

Cyber liability coverage is projected to rise 10%, but heavily exposed industries should expect to see higher than 10% rate increases. Insurers will be tightening up policy wordings and being cautious about how much capacity they allocate to any single account.

Among the largest increases is umbrella and excess coverage, forecast to increase 16.6% Industrywide. Increases may range between 10% and 150%, “depending upon underwriters’ risk perception” and limits purchased. Capacity is being “significantly” reduced, often to \$10 million, and with much higher attachment points.

In addition, infectious and communicable disease exclusions will be added to many new and renewal excess and umbrella contracts, the report said.

The broker forecast a challenging year for insurance buyers in 2021.

“The 2021 insurance marketplace promises to be a demanding one for insurance buyers. Few insurance programs will renew ‘as is.’ Most organizations will pay more for insurance. Some will have difficulty getting

the terms and desired limits,” Alera said in the report.

BUSINESS INSURANCE

Commercial insurance rates set to continue rising in 2021

Posted On: Dec. 22, 2020 7:00 AM CST

Matthew Lerner

Property/casualty insurance buyers, who have endured price hikes for more than a year in many cases, will likely see rate increases extending into 2021, with some lines continuing to see double-digit rate hikes, experts say.

The size of the increases could be blunted, however, as the hardening market draws new capital and insurers looking to take advantage of the rising tide.

A [recent survey](#) by brokerage Alera Group Inc., which included insurers, wholesalers and Alera's agent and broker affiliates, showed an average forecasted rate increase across all lines of 11.6% next year, with increases ranging from a high of 17.5% for medical malpractice insurance to a low of 4.7% for workers compensation.

The survey was conducted in the third quarter, said Mark Englert, national property and casualty leader at Alera in New York. He said the increases are driven by insurers' attempts to return lines to profitability.

"When you start to go by line of business, you can see why some lines are more aggressive in the request for rate," Mr. Englert said.

Workers comp, for example, has been profitable for insurers since 2012, and showed an underwriting profit from 2015 to 2019. By contrast, commercial auto was unprofitable from 2015 to 2019 and generated underwriting losses from 2012 through 2019.

In addition, low interest rates have restricted insurers' ability to make up for underwriting losses with investment income. "Investment income is challenged, so what you are seeing in the carrier community is a real need to drive strong underwriting results," Mr. Englert said.

Insurers' "books were not profitable," said Renee Dube, vice president, national property and casualty practice, in Valhalla, New York, for USI Insurance Services LLC.

In its [recently published](#) outlook for the commercial property/casualty market for the fourth quarter of this year and the first half of 2021, USI forecasts that at one end of the pricing spectrum workers comp could rise up to 5%, while at the other end public company directors and officers insurance liability rates may see increases of up to 100%.

The hard market "will probably last for some time," said J. Paul Newsome Jr., Chicago-based managing director at investment brokerage Piper Sandler Cos.

Mr. Newsome noted, however, that higher rates and premiums are attracting fresh capital, which could help slow rate increases. "Private equity has been quick to try to build new companies, and this might reduce the length of the hard market," he said.



“Challenging conditions continue to exist across most coverage lines in the U.S., but especially in the umbrella/excess casualty and directors and officers liability market,” said Christopher Lang, global placement leader, U.S. and Canada, for Marsh LLC in New York, in a statement emailed to *Business Insurance*. “We expect these conditions to persist into 2021.”

Next year should see “persistent rate increases and solid core underwriting margin expansion for most commercial, especially specialty, insurance lines and for reinsurance,” according to a Dec. 18 report from Meyer Shields, Baltimore-based managing director at Keefe, Bruyette & Woods Inc.

“Heightened property and casualty loss cost inflation, pressured investment yields, and rising reinsurance costs should support enduring rate increases for most commercial lines,” he said in the report.

BUSINESS INSURANCE

Commercial insurance rate hikes accelerate

Posted On: Jan. 5, 2021 10:39 AM CST

Gavin Souter

U.S. commercial insurance rates increased 7.1% in the fourth quarter of 2020, continuing an upward trend that started in 2017, according to a report Monday from MarketScout Corp.

The fourth-quarter increase follows an average 6.3% increase in [the third quarter](#), the Dallas-based specialty intermediary and insurance exchange said.

The biggest fourth-quarter increase was in the umbrella/excess liability market where rates increased 12.7% on average. Other sectors seeing large increases included directors and officers liability, 11.7%; professional liability, 10.3%; commercial property, 9%; and commercial auto, 8.3%, the report said.

Employment practices liability rates increased 6.7%, general liability rates rose 6%, and workers compensation rates were up 0.7%.

Broken down by size of account, jumbo accounts, in which policyholders pay more than \$1 million in annual premium, saw average rate increases of 8%; large accounts, those paying \$250,001 to \$1 million, were up 9.3%; medium accounts, \$25,001 to \$250,000, were up 8.3%; and small accounts, up to \$25,000, were up 6.7%.

By industry class, transportation risks saw the biggest quarterly rate increases, up 11.5%, followed by habitational, 9.5%; and contracting, 7.25%.



BUSINESS INSURANCE

Global prices rise 22% in Q4: Marsh

Posted On: Feb. 4, 2021 12:40 PM CST

Matthew Lerner

Global commercial insurance prices rose 22% in the fourth quarter of 2020, the largest year-over-year increase in the Marsh Global Insurance Market Index since its inception in 2012, the broker said Thursday.



It was also the 13th consecutive quarter of price increases.

The U.K. and Pacific drove the global composite increase, with composite pricing increases of 44% and 35%, respectively, up from 34% and 33%. The U.S. saw a 17% increase, down a point from the third quarter's 18%, data showed.

Latin America saw a 9% increase, matching the third quarter, and Asia an 11% increase, off one point from 12% in the third quarter.

Average composite pricing increased in all regions for the ninth consecutive quarter.

By line, global property rose 20% in the fourth quarter, off from 21% in the third quarter. Global casualty increased 7%, up from 6% in the third quarter, and global financial and professional lines insurance was up 47%, from 40% in the third quarter.

Despite the overall increases, hikes in some specific lines and geographies have begun to slow, Marsh said, as new capacity blunts further pricing hikes.

In the U.S., excess liability pricing rose 28%, with 75% of clients experiencing an increase. Workers compensation, however, was off 4%.

“Pricing increases may be starting to plateau for certain insurance products in certain geographies, for example, directors and officers and property in the U.S., due in part to new capacity entering the market.”



BUSINESS INSURANCE

Continued price increases expected in 2021: Aon

Posted On: Feb. 18, 2021 12:14 PM CST

Claire Wilkinson

Insurance pricing is up across most lines and classes globally and the upward pricing trend will continue well into 2021, Aon PLC said in a report Thursday.

COVID-19 and the economic downturn have heightened underwriting scrutiny and risk aversion from insurers, Aon said in the report.

In North America, increased frequency of high severity claims from mass tort litigation, a severe storm season and the pandemic are putting strain on pricing, limits, deductibles, coverage terms and claims performance, Aon said.

However, the momentum in pricing is expected to temper in the second half of 2021 after prices hit the high-water mark previously reached in 2003, the report said.

Some \$20 billion of capital entered the market globally between March and December 2020, Aon said in the report.

Pricing will remain challenged, though there is general optimism that the rollout of the COVID-19 vaccine and the introduction of additional capacity in the market may result in “an easing in the second half of 2021,” Cynthia Beveridge, president of Aon Broking, said in a statement accompanying the report.

Coverage clarifications will continue, especially for communicable disease and cyber, the report said.

Risk complexity will continue to be impacted by supply chain vulnerability, a virtual workforce, ongoing economic uncertainty, social inflation and weather volatility, Aon said.

Alternative risk retention and financing strategies are becoming more prevalent in this environment, the report said.

“When renewing cover, we are advising our clients to explore alternatives such as captives,” Hugo Wegbrans, global chief broker officer, commercial risk solutions for Aon, said in the statement.

More insurance and risk management news on the coronavirus crisis [here](#).



BUSINESS INSURANCE

Commercial insurance rates increase across most lines

Posted On: Mar. 11, 2021 9:34 AM CST

Gavin Souter

Average renewal rates rose for most commercial coverages in February, but the pace of the increases slowed in some major lines, according to a report Thursday from Ivans Insurance Services, a division of Tampa, Florida-based Applied Systems Inc.

Commercial property saw the biggest increases, up 6.13% on an annual basis and up slightly from 5.63% in January.

Business owners policies rates rose 4.59% last month, compared with 4.46% in January, and general liability rates rose 3.93%, compared with 3.69% in the prior month.

Commercial auto rates increased 4.38% in February, a slight slowdown from 4.45% in January, and umbrella liability rates rose 4.25%, fractionally off the 4.29% increase a month earlier.

Workers compensation, which has been the only line showing consistent decreases over the past year, saw rates decline 1.47% in February, compared with a 1.02% decrease in January.

Ivans says it builds the index from transactions placed through more than 33,000 agencies.



BUSINESS INSURANCE

Property/casualty insurance prices keep rising

Posted On: Apr. 6, 2021 2:47 PM CST

Gavin Souter

Commercial property/casualty insurance rates rose 7% on average in the first quarter, but some lines saw significantly steeper hikes, according to insurance exchange MarketScout Corp.

Umbrella and excess liability insurance rates rose the most at 14%, followed by directors and officers liability, 11.6%; professional liability, 11.3%; commercial auto 8.7%; and commercial property, 8.6%, according to the report released Tuesday.

No lines experienced rate decreases. The smallest increases were in workers compensation and surety, which both saw rates rise 1.7%.

Large accounts saw the biggest increases, up 8.3% on average, compared with 6.3% for small and mid-sized accounts, the report said.

By sector, transportation policyholders were hit the hardest, with 11.7% rate increases on average, followed by habitational risks at 9.3%.





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Advisen

US commercial rate increases continue to climb in Q1

By Erin Ayers, Advisen

Commercial rate increases in the United States retained momentum in the first quarter of 2021, with an average change of 7%, according to the latest data from MarketScout.

Umbrella/excess, directors and officers liability, and professional liability showed the steepest rate increases in the first three months of the year at 14%, 11.6%, and 11.3%. Even workers compensation rates increased by an average 1.7%, according to MarketScout.

The average rate increase change of 8.6% for property insurance doesn't reflect the experience for all buyers, with some factors pushing prices much higher, according to MarketScout CEO Richard Kerr.

"Because the property market is so large, the composite rate is tempered by placements across the U.S.," said Kerr. "In CAT-prone areas, rates were up significantly more than the composite rate of 8.6 percent."

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He added, "We expect rate increases to continue for the remainder of 2021."

The transportation sector experienced the highest average increases across all industries, at 11.7%, followed by habitation risks at 9.3%. Energy rates "increased more aggressively" during the first quarter, according to the report.

"Jumbo" and large accounts saw higher average increases at 8.3%, while small and medium accounts were up 6.3% on average.

In the personal lines sector, MarketScout saw rate increases moderating in the first quarter, at an average 5.6% compared to 6.3% in Q4 of 2020. Homes valued at \$1 million or higher experienced the highest average increases at 6.7%, compared to 5% for homes under \$1 million. Personal auto rates were up an average of 5.3%, according to the data.

Even with rate increases trending downward on average, Kerr noted that homeowners in Florida and California continued to experience price hikes as much as 30% as insurers continue to cut back on their market share in riskier regions.

MarketScout bases its analysis on pricing survey conducted by the National Alliance for Insurance Education and Research.

Editor Erin Ayers can be reached at erin.ayers@zywave.com



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BUSINESS INSURANCE

Reinsurers post strong earnings despite cat, pandemic losses

Posted On: Apr. 22, 2021 10:15 AM CST

U.K.-based Aon PLC's Reinsurance Aggregate report shows that reinsurers posted earnings in 2020 despite suffering from nearly \$25 billion in natural catastrophe and COVID-19 pandemic related losses, Reinsurance News reported. Property and casualty premiums of the 23 ARA monitored reinsurers grew 7% year-on-year to \$223 billion, and total capital was up by 6% to \$270 billion.

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Advisen

Underwriting income dropped 53% in Q1, but premium boosts expected through 2021

By Erin Ayers, Advisen

Net underwriting income for the U.S. property/casualty industry dropped by 53% for the first quarter of 2021 compared to the prior-year period, according to a first look at insurers' financial results released by AM Best.

The first quarter should still show an underwriting profit, but the industry's combined ratio rose to 96.4% compared to 95% in 2020, with catastrophe losses adding 6.9 points for the first three months of 2021, Best noted.

The industry showed 2.3% growth in net earned premiums for Q1 2021, but higher losses, loss adjustment expenses, underwriting expenses, and a 72% jump in policyholder dividends produced the decline in underwriting income. Combined with a slight decrease in net investment income, the drop in underwriting income drove a 12.9% cut in pre-tax operating income, Best said. However, an 18.4% drop in tax expenses and \$4.1 billion in realized capital gains boosted the industry's net income 11.4% to \$20.2 billion.

Industry surplus rose to \$947.8 billion in Q1, up 2.6% from \$923.8 billion at year-end 2020.

The boosted surplus will be essential heading into an Atlantic hurricane season expected to feature above-average activity, according to an [update](#) from Colorado State University (CSU) researchers. CSU projects 18 named storms, with eight hurricanes, four of them potentially major storms.

A recent projection from the Insurance Information Institute and Milliman forecasts a combined ratio of 99% for the full year of 2021 after a "bumpy start," according to a recent blog post and webinar from the III.

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III analysts project a 7.1 percent surge in premiums for 2021, and above 5% for both 2022 and 2023.

“The industry took a big hit with the Texas freeze in Q1, with overall cat loss estimates in the \$15 billion range,” said James Lynch, III senior vice president and chief actuary. “Most of that was the Texas storm. Q1 losses that big are atypical.”

Editor Erin Ayers can be reached at erin.ayers@zywave.com



Commercial prices up average 15% globally in Q2: Marsh

Posted On: Jul. 27, 2021 12:50 PM CST

Matthew Lerner

Commercial insurance prices increased an average of 15% globally in the second quarter, according to a report released Tuesday by Marsh LLC.

It was the 15th consecutive quarter of rate increases in the global commercial insurance market but also the third consecutive quarter to show a decline in the average rate of increase. Rates increased 18% in the first quarter and 22% in the fourth quarter of 2020.

“It appears, barring unforeseen changes in conditions, that pricing increases peaked in the fourth quarter of 2020 at 22%,” Marsh said in its report.

Property insurance pricing was up 12% on average, compared with 15% in the previous quarter and 20% in the fourth quarter of 2020.

Casualty pricing was up 6% on average in the second quarter, the same as the first quarter, and just lower than the 7% increase in last year’s fourth quarter.

Financial and professional lines saw an average rate increase of 34%, compared with 40% in the first quarter and 47% in fourth-quarter 2020, as each of the three major lines showed a slowing rate of increase.

Pricing increases for cyber insurance, however, continued to accelerate, up 56% in the U.S. in the second quarter, compared with 35% in the first quarter, and 35% in the United Kingdom, compared with 29% in the first quarter. The frequency and severity of ransomware claims drove the increases, according to Marsh.

Regionally, the U.K. saw the largest composite increase

at 28%, down from 35% in the first quarter and 44% in fourth-quarter 2020. The Pacific region was next at 23%, compared with 29% in the first quarter and 35% in last year’s final quarter.

Continental Europe pricing rose 13% in the second quarter, even with the first quarter and down from 14% in fourth quarter 2020. The U.S followed, with a 12% second-quarter increase, following 14% in the first quarter and 17% in fourth-quarter 2020.

Asia region pricing increased 6% in the second quarter, down from 8% in the first quarter and 11% in fourth-quarter 2020. Latin America pricing rose 4%, down from 5% in the first quarter and 9% in last year's fourth quarter.

“Although we expect continued pressure on pricing, especially in loss-affected lines, we also expect the general trend of moderating price increases to continue through the rest of the year,” Lucy Clarke, president, Marsh specialty and Marsh global placement, said in a statement with the report.



ADDENDUM 2

UNITED STATES

SOUTH CAROLINA

JUMP TO: **Select A Section** ▼

STATE OVERVIEW

All Time

Past Day

Past Week

Past Month

Confirmed Cases

1,400,276

Deaths

15,744

Total Tested

12,187,296

Testing Positivity

12.36%



VACCINE TRACKER

[Learn more about vaccines >](#)

Doses Administered

7,101,195

People Fully Vaccinated

2,833,644

% of Population Fully Vaccinated

56.44%



DATA TIMELINE

Explore the most vital information about how COVID-19 has affected your state since the pandemic first officially arrived in the United States in January 2020 – cases, deaths, test positivity, hospitalizations, and vaccinations.

NEW

Comparisons

Vaccinations

Cases

Deaths

Hospitalizations

Test
Positivity

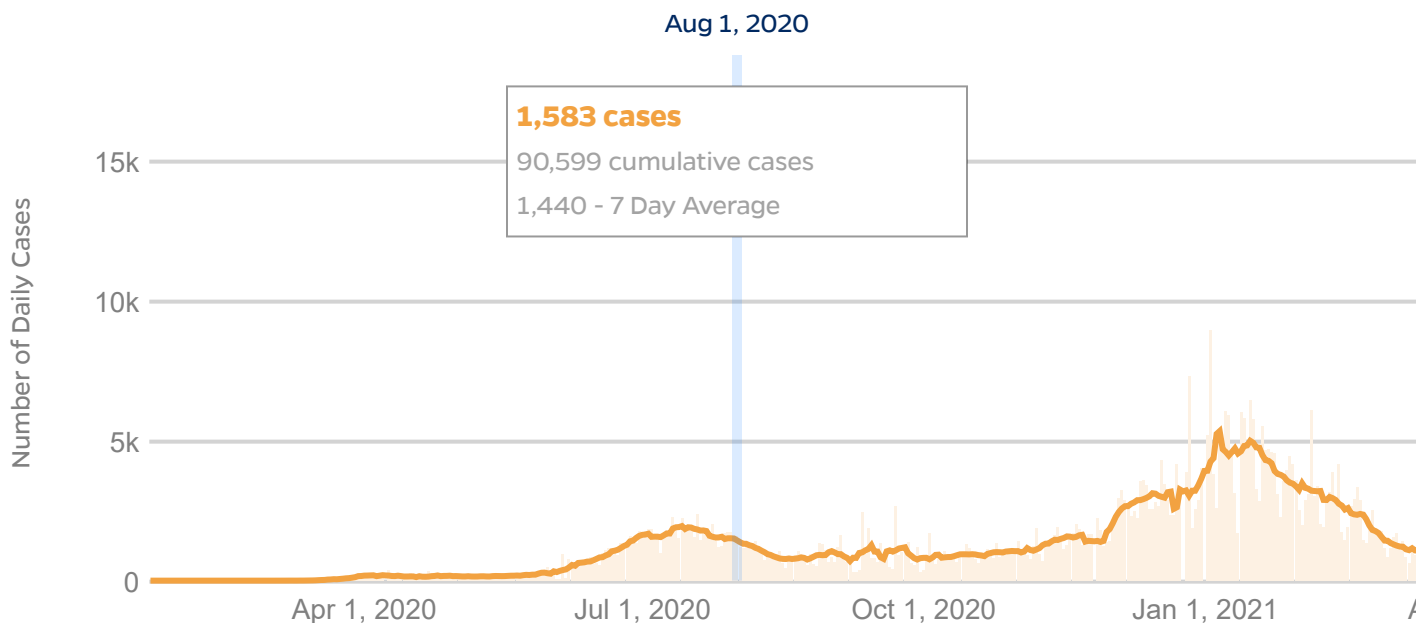
Number of Daily Cases

Number of Daily Cases

7-Day Average of Daily Cases

All Time

Last 90 Days



Data Sources: Cases and deaths data from [JHU CSSE](#); testing and vaccine data from [JHU CCI](#); and hospitalization data from the U.S. Department of [Health and Human Services](#).



HOSPITALIZATION

This tool contains the most updated information on hospital inpatient bed and ICU bed occupancy rates for last week and the week prior.



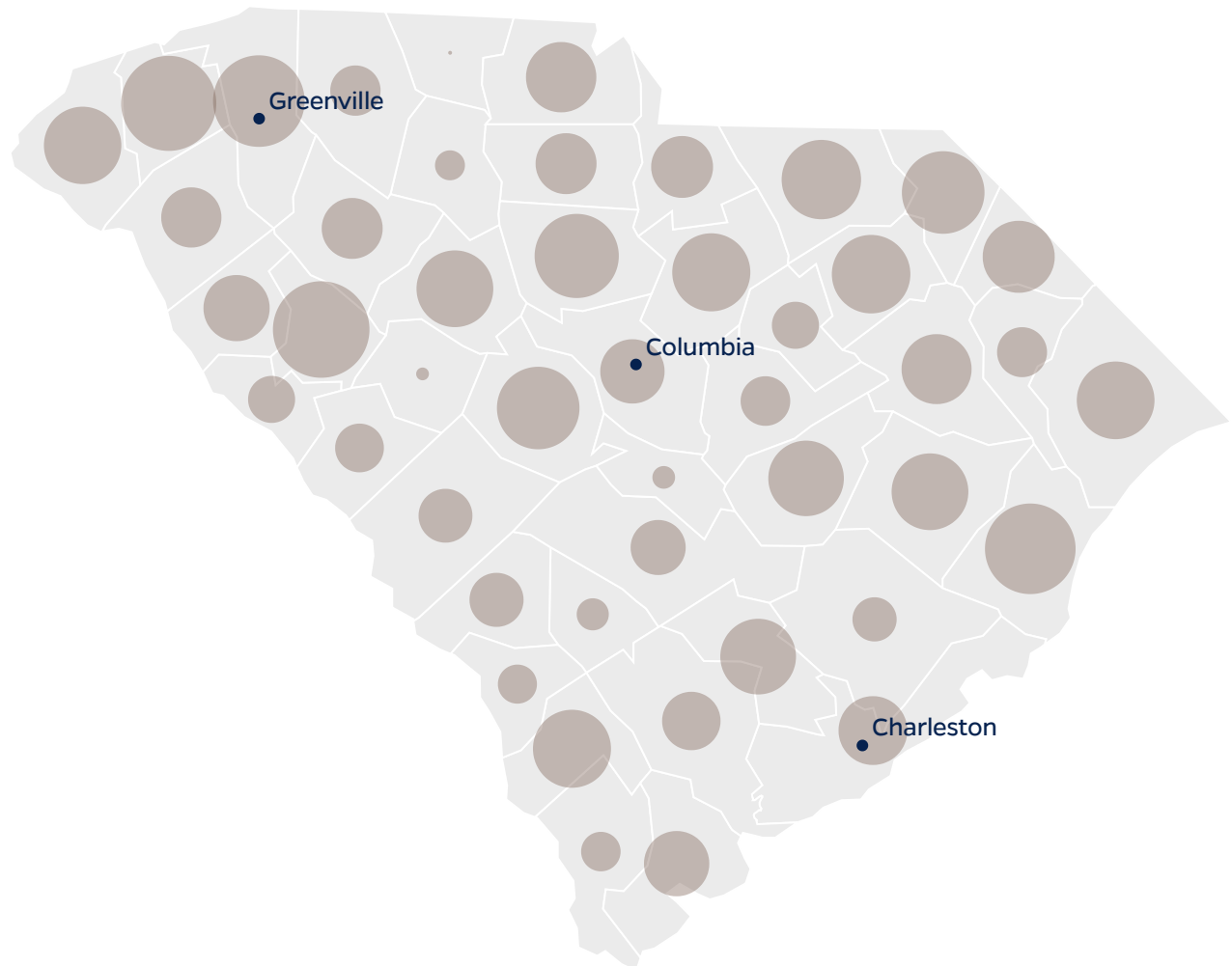
SEPTEMBER 14, 2021

- [View All Data Notes](#)



<https://coronavirus.jhu.edu/region/us/south-carolina>

This tool shows key county-level COVID-19 case and testing data with the option to overlay it against demographic information—including race/ethnicity and poverty rates.



COVID-19 data points can be chosen from the drop down menu below, All data reflect a 7-day moving average.

New daily cases per 100,000 people ▼

New daily cases per 100,000 people

Demographic data can be selected from the menu below.

No demographic layer selected ▼



Hover or tap the map to see County's data

Data Sources: County testing data from [JHU CCI](#); cases and deaths data from [JHU CSSE](#); demographic data from [American Community Survey](#)

Statewide Racial Breakdown of Cases, Deaths, and Vaccines

RACE

Black or African American

27% of population

20% of cases

25% of deaths

21% of vaccines

American Indian / Alaska Native

0.3% of population

***Cases** data not available.

***Deaths** data not available.

***Vaccines** data not available.

Asian

2% of population

***Cases** data not available.

***Deaths** data not available.

***Vaccines** data not available.

Native Hawaiian/Pacific Islander

0.1% of population

***Cases** data not available.

***Deaths**

data not available.

***Vaccines**

data not available.

White

67% of population

46% of cases

57% of deaths

56% of vaccines

Other

2% of population

12% of cases

6% of deaths

15% of vaccines

Two or More Races

2% of population

***Cases**

data not available.

***Deaths**

data not available.

***Vaccines**

data not available.

Race Unknown

***Population**

data not available.

22% of cases

12% of deaths

8% of vaccines

ETHNICITY

Hispanic or Latino

6% of population

5% of cases
3% of deaths
5% of vaccines

Non-Hispanic or Latino

94% of population
63% of cases
76% of deaths
78% of vaccines

Ethnicity Unknown

***Population** data not available.
32% of cases
21% of deaths
17% of vaccines

Data Sources: JHU CCI. Data shown is only for cases, deaths, tests, and vaccines where racial data is reported.

*State does not report racial breakdown of COVID-19 data.



TESTING OVERVIEW

New Daily Cases



+45,160 new

WEEKLY TREND

THIS WEEK LAST WEEK



Daily Tests

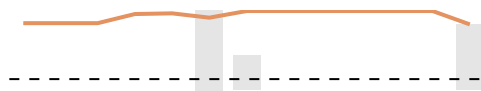


WEEKLY TREND

THIS WEEK LAST WEEK



Daily % Positive (7-day moving average)



29.4% positive

ABOVE THRESHOLD?



LEARN MORE

COVID-19 Racial Data Availability

Testing: **Unavailable**Confirmed Cases: **Available**Deaths: **Available**[View All](#) >

Does South Carolina meet WHO recommended testing criteria?

**NO**[View All](#) >

STATE & COUNTY INSIGHTS

Recent Opening and Closing Policy Decisions:

[All Policy Decisions](#) >

NOVEMBER 5, 2021

- Gov. Henry McMaster Bans Vaccine Mandates at Cabinet Agencies, Requires State Agencies to Cooperate with Ongoing and Anticipated Litigation Related to Federal Vaccine Mandates

Data Sources: Cases and deaths data from [JHU CSSE](#). As of August 1, 2020, policy events are drawn from [various state-specific sources](#). Prior to that, the data source for policy events was the [National Governor's Association](#).

[Learn more about why the positivity rates shown on our site may differ from state calculations](#)

ADDENDUM 3

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

JDS Construction Group, LLC, and
9 Dekalb Fee Owner LLC,

Plaintiffs,

v.

Continental Casualty Company,

Defendant.

Case No. 2020 CH 5678

Calendar 2

ORDER

RAYMOND W. MITCHELL, Circuit Judge.

Defendant Continental Casualty Company moves for reconsideration of an August 12, 2021 decision denying Defendant's motion to dismiss Plaintiffs JDS Construction Group, LLC and 9 Dekalb Fee Owner LLC's first amended complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure.

The August 12, 2021 Order denied Defendant's motion to dismiss Plaintiffs' complaint, because that complaint explicitly alleges "physical loss or damage" to the insured property based on the presence of SARS CoV-2, the virus that causes COVID-19. As an initial matter, Defendant devoted a significant portion of its motion to reconsider to argue that I had mistakenly applied Illinois law and that the August Order somehow "created a conflict with New York law." However, at the hearing on the reconsideration motion, Defendant's counsel conceded that the legal standard articulated in the August 12, 2021 Order was, in fact, the correct one. New York and Illinois law are in accord, and courts in both states have adopted identical interpretations of the policy-triggering language "direct physical loss or damage." *See* 8/12/21 Order at 3.

Defendant has cited numerous decisions from New York and Illinois, asserting that courts in both jurisdictions have uniformly — or, at least, overwhelmingly — concluded that the presence of the virus does not trigger coverage under a policy requiring "direct physical loss of or damage to property." In fact, Defendant has cited to COVID coverage cases in which I too have dismissed complaints. *See, e.g., MTDB Corp. d/b/a Striker Lanes v. American Automobile Ins. Co.*, No. 20 CH 5257 (Ill. Cir. Ct. Cook Cnty. July 16, 2021); *Royale Bezjian Bros.*,

Inc. v. Pekin Ins. Co., No. 20 CH 4954 (Ill. Cir. Ct. Cook Cnty. July 16, 2021). Of course, trial court decisions, particularly those untested on appeal, have no precedential value. But more importantly, whatever inference can be drawn from any particular dismissal necessarily depends on the allegations in the complaint and the arguments advanced by counsel in that specific case. In the *MTDB*, for example, the complaint merely alleged a probability of the presence of the virus, and did not contain specific, detailed allegations that the virus in any way altered the subject property. The same is true for the complaint in *Bezjian*.

What is remarkable about Defendant's reconsideration motion is that it is bereft of even a single citation to the Plaintiffs' complaint. The complaint alleges not only the presence of the virus on the insured premises, but also how the virus droplets were conveyed to solid surfaces and into the air and HVAC system, causing structural damage and alteration to the property:

46. First, respiratory droplets (*i.e.*, droplets larger than 5-10 μm) expelled from infected individuals land on, attach, and adhere to surfaces and objects. In doing so, they structurally change the property and its surface by becoming a part of that surface. This structural alteration makes physical contact with those previously safe, inert surfaces (*e.g.*, fixtures, handrails, furniture) unsafe.

* * * *

52. When the coronavirus and COVID-19 attach to and adhere on surfaces and materials, they become a part of those surfaces and materials, converting the surfaces and materials to fomites. This represents a physical change in the affected surface or material, which constitutes physical loss and damage.
53. Merely cleaning surfaces may reduce but does not altogether eliminate the risk of transmission amongst people. There may be surfaces with residual infectious virus, and aerosolized infectious particles. In other words, disinfection is temporary at best; however, a space may remain contaminated if an aerosol is present, and immediately become contaminated thereafter if another infected person is present in the area. This contamination will provide a constant modality for infection to people.

* * * *

99. When individuals carrying the coronavirus breathe, talk, cough, or sneeze, they expel aerosolized droplet nuclei that remain in the air and, like dangerous fumes, make the premises unsafe and affirmatively dangerous. In addition, the coronavirus physically alters the air. Air inside buildings that was previously safe to breathe but can no longer safely be breathed due to coronavirus and COVID-19, has undergone a physical alteration.
100. Coronavirus droplets have been conveyed from infected persons (whether symptomatic, pre-symptomatic, or asymptomatic) to solid surfaces, including but not limited to furniture, doors, floors, bathroom facilities, equipment, and supplies, and into the air and HVAC system at Plaintiffs' properties, causing damage and alteration to physical property and ambient air at the premises. Aerosolized coronavirus has entered the air in Plaintiffs' properties.
101. The presence of the coronavirus and COVID-19, including but not limited to coronavirus droplets or nuclei on solid surfaces and in the air at insured property, has caused and will continue to cause direct physical damage to physical property and ambient air at the premises. Coronavirus, a physical substance, has attached and adhered to Plaintiffs' properties, and by doing so, altered that property. Such presence has also directly resulted in loss of functionality of that property.

Compl. ¶¶ 46, 52-53, 99-101. A complaint need only set forth the ultimate facts to be proved. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 369 (2004). Most importantly, a court must take as true and construe the allegations in the light most favorable to the plaintiff and draw all reasonable inferences in the plaintiff's favor. *Young v. Bryco Arms*, 213 Ill. 2d 433, 441 (2004).

Defendant's counsel argues that it does not matter what Plaintiffs alleged in their complaint because a virus like SARS-CoV-2 can *never* trigger coverage since it can just be wiped off. How do I know that? Counsel suggests that it is a "fact" subject to judicial notice, but at least in Illinois, only commonly known facts beyond reasonable dispute are subject to judicial notice. Ill. R. Evid. 201(b). Hard to imagine that emerging "facts" about a *novel* coronavirus would satisfy that standard. There is far from universal agreement on how the virus attaches to

surfaces and the effectiveness of efforts to remove the virus.¹ More importantly, it is procedurally improper to introduce facts from outside the complaint in a motion to dismiss brought under section 2-615. *See, e.g., Seith v. Chi. Sun-Times, Inc.*, 371 Ill. App. 3d 124, 133 (1st Dist. 2007) (section 2-615 is strictly limited to the four corners of the complaint). Indeed, the complaint alleges that “[m]erely cleaning surfaces may reduce but does not altogether eliminate the risk of transmission” and that “disinfection is temporary at best.” Compl. ¶ 53. On a motion to dismiss, that allegation must be accepted as true. Introducing a “fact” that contradicts an allegation of a complaint is never a basis for dismissal. Resolving such a fact conflict is what trials are for.

There seems to be some suggestion that the August 12, 2021 Order must be wrong because so many other courts have reached a contrary conclusion. Economists refer to this as an appeal to “herding behavior”—a process by which group-think replaces individual decision-making. As set out above, I do not quarrel with the contrary decisions (my own included), but those decisions are not helpful in determining whether the facts alleged in this complaint satisfy the legal standard, a standard which Defendant now concedes was correctly articulated. Judges are not sheep, and I do not decide a case by counting noses. Further, the “herd” can be wrong. *See, e.g., A. Daughety et al., “Stampede to Judgment: Persuasive Influence and Herding Behavior by Courts,” 1 American Law and Economics Review* 158 (Fall 1999) (analyzing a cascade of decisions among various circuits of United States Court of Appeals on a single point of law later invalidated by the United States Supreme Court). As I have said, I always welcome motions to reconsider because I approach the judicial role with humility and a recognition of my own limitations. After full briefing and argument on this motion to reconsider, I am more convinced now than ever as to the correctness of my original decision. As a consequence, the August 12, 2021 Order stands.

¹ *See, e.g., N. Cimolai et al., “Environmental and Decontamination Issues for Human Coronaviruses and Their Potential Surrogates,” Journal of Medical Virology* 2020; 92: 2498-2510; M. Aydogdu et al., “Surface Interactions and Viability of Coronavirus,” *Journal of the Royal Society Interface* 18: 20200798.

III.

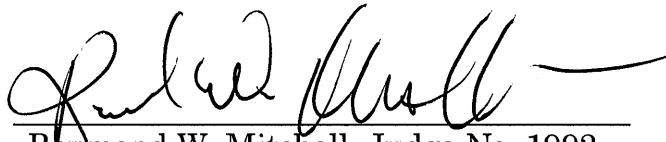
It is hereby ORDERED:

1. Defendant Continental Casualty Company's motion to reconsider the August 12, 2021 Order is DENIED.
2. The case is continued for a case management conference on November 17, 2021 at 10:30 a.m. for the purpose of setting a comprehensive schedule including a dispositive motion cut-off date and trial date.

Zoom Meeting ID: 940 2104 4687

Password: 296476

ENTERED,



Raymond W. Mitchell, Judge No. 1992

Judge Raymond W. Mitchell

OCT 25 2021

IRIS Y. MARTINEZ
Circuit Court - 1992

ADDENDUM 4



FORMS - FILED

JULY 6, 2006

FROM: LARRY PODOSHEN, SENIOR ANALYST

COMMERCIAL PROPERTY

LI-CF-2006-175

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

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

BACKGROUND

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

ISO ACTION

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

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

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

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

PROPOSED EFFECTIVE DATE

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

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

RATING SOFTWARE IMPACT

New attributes being introduced with this revision:

- A new form is being introduced.
-

CAUTION

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

RELATED RULES REVISION

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

REFERENCE(S)

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

ATTACHMENT(S)

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

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

PERSON(S) TO CONTACT

If you have any questions concerning:

- the content of this circular, please contact:

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Senior Analyst

Commercial Property

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Fax: (201) 748-1637

comfal@iso.com

lpodoshen@iso.com

or

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Manager

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lnewman@iso.com

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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- OVBBER

Introduction

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

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

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

Current Concerns

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

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

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

Features Of New Amendatory Endorsement

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

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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.

N

E

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Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

About This Filing

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

New Form

We are introducing:

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

Related Filing(s)

Rules Filing CF-2006-OVBER

Introduction

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

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

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

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.

N

E

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ADDENDUM 5

COUCH'S "PHYSICAL ALTERATION" FALLACY: ITS ORIGINS AND CONSEQUENCES

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I. INTRODUCTION

Look at virtually any Covid-19 case favoring an insurer, and you will find a citation to Section 148:46 of *Couch on Insurance*.¹ It is virtually ubiquitous: courts siding with insurers cite *Couch* as restating a “widely held rule” on the meaning of “physical loss or damage”—words typically in the trigger for property-insurance coverage, including business-income coverage. It has been cited, ad nauseam, as evidence of a general consensus that all property-insurance claims require some “distinct, demonstrable, *physical alteration* of the property.”² Indeed, some pro-insurer decisions substitute a citation to this section for an actual analysis of the specific language before the court.

Couch is generally recognized as a significant insurance treatise, and courts have cited it for almost a century.³ That

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¹ 10A STEVEN PLITT, ET AL., COUCH ON INSURANCE 3D § 148:46. As shown below, some courts quote *Couch* itself, while others cite cases citing *Couch* and merely intone the “distinct, demonstrable, physical alteration” language without citing *Couch* itself. *Couch First* and *Couch Second* were published in hardback books (with pocket parts), in 1929 and 1959 respectively. As explained below (*infra* n.5), *Couch 3d*, a looseleaf, was first published in 1995..

² *Id.* (emphasis added); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1144 (8th Cir. 2021).

³ *Girard Fire & Marine Ins. Co. v. Winfrey*, 26 S.W.2d 701, 705 (Tex. Ct. App. 1930) (citing 4 GEORGE J. COUCH, CYCLOPEDIA OF INSURANCE LAW § 915).

respect began with the first edition written by George Couch and subsequent editions written by his successors.

This particular section, however, as formulated in the third edition of *Couch*, contains an unfortunate, and serious, error. *Couch*'s apparent conclusion—that “direct physical loss” requires a “distinct, demonstrable, physical alteration”—is wrong. It was wrong when *Couch* first made it in the 1990s, and it is wrong today. As another well-respected treatise puts it, “when an insurance policy refers to *physical loss of or damage* to property, the ‘loss of property’ requirement can be satisfied by any ‘detriment,’ and a ‘detriment’ can be present *without there having been a physical alteration of the object.*”⁴

A review of the three editions of *Couch* shows that this statement first appeared in the third edition.⁵ As originally published, it supported its assertion by citing to five cases for support and two cases holding to the contrary, presenting the former as “widely held” majority rule.⁶

But none of these cases used the “distinct, demonstrable, physical alteration” test that *Couch* presents, and it was far from the majority rule. As of March 2020, there were at least *thirty-five* cases adopting a broader rule (including many binding appellate decisions and several rulings by state high courts), and significantly fewer following the *Couch* test. The “physical alteration” test gained traction only because courts

⁴ 3 ALLAN D. WINDT, INSURANCE CLAIMS & DISPUTES § 11:41 (6th ed. 2013) (emphasis added).

⁵ The authors conducted searches in an effort to identify when this phrase first appeared in *Couch*. The authors ran searches on the first edition through HeinOnline and reviewed the hard copy of *Couch 2d* to see if those editions used this language. We found no language in either of the first two editions that was similar to that in section 148:46 of *Couch 3d* (“distinct, demonstrable, physical alteration”). *Couch 3d*, unlike *Couch 1st* and *Couch 2d*, was published in loose-leaf format. Without saving all versions of superseded pages in the updates published over the years, it is not possible at this point in time for us to say with certainty when language first appeared. We were able to verify that the first time that a court cited the “distinct, demonstrable” phrase in *Couch 3d* was in 1999. *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, 1999 WL 619100, at *7–8 (D. Or. Aug. 4, 1999).

⁶ 10A COUCH ON INSURANCE 3D § 148:46. Couch added four cases to supplement this position following the original publication date.

relied on *Couch*'s initial mischaracterization—inferred from a single district court opinion that was disapproved three years later by the governing Court of Appeals, rather than from the thirteen extant cases then holding to the contrary.

We may never know why *Couch* got the law so profoundly backwards on this key issue. But one thing is clear: courts need to stop citing it as the *sine qua non* of what “physical loss or damage” means. It is not. If the courts, and particularly the federal courts,⁷ continue down this path without addressing *Couch*'s fallacy, there will be serious practical consequences. They risk overruling decades of insurance law and drastically narrowing the scope of property insurance that forms the backbone of risk protection for homeowners, businesses, and the banks that lend to them. All of those policies rest on the same terms *Couch* misconstrued. More immediately, courts will deprive American businesses of billions of dollars in coverage they paid for and need to survive the worst public health crisis in a century. Until *Couch* reckons with this error, busy trial and appellate judges cannot, and should not, trust it to give them the straight answer on this foundational question.

II. THE LAW OF “DIRECT PHYSICAL LOSS”

Modern property-insurance policies are triggered by some “direct physical loss or damage” to the property (or some variant of that term).⁸ After this standard-form language was

⁷ There is a stark disparity between the way state and federal courts are treating these claims in the Covid-19 context. *Trial Court Rulings on the Merits in Business Interruption Cases, Covid Coverage Litigation Tracker*, U. PA. L. SCH., <https://cclt.law.upenn.edu/judicial-rulings> (last viewed Aug. 9, 2021). State courts have heard less than 100 insurer motions to dismiss and have denied 30 of them. Federal courts have heard 381 motions, yet they have denied even fewer (22), with the balance finding, as a matter of law, that there is no claim. *Id.* Since federal courts are constitutionally bound to follow state insurance law under the *Erie* doctrine, this massive disparity simply should not exist. That it does may require corrective action from the U.S. Supreme Court. See Brief of Amicus Curiae United Policyholders, *Mama Jo's, Inc. v. Sparta Ins. Co.*, No. 20-998 (U.S. Feb. 25, 2021) (raising similar concerns, though in a non-Covid case and without the benefit of current case data), *cert. denied*, 141 S. Ct. 1737 (Mar. 29, 2021).

⁸ 5 NEW APPLEMAN ON INSURANCE LAW, LIBR. ED. § 42.02[3].

adopted, courts were quickly called upon to determine what it meant. Plainly it included injuries by fire, lightning, or tornado. But the breadth of the words—layered on the broad “all risk”⁹ template—generated questions about whether a loss of use or function was sufficient to trigger these policies.

From 1950 to 1990, courts uniformly found that such losses qualified. Over the insurance industry’s objections at the point of claim, courts asked only whether the property was unsafe or unusable for its intended purpose. If the answer to either question was “yes,” then there was “direct physical loss or damage” to the property. The contrary view—requiring “distinct, demonstrable, physical alteration”—emerged in the 1990s but was in the distinct minority. Despite this backdrop, *Couch* wrongly portrayed “physical alteration” as the “widely held” majority rule.

A. *The Original Meaning of “Physical Loss:” 1950 to 1995.*

Until the 1990s, courts uniformly gave “direct physical loss” and its variants their broad, ordinary meaning. That phrase included cases where property became unsafe or unusable for its intended purpose. Standard-form policies were

⁹ There are two general types of property insurance. The first is “all risk” insurance. As its name suggests, it is the broadest of all insurance products because it “creates a type of coverage not ordinarily present under other types of insurance, and recovery is allowed for all fortuitous losses unless the loss is excluded by a specific policy provision.” 10A COUCH ON INSURANCE 3D § 148:50. The second is “named perils” insurance, which insures only for specified causes of loss.

triggered in such circumstances in the 1950s,¹⁰ the 1960s,¹¹ the 1970s,¹² the 1980s,¹³ and the 1990s.¹⁴

In 1995, the Second Edition of *Couch on Insurance* added a new section, titled “*Generally; ‘Physical’ loss or damage.*”¹⁵ The first case to cite this section was decided in 1999.¹⁶ The fourth

¹⁰ *Am. Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957) (finding coverage when a release of radon dust and gas made the policyholders’ building unsafe to work in and unusable for its purpose, which was calibrating medical instruments); *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 98 N.W.2d 280, 295, 300 (Minn. 1959) (finding that egg powder, which had been exposed to smoke, was physically damaged because it suffered a loss of market value even without actual injury).

¹¹ *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 655 (Ct. App. 1962) (finding “physical loss” because policyholder’s home was unsafe for occupancy after a landslide deprived it of support); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968) (en banc) (finding a “direct physical loss” where gasoline vapors made “use of the building highly dangerous”).

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

¹³ *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986) (finding Business Income coverage where danger of collapse required abandonment of grocery store); *Intermetal Mexicana, S.A. v. Ins. Co. of N. Am.*, 866 F.2d 71 (3d Cir. 1989) (theft of property, depriving policyholder of possession and control, qualified as “direct physical loss”); *Blaine Richards & Co. v. Marine Indem. Ins. Co.*, 635 F.2d 1051, 1055–56 (2d Cir. 1980) (finding policyholder could recover lost value of beans exposed to chemical not accepted in the United States but not actually harmed).

¹⁴ In chronological order: *Hetrick v. Valley Mut. Ins Co.*, 1992 WL 524309, at *3 (Pa. Comm. Pl. May 28, 1992) (finding coverage for loss of use of a house if an outside oil spill made the house uninhabitable); *Largent v. State Farm Fire & Cas. Co.*, 842 P.2d 445, 446 (Or. Ct. App. 1992) (noting insurance company conceded meth fumes could cause “direct physical loss”); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. Ct. App. 1993) (finding costs of meth odor covered as direct physical loss or damage); *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So. 2d 600, 602 (Fla. Ct. App. 1995) (chemicals that destroyed a bacteria colony necessary for sewage treatment plant to operate caused “direct damage to the structure”).

¹⁵ 10A COUCH ON INSURANCE 2D § 148:46.

¹⁶ *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, 1999 WL 619100, at *7–8 (D. Or. Aug. 4, 1999) (nevertheless finding that policyholder could bear its burden to demonstrate that clothes contaminated with mold or mildew suffered “direct physical loss or damage” if it established “at trial a class of

paragraph in that section (as reprinted without relevant change in the Third Edition) reads:

The requirement that the loss be “physical,” given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a *distinct, demonstrable, physical alteration of the property*.¹⁷

The origin of this matter-of-fact statement is puzzling. At the time this section first appeared, only one reported case had adopted this test in the circumstances relevant here—*Great Northern Ins. Co. v. Benjamin Franklin Federal Savings & Loan Ass’n*, decided by a federal district court in Oregon, in 1990.¹⁸

Benjamin Franklin involved the sudden discovery of non-friable (or intact) asbestos in a building.¹⁹ The property insurer refused to pay for its removal, arguing there was no “direct physical loss.”²⁰ The district court agreed, citing a 1978 Oregon Supreme Court case (*Wyoming Sawmills v. Transportation Ins. Co.*) finding that a lumber manufacturer’s third-party liability-insurance policy did not cover a lawsuit seeking labor expenses for removing defective 2x4 studs from a building.²¹ Despite the many cases actually addressing “direct physical loss” language in this context—and universally coming out the other way—the *Benjamin Franklin* court found this liability-insurance case “most helpful.”²² The court held that property

garments which has increased microbial counts and that will, as a result, develop either an odor or mold or mildew”).

¹⁷ 10A COUCH ON INSURANCE 3D § 148:46 (emphasis added).

¹⁸ *Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass’n*, 793 F. Supp. 259, 263 (D. Or. 1990). There were other cases favoring insurers, but they involved (for example) claims that a title impairment was a “physical loss,” which it obviously is not. Those cases are discussed in more detail below. *Benjamin Franklin* was the first to apply this rule in the context of physical effects on property.

¹⁹ *Id.* at 261.

²⁰ *Id.* at 263.

²¹ *Id.* (citing *Wyoming Sawmills v. Transp. Ins. Co.*, 578 P.2d 1253, 1256 (Or. 1978)).

²² *Id.*

insurance, like liability insurance, does not “include consequential or intangible damages such as depreciation in value, within the terms property damage.”²³ Ignoring the distinction between first-party and third-party coverage, the court held that, since the building was “physically intact and undamaged,” there was no “*physical* loss, direct or otherwise.”²⁴

The “physically intact and undamaged” gloss was brand new in *Benjamin Franklin*. At that time, the major decisions predating it—*Hughes* and *First Presbyterian*—had rejected that precise logic. *Hughes* was particularly forceful:

To accept [the insurer’s] interpretation of its policy would be to conclude that a building which has been overturned or which has been placed in such a position as to overhang a steep cliff has not been “damaged” so long as its paint *remains intact and its walls still adhere to one another*. Despite the fact that a “dwelling building” might be rendered completely useless to its owners, [the insurer] *would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected*. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner.²⁵

Similarly, *First Presbyterian* found that a church rendered too dangerous for occupancy because it was permeated with

²³ *Id.* (quoting *Wyoming Sawmills*, 578 P.2d at 1256).

²⁴ *Id.* (emphasis in original). Third-party and first-party insurance serve significantly different functions. Third-party insurance is essentially fault-based; it provides compensation for loss suffered by “third parties” that is caused by the policyholder’s wrongful acts. First-party insurance, in contrast, provides coverage for loss regardless of fault. This distinction is important in understanding *Wyoming Sawmills*. Most commercial third-party policies have “business risk” exclusions—in *Wyoming Sawmills*, it was an exclusion for liability arising from damage to “your product” or “your work” (i.e., the defective 2x4s). The aim of such exclusions is to enforce the general third-party rule that coverage exists only for damage to *someone else’s* property, and so that liability insurance is not equated with a builder’s “performance bond.” Thus, *Wyoming Sawmills* is not properly read to require a “physical alteration” rule, even in the third-party context. Loss of use to a third party’s property is indisputably “property damage” under standard-form general liability insurance.

²⁵ *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 655 (Ct. App. 1962) (emphasis added).

gasoline fumes had suffered a “loss of use” that triggered the policy.²⁶

Perhaps because the “intact and undamaged” rule was invented by a single district judge, it did not stick. Three years after *Benjamin Franklin*, the Oregon Court of Appeals refused to follow it in *Farmers Ins. Co. v. Trutanich*, a case involving methamphetamine contamination.²⁷ *Trutanich* distinguished *Wyoming Sawmills* (the liability-insurance case *Benjamin Franklin* found “most helpful”) and instead followed *First Presbyterian*.²⁸

When *Couch (Third)* cited *Benjamin Franklin* as evincing a “distinct, demonstrable, physical alteration” rule,²⁹ it ignored that *Trutanich* had rendered the “intact and undamaged” rule a dead letter three years earlier.³⁰ It also added the modifiers “distinct” and “demonstrable” out of thin air—we have found no pre-*Couch (Third)* case where a court frames the test using those adjectives. In spite of this, *Couch (Third)* crafted its own rule out of whole cloth, and then then included a paragraph, written in the passive voice, suggesting that there was only some case law to the contrary:

The opposite result has been reached, allowing coverage based on physical damage despite the lack of physical alteration of the property, on the theory that the uninhabitability of the property was due to the fact that gasoline vapors from adjacent property had infiltrated and saturated the insured building, and the theory that the threatened physical damage to the insured building from a covered peril essentially triggers the insured’s obligation to mitigate the impending loss by undertaking some hardship and expense to safeguard the insured premises.³¹

²⁶ *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968) (en banc).

²⁷ *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. Ct. App. 1993).

²⁸ *Id.* at 1335–36.

²⁹ 10A COUCH ON INSURANCE 3D § 148:46 (emphasis added).

³⁰ *Trutanich*, 858 P.2d at 1335 n.4 (limiting *Benjamin Franklin* to asbestos that was “intact” and nonfriable).

³¹ 10A COUCH ON INSURANCE 3D § 148:46.

This lukewarm counterpoint cited only *First Presbyterian* and *Hampton Foods*—two of at least *thirteen* cases that had adopted the broader rule when the section was first drafted.³²

B. *The One-Sided Portrayal Grows: 1995–2019.*

Like any treatise updated regularly, *Couch* over the years generally added citations as the law developed. However, a problem appeared on this issue as *Couch (Third)* began discussing it—the third edition only added cases favorable to its made-up “majority” position.³³ Every one of these decisions cited *Couch (Third)*’s “physical alteration” doctrine.³⁴ For example, under facts identical to *Benjamin Franklin*, the Third Circuit denied coverage by declaring (citing *Couch* and nothing else) that this was the “widely accepted definition.”³⁵

Yet this rule was neither “widely accepted” nor correct. *Couch* did not address many of the significant decisions adopting the contrary and earlier generally accepted position. In fact, the only case supporting *Couch*’s assertion was at the

³² The others are similar. See *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 98 N.W.2d 280, 295, 300 (Minn. 1959) (unsalable goods); *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 655 (Ct. App. 1962) (erosion); *Am. All. Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957) (radon contamination); *Intermetal Mexicana, S.A. v. Ins. Co. of N. Am.*, 866 F.2d 71 (3d Cir. 1989) (theft); *Blaine Richards & Co. v. Marine Indem. Ins. Co.*, 635 F.2d 1051, 1055–56 (2d Cir. 1980) (unsalable goods); *Cyclops Corp. v. Home Ins. Co.*, 352 F. Supp. 931, 937 (W.D. Pa. 1973) (inoperable motor); *Hetrick v. Valley Mut. Ins. Co.*, 15 Pa. D. & C. 4th 271 (Comm. Pl. May 28, 1992) (oil spill); *Largent v. State Farm Fire & Cas. Co.*, 842 P.2d 445, 446 (Or. Ct. App. 1992) (meth contamination); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. Ct. App. 1993) (same); *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So. 2d 600, 602 (Fla. Ct. App. 1995) (chemical contamination).

³³ 10A COUCH ON INSURANCE 3D § 148:46 (adding *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002); *Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App’x 569, 573 (6th Cir. 2012); *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323 (S.D.N.Y. 2014); *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 115 Cal. Rptr. 3d 27, 38 (Ct. App. 2010)).

³⁴ *Port Authority*, 311 F.3d at 235; *Universal Image*, 475 F. App’x at 573–74; *Newman Meyers*, 17 F. Supp. 3d at 331; *MRI Healthcare*, 115 Cal. Rptr., at 778–79.

³⁵ *Port Authority*, 311 F.3d at 235.

trial level, was not binding, and had been disapproved by the governing state's court of appeals. Beyond that, more and more cases began to recognize that the *Hughes* rule—and not the *Couch* theory—was correct. There were five such cases (including two from state courts of last resort) before the turn of the twenty-first century.³⁶ *Couch* to date has ignored all of them.

³⁶ *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, 1996 WL 1250616, at *2 (Mass. Super. Ct. Mar. 15, 1996) (finding oil fumes present in house after discovery of oil leak constituted physical damage to the house); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (asbestos); *Dundee Mut. Ins. Co. v. Marifjeren*, 587 N.W.2d 191 (N.D. 1998) (power outage causing potatoes to freeze); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 16–17 (W. Va. 1998) (concluding that a home rendered dangerously unlivable by the presence of falling rocks had suffered a “direct physical loss to the property”); *Matzner v. Seaco Ins. Co.*, 9 Mass. L. Rptr. 41, 1998 WL 566658, at *4 (Mass. Super. Ct., Aug. 12, 1998) (concluding that the phrase “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. v. Int’l Ins. Co.*, 720 N.E.2d 622, 625–26 (Ill. Ct. App. 1999) (citing liability insurance coverage cases finding that incorporation of asbestos into buildings caused “property damage,” defined under liability policies to be “physical injury to or destruction of tangible property,” and finding that policyholder had established that the asbestos fiber contamination constituted physical damage).

The law continued to snowball in policyholders' favor after that. In 2000,³⁷ 2001,³⁸ 2002,³⁹ 2003,⁴⁰ 2005,⁴¹ courts rendered eleven decisions for policyholders on this issue without requiring "physical alteration." *Couch* took no notice. In 2007,⁴²

³⁷ *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 825–26 (Minn. 2000) ("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.").

³⁸ *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (oats rendered unsalable by FDA regulation suffered "direct physical loss").

³⁹ *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, 2002 WL 31495830, at *8–9 (D. Or. June 18, 2002) (concluding that mold damage to house could constitute "distinct and demonstrable" damage and that inability to inhabit a building may constitute "direct, physical loss"); *Cooper v. Travelers Indem. Co. of Ill.*, 2002 WL 32775680, at *1 (N.D. Cal. Nov. 4, 2002) (coliform bacteria and *E.coli*); *Graff v. Allstate Ins. Co.*, 54 P.3d 1266, 1269 (Wash. Ct. App. 2002) (methamphetamine vapors); *Yale Univ. v. CIGNA Ins. Co.*, 224 F. Supp. 2d 402, 413 (D. Conn. 2002) (finding while the presence of asbestos and lead in buildings did not constitute "physical loss of or damage to property," contamination by such materials could, citing "the substantial body of case law" "in which a variety of contaminating conditions have been held to constitute 'physical loss or damage to property'").

⁴⁰ *S. Wallace Edwards & Sons, Inc. v. Cincinnati Ins. Co.*, 353 F.3d 367, 374–75 (4th Cir. 2003) (affirming finding that meat exposed to ammonia and thus less valuable even though not actually affected had suffered property damage).

⁴¹ *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 824, 826–27, 824–26 (3d Cir. 2005) (*E. coli* contamination); *De Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 722–23 (Tex. Ct. App. 2005) (finding mold damage constituted "physical loss to property"); *Pepsico, Inc. v. Winterthur Int'l Ins. Co.*, 24 A.D.3d 743, 744 (N.Y. App. Div. 2005) (unmerchantable product); *Schlamm Stone & Dolan LLP. v. Seneca Ins. Co.*, 800 N.Y.S.2d 356 (Super. Ct. 2005) (finding that "the presence of noxious particles, both in the air and on surfaces of the plaintiff's premises, would constitute property damage under the terms of the policy").

⁴² *Cook v. Allstate Ins. Co.*, 2007 Ind. Super. LEXIS 32, at *6–10 (Madison Cnty. Nov. 30, 2007) (finding that infestation of house with brown recluse spiders constituted "direct physical loss" to the house: "Case 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"); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co.*, 2007 WL 464715, at *8 (D. Or. Feb. 7, 2007) (finding "physical loss or damage" where the policyholder's

2009,⁴³ and 2010,⁴⁴ courts decided eight more. Again, *Couch* ignored them. Five more cases came in 2011,⁴⁵ 2013,⁴⁶ 2014,⁴⁷ 2015,⁴⁸ and 2016,⁴⁹ including from another state supreme

heat treater for medical implants was contaminated by lead and could no longer be used); *Fed. Ins. Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 2007 WL 1007787, at *12 (E.D. Mich. Mar. 31, 2007) (finding that food in cardboard containers exposed to ammonia was physically injured, despite the fact the food was judged fit to eat).

⁴³ *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (unpleasant odor in home); *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 968 A.2d 724, 734 (N.J. Super. 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.*, 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).

⁴⁴ *Travco Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 707–08 (E.D. Va. 2010) (finding that drywall emitting toxic gases, causing the policyholder to move out, caused a direct physical loss, despite the fact that it was “physically intact, functional and ha[d] no visible damage,” noting the majority of cases nationwide find that “physical damage to the property is not necessary”); *In re Chinese Mfr’d Drywall Prods. Liab. Litig.*, 759 F. Supp. 2d 822, 831 (E.D. La. 2010) (finding that “the presence of Chinese-manufactured drywall in a home constitutes a physical loss” because it “renders the [policyholders] homes useless and/or uninhabitable”).

⁴⁵ *Widder v. La. Citizens Prop. Ins. Corp.*, 82 So.3d 294 (La. Ct. App. 2011).

⁴⁶ *Ass’n of Apartment Owners of Imperial Plaza v. Fireman’s Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1068 (D. Haw. 2013) (finding that intrusion of arsenic into roof caused “direct physical loss or damage” to the roof).

⁴⁷ *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, 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).

⁴⁸ *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 806 (N.H. 2015) (rejecting “tangible alteration” rule and holding that pervasive odor of cat urine was “physical loss” to condominium).

⁴⁹ *Oregon Shakespeare Festival Ass’n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *5–6 (D. Or. June 7, 2016), *vacated by joint stipulation*, 2017 WL 1034203 (Mar. 6, 2017) (smoke from wildfires, making operations hazardous to human health, caused a “direct physical loss”).

court. None of these decisions were featured in *Couch*, and even its June 2021 update failed to grapple with (or even cite) any of them.

Couch may not have recognized these cases, but insurers did—when it served their purposes. In late 2019, Factory Mutual Insurance Company (“FM”), one of the largest and most sophisticated property insurers in the world, sued another insurer seeking to shift some of its liability for mold and mold spore contamination at a biopharmaceuticals lab.⁵⁰ In the case, it brought a motion *in limine* contending that “physical loss or damage” to property exists when a physical substance renders property unfit for its intended use, despite that there was *no* physical alteration.⁵¹ Citing cases like *First Presbyterian*, *Gregory Packaging*, and *Trutanich*, FM argued to the Court:

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

Moreover, FM argued that, *at worst*, it had put forward a reasonable interpretation of the undefined phrase “physical loss or damage”—and even if Federal could propose a

⁵⁰ *Factory Mut. Ins. Co. v. Fed. Ins. Co.*, 1:17-cv-00760-GJF-LF, 2019 U.S. Dist. LEXIS 191769 (D.N.M. Nov. 5, 2019).

⁵¹ Motion *in Limine* No. 5 re Physical Loss or Damage at 3, *Factory Mut. Ins. Co.*, filed Nov. 19, 2019, ECF#127, https://3inbm04c0p4j2h1w132uyb5e-wpengine.netdna-ssl.com/wp-content/uploads/2021/02/fm_v_federal.pdf.

⁵² *Id.* at 3–4 (emphasis added).

reasonable reading, this merely rendered the subject policy ambiguous and required the court to construe it in favor of coverage.⁵³

The oddity and error in *Couch (Third)*'s statement is further shown by other major insurance-coverage treatises. Allan Windt's *Insurance Claims & Disputes* (6th ed. 2013) is most explicit: "[W]hen an insurance policy refers to physical loss of or damage to property, the 'loss of property' requirement can be satisfied by any 'detriment,' and a 'detriment' can be present *without there having been a physical alteration of the object*."⁵⁴ Windt then proceeds to discuss the major cases that *Couch* ignores, including *Murray*, *Sentinel*, and *Hardinger*.⁵⁵

Appleman's *Insurance Law and Practice*, often cited side-by-side with *Couch*, contains a similar statement of the standard in its section on "all risk" insurance.⁵⁶ After discussing *First Presbyterian*, it concluded that "[t]he courts have construed the scope of what constitutes 'physical loss or damage' liberally," while still recognizing that some losses (such as a withdrawn warranty) were not "physical."⁵⁷ At the time it was discontinued in favor of the *New Appleman* series, the "Old" *Appleman*'s second edition recognized all, or nearly all, of the seminal decisions on "physical loss" that *Couch* omitted. Those cases include dispossession of property (*Intermetal Mexicana*), "unusable or uninhabitable" property (*Murray*), and contamination (*Board of Education*).⁵⁸

⁵³ See *id.* at 3 n.1.

⁵⁴ 3 ALLAN D. WINDT, *INSURANCE CLAIMS & DISPUTES* § 11:41 (6th ed. 2013) (emphasis added).

⁵⁵ *Id.*

⁵⁶ 5 APPLEMAN, *INSURANCE LAW & PRACTICE* 2D § 3092 (1970, supp. 2012), reprinted in 5f-142f APPLEMAN ON *INSURANCE LAW & PRACTICE* ARCHIVE § 3092 (LEXIS 2011).

⁵⁷ *Id.*

⁵⁸ *Id.* The *New Appleman* successor to this work, rather than carrying forward the existing research, borrowed heavily from *Couch*'s misstatement of the rule—down to the cases *Couch* cited and some of the descriptive words *Couch* used. 5 NEW APPLEMAN ON *INSURANCE LAW*, LIBR. ED., § 46.03[2] (offering the "generally prevailing" rule as one that "preclude[s] coverage for losses that are solely intangible or incorporeal; for example, an economic loss unaccompanied by a distinct physical alteration to property"). To the *New Appleman* authors' credit, their statements are more restrained, and (unlike

The 1999 update to another treatise by Peter J. Kalis reaches the same conclusion.⁵⁹ Explaining that “direct” and “physical” loss or damage is the coverage trigger for property insurance, the authors correctly summarized the law at the time by saying that disputes over these words “generally have been resolved in favor of coverage.”⁶⁰ It then proceeds to discuss *Hampton Foods*, *First Presbyterian*, *Hughes*, and *Intermetal Mexicana*, among other cases, as representing the majority rule.⁶¹ It acknowledged *Benjamin Franklin* but noted that it was an outlier.⁶² It concluded that while insurers may argue for a more stringent version of “physical loss,” “[t]hese arguments have generally been unsuccessful if the loss arises out of some external event or condition changing and devaluing the property.”⁶³

For whatever reason, this robust body of scholarship—all contrary to *Couch*—has not caught the courts’ attention. That is unfortunate. Windt, Appelman, and Kalis present a far superior resource for courts interested in understanding the full scope of the law, rather than *Couch*’s truncated, one-sided version.

Couch) they do follow this introduction with treatments of important cases like *Trutanich*, *Sentinel*, *Hardinger*, *Pepsico*, *General Mills*, and *Wakefern*, discussed throughout this article. *Id.* § 46.03[3] (“Contamination by Vapor, Bacteria, or other Foreign Substance,” “Intact Property Rendered Unfit for Intended Purpose,” “Destruction or Corruption of Electronic Data,” and “Deprivation of Access by Government Authorities”). Although *New Appleman*’s decision to borrow its summary from *Couch* was ill-advised, the balance of the section—and the nuance it explains—illustrates the severity of *Couch*’s error.

⁵⁹ I PETER J. KALIS, THOMAS M. REITER & JAMES R. SEGERDAHL, POLICYHOLDER’S GUIDE TO THE LAW OF INSURANCE COVERAGE § 13.04 (ASPEN L. & BUS., Supp. 1999). As the name of this treatise suggests, its authors generally represented policyholders. But unlike this section of *Couch*, the discussion is balanced and accurately represents the case law.

⁶⁰ *Id.*

⁶¹ *Id.* at 13-15 to 13-18.

⁶² *Id.* at 13-18 to 13-19.

⁶³ *Id.* at 13-19.

C. *Couch's 2021 Update Has Not Remedied This Significant Error*

In 2021, *Couch* updated this section. The current edition repeats the error of the previous ones.

For the proposition that its “physical alteration” rule is “widely held,” *Couch* currently cites seven cases—none of which were decided in 1995, when it appears that *Couch* (*Third*) first made this statement. Moreover, nearly all of these cases *themselves cite Couch* (or cases citing *Couch*) for this proposition.⁶⁴ This is a remarkable feat: state *ipse dixit* you wish was true, convince courts to cite it, and then cite *those* cases as establishing that the rule is “widely held.”

For its claim that there must be a “distinct, demonstrable, physical alteration of the property,” *Couch* now cites five cases extant in 1995 (*Benjamin Franklin* and four others).⁶⁵ None of these pre-1995 cases cure *Couch's* original error. Nor do they offer support for the way courts are citing this section in Covid-19 cases.

For example, in the oldest case (*Cleland Simpson*) the Pennsylvania Supreme Court summarily affirmed the lower court's decision.⁶⁶ That case, however, involved a *named perils*

⁶⁴ Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co., 311 F.3d 226, 236 (3d Cir. 2002); Universal Image Prods., Inc. v. Fed. Ins. Co., 475 F. App'x 569, 573 (6th Cir. 2012); Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co., 17 F. Supp. 3d 323 (S.D.N.Y. 2014); *In re Chinese Mfd. Drywall Prods. Liab. Litig.*, 759 F. Supp. 2d 822 (E.D. La. 2010); MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co., 115 Cal. Rptr. 3d 27, 38 (Ct. App. 2010); Welton Enters., Inc. v. Cincinnati Ins. Co., 131 F. Supp. 3d 827 (W.D. Wis. 2015); Shirley v. Allstate Ins. Co., 392 F. Supp. 3d 1185 (S.D. Cal. 2019).

⁶⁵ Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass'n, 793 F. Supp. 259, 263 (D. Or. 1990) (asbestos), *disapproved by* Farmers Ins. Co. v. Trutanich, 858 P.2d 1332 (Or. Ct. App. 1993); Comm. Union Ins. Co. v. Sponholz, 866 F.2d 1162, 1989 (9th Cir. 1989) (title defect); HRG Dev. Co. v. Graphic Arts Mut. Ins. Co., 527 N.E.2d 1179 (Mass. Ct. App. 1988) (title defect); Cleland Simpson Co. v. Fireman's Ins. Co. of Newark, 140 A.2d 41 (Pa. 1958) (named-perils coverage); Glens Falls Ins. Co. v. Covert, 526 S.W.2d 222 (Tex. Ct. App. 1975) (products lacking manufacturer's warranty).

⁶⁶ *Cleland Simpson*, 140 A.2d at 44.

policy for “all direct loss by fire [and] lightning.”⁶⁷ The court held that an order of civil authority was not covered in the absence of fire or lightning damage.⁶⁸ In the context of a named-perils property-insurance policy, that made perfect sense: without a loss caused by an insured peril, there is no coverage. But the use of “physical loss” in an *all* risk policy is entirely different, because *all* (nonexcluded) perils are insured. *Cleland Simpson* fails to support *Couch*’s proposition at all.

In the next two cases (*Sponholz* and *HRG*) the courts held that a defect in the title to property was not a “physical loss.”⁶⁹ That too, makes sense, but fails to support a “physical alteration” requirement. Title defects are *legal* injuries, not physical ones, and these cases are perfectly reconcilable with the loss-of-safe-use rule from *Hughes* and *First Presbyterian*, neither of which required “physical alteration.”

The final case from this group of pre-1995 cases (*Covert*) involved products that were discarded because the manufacturer had rescinded its warranty.⁷⁰ The policyholder would not sell them without the warranty. This case comes the closest to supporting *Couch*’s argument, but it still fails. As in the title-defect cases, the defect was legal or contractual (i.e., the manufacturer would not indemnify the seller from potential product defects). However, that can still be squared with the prevailing loss-of-safe-use and loss-of-function rules.⁷¹ These cases did not support the rule *Couch* derived from them.

In sum, *Couch* seized on a single trial-level case with no support in the appellate law, asserted in the first instance that such a rule was “widely held,” did not confess error when that case was disapproved, convinced courts to cite it as authoritative, and then cited *those* cases as showing that its scantily supported test was correct. That circular process does not create sound jurisprudence, it is not persuasive, and it should not be followed any further.

⁶⁷ *Cleland Simpson Co. v. Fireman’s Ins. Co.*, 1957 Pa. Dist. & Cnty. LEXIS 202, at *5 (Lackawanna Cnty. Jan. 11, 1957).

⁶⁸ *Id.* at *8.

⁶⁹ *Sponholz*, 866 F.2d at 1989; *HRG*, 527 N.E.2d at 1179.

⁷⁰ *Covert*, 526 S.W.2d at 222.

⁷¹ See *supra* notes 10–13 and accompanying text.

D. The Current Majority of Covid-19 Cases Adopt and Perpetuate Couch's Error.

To any objective observer, *Couch's* treatment of this issue is incorrect and unnerving. Despite this, a large number of courts are relying upon it to dismiss claims that the presence of SARS-CoV-2, the Covid-19 pandemic, and/or the associated orders of Civil Authority cause “physical loss or damage” to property. The result of these decisions is that many businesses—entitled to business-income coverage under the *actual* majority rule—are not receiving it.

At least twenty-eight of the early pandemic decisions ruling for insurers expressly rely on this section.⁷² Another

⁷² E.g., *Brunswick Panini's LLC v. Zurich Am. Ins. Co.*, 2021 WL 663675, at *8 (N.D. Ohio Feb. 19, 2021) (Ohio law); *Kahn v. Pa. Nat'l Mut. Cas. Ins. Co.*, 2021 WL 422607, at *5 (M.D. Pa. Feb. 8, 2021) (Pennsylvania law); *Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.*, 2021 WL 389215, at *5 (S.D. Cal. Feb. 3, 2021) (California law); *Frank Van's Auto. Tag, LLC v. Selective Ins. Co.*, 2021 WL 289547, at *5 (E.D. Pa. Jan. 28, 2021) (Pennsylvania law); *Graspa Consulting, Inc. v. United Nat'l Ins. Co.*, 2021 WL 199980, at *5 (S.D. Fla. Jan. 20, 2021) (Florida law); *1 S.A.N.T., Inc. v. Berkshire Hathaway, Inc.*, 2021 WL 147139, at *6 (W.D. Pa. Jan. 15, 2021) (Pennsylvania law); *Zagafen Bala, LLC v. Twin City Fire Ins. Co.*, 2021 WL 131657, at *4 (E.D. Pa. Jan. 14, 2021) (Pennsylvania law); *TAQ Willow Grove, LLC v. Twin City Fire Ins.*, 2021 WL 131555, at *4 (E.D. Pa. Jan. 14, 2021) (Pennsylvania law); *Ultimate Hearing Sols. II, LLC v. Twin City Fire Ins. Co.*, 2021 WL 131556, at *5 (E.D. Pa. Jan. 14, 2021) (Pennsylvania law); *Moody v. Hartford Fin. Grp., Inc.*, 2021 WL 135897, at *4 (E.D. Pa. Jan. 14, 2021) (Pennsylvania law); *ATCM Optical, Inc. v. Twin City Ins. Co.*, 2021 WL 131282, at *4 (E.D. Pa. Jan. 14, 2021) (Pennsylvania law); *Indep. Rest. Grp. v. Certain Underwriters at Lloyd's, London*, 2021 WL 131339, at *5 (E.D. Pa. Jan. 14, 2021) (Pennsylvania law); *Santo's Italian Café LLC v. Acuity Ins. Co.*, 508 F. Supp. 3d 186, 197–98 (N.D. Ohio 2020) (Ohio law); *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, 507 F. Supp. 3d 616, 623–24 (E.D. Pa. 2020) (Pennsylvania law); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, 2020 WL 7351246, at *5 (W.D. Tex. Dec. 14, 2020) (Texas law); *Richard Kirsch, DDS v. Aspen Am. Ins. Co.*, 507 F. Supp. 3d 835, 839 (E.D. Mich. 2020) (Michigan law); *SA Palm Beach LLC v. Certain Underwriters at Lloyd's, London*, 506 F. Supp. 3d 1248, 1253 (S.D. Fla. 2020) (Florida law); *El Novillo Rest. v. Certain Underwriters at Lloyd's, London*, 505 F. Supp. 3d 1343, 1349 (S.D. Fla. 2020) (Florida law); *Hajer v. Ohio Sec. Ins. Co.*, 505 F. Supp. 3d 646, 650 (E.D. Tex. 2020) (Texas law); *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, 504 F. Supp. 3d 1191, 1198 n.38 (D. Kan. 2020); *S. Fla. Ent. Assocs., Inc. v. Hartford Fire Ins. Co.*, 2020 WL 6864560, at *6 (S.D. Fla. Nov. 13, 2020) (Florida law); *Dab Dental PLLC v. Main St. Am. Prot. Ins. Co.*, 2020 WL 7137138, at *5 (Fla.

fifteen cases applied *Couch*'s "distinct, demonstrable, physical alteration" rule without citing it directly.⁷³ And the first appellate decision on this issue cites the section as authoritative.⁷⁴

III. THINKING CRITICALLY ABOUT *COUCH* AND PROPERTY INSURANCE LAW

Whatever the ultimate outcome of the Covid-19 business-income-coverage litigation, the Courts' treatment of *Couch* will have profound impacts on property-insurance coverage. The

Cir. Ct. Hillsborough Cnty. Nov. 10, 2020); Hillcrest Optical, Inc. v. Cont'l Cas. Co., 497 F. Supp. 3d 1203, 1211 & n.4 (S.D. Ala. 2020) (Alabama law); Plan Check Downtown III, LLC v. AmGuard Ins. Co., 485 F. Supp. 3d 1225, 1229 (C.D. Cal. 2020) (California law); Malaube, LLC v. Greenwich Ins. Co., 2020 WL 5051581, at *5 (S.D. Fla. Aug. 26, 2020) (Florida law); Diesel Barbershop, LLC v. State Farm Lloyds, 479 F. Supp. 3d 353, 360 (W.D. Tex. 2020) (Texas law); Visconti Bus. Serv., LLC v. Utica Nat'l Ins. Grp., 71 Misc. 3d 516, 528 (N.Y. Super. Ct. 2021).

⁷³ Café La Troya LLC v. Aspen Spec. Ins. Co., 2021 WL 602585, at *7 (S.D. Fla. Feb. 16, 2021) (Florida law); Vandalay Hosp. Grp. LP v. Cincinnati Ins. Co., 2021 WL 462105, at *1 (N.D. Tex. Feb. 9, 2021) (Texas law); Protégé Rest. Partners LLC v. Sentinel Ins. Co., 2021 WL 428653, at *4 (N.D. Cal. Feb. 8, 2021) (California law); Colgan v. Sentinel Ins. Co., 2021 WL 472961, at *3 (N.D. Cal. Jan. 26, 2021) (California law); Ba Lax, LLC v. Hartford Fire Ins. Co., 2021 WL 144248, at *3 (C.D. Cal. Jan. 12, 2021) (California law); O'Brien Sales & Mktg, Inc. v. Transp. Ins. Co., 2021 WL 105772, at *3–4 (N.D. Cal. Jan. 12, 2021) (California law); Humans & Resources, LLC v. Firstline Nat'l Ins. Co., 2021 WL 75775, at *5 (E.D. Pa. Jan. 8, 2021) (Pennsylvania law); Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co., 2020 WL 7696080, at *4 (N.D. Cal. Dec. 28, 2020) (California law); Mortar & Pestle Corp. v. Atain Spec. Ins. Co., 2020 WL 7495180, at *3 (N.D. Cal. Dec. 21, 2020) (California law); Kessler Dental Assocs., P.C. v. Dentists Ins. Co., 505 F. Supp. 3d 474, 480 (E.D. Pa. 2020) (Pennsylvania law); Long Affair Carpet & Rug, Inc. v. Liberty Mut. Ins. Co., 500 F. Supp. 3d 1075, 1078 (C.D. Cal. 2020) (California law); Brian Handel D.M.D., P.C. v. Allstate Ins. Co., 499 F. Supp. 3d 95, 99 (E.D. Pa. 2020) (Pennsylvania law); Uncork & Create LLC v. Cincinnati Ins. Co., 498 F. Supp. 3d 878, 883 (S.D. W. Va. 2020) (West Virginia law); Mudpie, Inc. v. Travelers Cas. Ins. Co., 487 F. Supp. 3d 834, 839 (N.D. Cal. 2020) (California law); Pappy's Barber Shops, Inc. v. Farmers Group, Inc., 487 F. Supp. 3d 937, 944 (S.D. Cal. 2020) (California law); 10e, LLC v. Travelers Indem. Co., 483 F. Supp. 3d 828, 836 (C.D. Cal. 2020) (California law).

⁷⁴ Oral Surgeons, P.C. v. Cincinnati Ins. Co., 2 F.4th 1141 (8th Cir. 2021).

error originating from that section is poised to reshape insurance law without the rigorous intellectual analysis of a state appellate court charged with determining the law in its jurisdiction. If courts continue to blindly follow *Couch* on this point, they will effectively overrule decades of property-insurance law without grappling with *stare decisis* or the usual stabilizing principles attached to precedent. Courts must dismantle *Couch*'s fallacy, and the cases it has spawned, before it is too late—and, above all, stop citing *Couch* on this point until the authors address the problem. We offer three general reasons for this position.

First, this section of *Couch* never provides a precedent-driven or intellectual justification for its test (for it is, in reality, a test *Couch* invented). Generally, when staking a position that rests at the core of a body of law, a treatise will either (a) rely on the reasoned decisions of then-extant judicial decisions to justify the rule, or (b) develop its own, independent reason that the rule is correct. *Couch* does neither. This oversight is having devastating consequences for businesses struggling to survive the Covid-19 pandemic, and it will have even greater consequences for the homeowners and lenders who purchase property insurance on a daily basis.

The *Couch* test is largely circular. It does not flow from any substantial body of insurance law that existed (or that currently exists) outside of *Couch*'s own sphere of influence. Nor is it compelling on its own. Property policies generally cover “direct physical loss or damage,” which does not unmistakably communicate *Couch*'s rule to an ordinary person. Perhaps insurers view “physical” as a term of art that means a “distinct, demonstrable, physical alteration.” But they have not *communicated* that intent in the policy by actually defining “physical loss or damage,” as courts have “begged” them to do for decades.⁷⁵

Basic textual analysis shows why the opposite rule is correct. When property is stolen, unusable, unsafe, or nonfunctional, the policyholder has suffered a “physical loss.”

⁷⁵ *Cherokee Nation v. Lexington Ins. Co.*, 2021 WL 506271, at *3–6 (Cherokee Cnty., Okla. Jan. 28, 2021).

This comports with the distinction between “loss”⁷⁶ and “damage,”⁷⁷ two words with different meanings in the English language. If “physical” required some “distinct, demonstrable, physical alteration,” then “physical loss” would be rendered meaningless.

The word “physical” simply restricts coverage to losses that are “of or relating to natural or material things, as opposed to things mental, moral, spiritual, or imaginary.”⁷⁸ This draws the same line as pre-1995 decisions favoring policyholders (involving physically unsafe, physically unusable, or physically contaminated property) and pre-1995 cases favoring insurers (involving title insurance and voided warranties). An impaired title or an invalid warranty is a *legal* loss. It injures a legal right appurtenant to the property, and does not impair the property itself. Thus, *Couch* is correct in observing that the term “physical loss” excludes losses “that are intangible or

⁷⁶ “[T]he act or fact of losing : failure to keep possession : deprivation.” *Loss*, WEBSTER’S THIRD NEW INT’L DICTIONARY 1338 (Unabridged ed. 1966) [hereinafter WEBSTER’S]; *Loss*, I THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 1666 (2nd ed. 1986) [hereinafter OXFORD’S] (“2.a. The being deprived of, or the failure to keep (a possession, appurtenance, right . . . or the like). . . . 5. Diminution of one’s possessions or advantages; detriment or disadvantage involved in being deprived of something.”); *Loss*, MERRIAM-WEBSTER ONLINE DICTIONARY, www.merriam-webster.com/dictionary/loss (last visited Sept. 1, 2021) (“2.a(2) the partial or complete deterioration or absence of a physical capability or function”); *Loss*, DICTIONARY.COM, www.dictionary.com/browse/loss (last visited Sept. 1, 2021) (“1. detriment, disadvantage, or deprivation from failure to keep, have, or get”).

⁷⁷ “[L]oss due to injury : injury or harm to person, property, or reputation : hurt, harm.” *Damage*, WEBSTER’S, *supra* note 76, at 571; *Damage*, I OXFORD’S, *supra* note 76, at 641 (“2. Injury, harm ; *esp.* physical injury to a thing.”); *Damage*, MERRIAM-WEBSTER ONLINE DICTIONARY, *supra* note 76 (“[L]oss or harm resulting from injury to person, property, or reputation.”); *Damage*, DICTIONARY.COM, *supra* note 76 (“injury or harm that reduces value or usefulness”).

⁷⁸ *Physical*, WEBSTER’S, *supra* note 76, at 1706; *see Physical*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1331 (5th ed. 2011) (same); II OXFORD’S, *supra* note 76, at 2161 (“Of or pertaining to material nature . . . as opposed to *psychical, mental, spiritual*”); *Physical*, MERRIAM-WEBSTER ONLINE DICTIONARY, *supra* note 76 (“of or relating to material things”); *Physical*, DICTIONARY.COM, *supra* note 76 (“of or relating to that which is material”).

incorporeal,” such as a defect in title.⁷⁹ But that statement, true as it is, does not support *Couch*’s blanket “physical alteration” test. It simply illustrates one kind of “loss” that property insurance does not cover.

As the title-insurance litigation shows, the word “physical” exists in the policy for a good reason. English speakers often use the word “loss” in the mental, moral, spiritual, or imaginary sense. We speak of a “loss of reputation,” a “loss of affection,” or even (as John Milton wrote) a world in a state of “utter loss” and in need of divine intervention.⁸⁰ Or, in another direction, the unwitting purchaser of a house “widely reputed to be possessed by poltergeists” might have made a claim on his property insurer for a “loss,” had the New York Appellate Division not excused him from the purchase by holding the seller “is estopped to deny their existence and, as a matter of law, the house is haunted.”⁸¹ In contrast to property overrun by chemicals⁸² or spiders,⁸³ a house possessed by ghosts would seem to be the prototypical example of an “incorporeal,” and thus a “nonphysical,” loss.

However, this discussion of ghosts, titles, and damnation simply shows that the traditional analysis—supported by the decades of case law predating this section of *Couch*—is not outlandish at all. A property perched on a cliff, inundated with gasoline, unusable due to odors or bacteria, or in danger of a rockfall is at risk due to the laws of the physical realm, not of perils legal or paranormal. *Couch*’s rule erases this important distinction.

Second, the pre-*Couch* rule has a firm basis in the risk-based nature of insurance, in basic principles of insurance law, and in insurance-industry intent. Actuaries can predict the likelihood of physical phenomena that might affect property, even if those perils do not alter or structurally injure property,

⁷⁹ 10A COUCH ON INSURANCE 3D § 148:46.

⁸⁰ *Loss*, I OXFORD’S, *supra* note 76, at 1666.

⁸¹ *Stambovsky v. Ackley*, 169 A.D.2d 254, 255–56 (N.Y. App. Div. 1991).

⁸² *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, 2014 WL 6675934, at *5–6 (D.N.J. Nov. 25, 2014).

⁸³ *Cook v. Allstate Ins. Co.*, 2007 Ind. Super. LEXIS 32, at *6–10 (Madison Cnty. Nov. 30, 2007).

and even if the peril strikes the entire risk pool at the same time.⁸⁴ They can set appropriate premiums. But more difficult (or impossible) to predict, in advance, is the risk that décor will go out of style, that a house will be deemed haunted as a matter of law, or that a market meltdown will impair property values.

Thus, the traditional distinction between physical and nonphysical losses matches up neatly with risks that insurers can price, predict, and guard against. *Couch*'s rule draws the line much further upstream, leaving homeowners, businesses, and lenders exposed to large swaths of perfectly insurable risks. That fact provides ample reason to doubt *Couch*'s argument that insurers drew the line there.

The more likely explanation is that “physical loss” is what the *Restatement (Second) of Contracts* calls a “deliberately obscure” term.⁸⁵ It is broad enough to let insurers charge “all risk” premiums, but ambiguous enough so the insurer can “decide at a later date what meaning to assert,”⁸⁶ i.e., a narrower, “physical alteration” rule.⁸⁷ This is illustrated by the industry's acts of playing both sides of the “physical loss” question—restrictive when it faces the policyholder, and expansive when it faces another insurer to whom it might shift liability.⁸⁸ As the *Restatement of the Law, Liability Insurance* points out, this is the definition of ambiguity: when “there is

⁸⁴ Erik S. Knutsen & Jeffrey W. Stempel, *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 CONN. INS. L.J. 185, 194–95 (2020) (explaining that pandemic losses are “insurable in theory because the timing of the pandemic itself is a fortuitous event,” because “not all industries will be affected at the same time and to the same degree,” and because some portions of the risk pool “may profit from the pandemic in their specific industries and may have no loss at all”).

⁸⁵ RESTATEMENT (SECOND) OF CONTRACTS § 206, cmt. a (AM. L. INST. 1981).

⁸⁶ *Id.*

⁸⁷ This is far from speculation. One writer recounts the story of an “experienced policy underwriter justifying an ambiguous draft policy as follows: ‘We draft them this way so we can say later that the policy means whatever we want it to mean.’” George M. Plews & Donna C. Marron, *Survey: Environmental Law Developments: Hope and Ambiguity in Achieving the Optimum Environment*, 37 IND. L. REV. 1055, 1058–59 (2004).

⁸⁸ See *supra* notes 50–53 and accompanying text.

more than one meaning to which the language of the term is reasonably susceptible when applied to the facts of the claim.”⁸⁹ If the insurance industry interprets the language both ways, surely both readings must be reasonable. But it is in these situations that both *Restatements* and every jurisdiction in the country calls for words to be construed against the drafter.⁹⁰

Third, property insurance is one of the least negotiable types of insurance. Millions of homeowners are required, by their lenders, to maintain insurance on mortgaged property. Homeowners lack the kind of leverage that a multinational company would have to negotiate commercial-property coverage. They must have it, and due to insurers’ antitrust immunity, they have no power to negotiate the terms of the policy. Yet they (and the banks that hold their mortgages) would be among the ones who suffer the most if *Couch*’s rule actually becomes “widely held.”

Homeowners’ policies, like commercial property policies, are written on “physical loss” forms. If property insurance is construed as *Couch* (incorrectly) suggests, the courts will unwittingly shift an enormous body of risks back on consumers and financial institutions. Homes condemned due to contamination, health hazards, or nearby natural perils could suddenly lack coverage. And if there are outstanding mortgages on those homes, the loss would be borne by the homeowner (saddled with five-or-six-figure debt or an additional mortgage payment) or the lender (unable to sell foreclosed property for anywhere near its mortgaged value). Given the long-term nature of these arrangements, blindly following *Couch* threatens to upend the law mid-stream and throw these reliance interests into disarray.

⁸⁹ RESTATEMENT OF THE LAW, LIABILITY INSURANCE § 4(1) (AM. L. INST. 2019).

⁹⁰ RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 85, § 206, cmt. a. The *Restatement of the Law, Liability Insurance* provides for the same outcome, for the same reasons. RESTATEMENT OF THE LAW, LIABILITY INSURANCE, *supra* note 89, § 4(2), *see id.* §§ 3(3), (4), cmt. d (“The *contra proferentem* rule gives the supplier of the terms the incentive to take all reasonable steps to eliminate ambiguity in the drafting of terms.”).

IV. CONCLUSION

The current Covid-19 coverage litigation is important in its own right. However, it is also a test of the courts' ability to be curious, thorough, and prudent in the way they resolve disputes. There is no substitute for a court's thorough review and analysis of the actual language before it and the actual law governing that language. Consulting a treatise is helpful. But they are only aids in legal analysis and can, as we have shown, be grievously wrong.

This particular section of *Couch* does not aid courts whatsoever in their efforts to faithfully apply the law. Not only does it get the law wrong, but it invites courts to set dangerous precedent that could unravel decades of settled property-insurance law, on which ordinary businesses, banks, and families rely. If courts accept *Couch*'s "physical alteration" fallacy, the results could be catastrophic. The ensuing legal regime could well deny policyholders the benefit of the all-risk coverage they purchased and, under the pressure of the greatest health and economic dislocation in a century, send droves of policyholders into bankruptcy. That is both bad law and bad policy.

ADDENDUM 6

INFECTED JUDGMENT: PROBLEMATIC RUSH TO CONVENTIONAL WISDOM AND INSURANCE COVERAGE DENIAL IN A PANDEMIC

ERIK S. KNUTSEN AND JEFFREY W. STEMPEL *©

Abstract

The COVID-19 pandemic created not only a public health crisis but also an insurance coverage imbroglio, prompting near-immediate business interruption claims by policyholders impacted by government restrictions ordered in response to the pandemic. Insurers and their representatives “presponded” to the looming coverage claims by quickly moving to denigrate arguments for coverage, engaging in a pre-emptive strike that has largely worked to date, inducing too many courts to rush to judgment by declaring—as a matter of law—that policy terms such as “direct physical loss or damage” do not even arguably encompass the business shutdowns resulting from COVID-19. Our closer examination of the term and of other key coverage questions suggests that policyholders have a much stronger case than suggested by the initial—and often superficial and conclusory—conventional wisdom flowing from the first wave of judicial decisions. Only a few courts have analyzed the COVID coverage debate with the type of reflective care, judicial humility, and respect for the trial process one would hope to see. The “early returns” in these coverage wars have been analytically disappointing, creating risk of an unfortunate path dependency or cascade of cases excessively narrowing the meaning of key terms such as “loss” and “damage,” and diminishing the quality of future coverage decisions.

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I. INTRODUCTION

A. COVID-19 AND COVERAGE CONTROVERSY

As the world now knows, a variant of the SARS coronavirus emerged in Asia in late 2019¹ creating a severe concentration of infections in Wuhan, China that spread rapidly throughout the world reaching the United States perhaps as early as December 2019.² By February 2020, the new virus named COVID-19³ was a

¹ “SARS” (Severe Acute Respiratory Syndrome) is the name given to a class of particularly dangerous virus that causes respiratory problems but often adversely affect other organs. Julia Ries, *Here’s How COVID-19 Compares to Past Outbreaks*, HEALTHLINE (Mar. 12, 2020), <https://www.healthline.com/health-news/how-deadly-is-the-coronavirus-compared-to-past-outbreaks>. SARS viruses are common in animals and only occasionally cross over to humans—with dangerous results. *Id.* The SARS-1 virus, which spread rapidly between 2002 and 2004, infected many and caused an estimated 774 deaths worldwide (though none in the United States). *Id.* See generally Center for Disease Control and Prevention, CDC.GOV, <https://www.cdc.gov> (providing range of information regarding the SARS virus and COVID-19 in particular).

² See CDC.GOV, *supra* note 1 (noting that as of January 1, 2021, COVID-19 surpassed twenty million cases and 341,199 deaths in the United States). Accord, Johns Hopkins Coronavirus Resource Center, <https://www.coronavirus.jhu.edu>.

³ COVID-19 is “a mild to severe respiratory illness that is caused by a coronavirus (*Severe acute respiratory syndrome coronavirus 2 of the genus Betacoronavirus*)” transmitted chiefly by contact with infectious material (such as respiratory droplets) or with objects or surfaces contaminated by the causative virus, and is characterized especially by fever cough, and shortness of breath and may progress to pneumonia and respiratory failure.” See *COVID-19*, MERRIAM-WEBSTER DICTIONARY (2020), <https://www.merriam-webster.com/dictionary/COVID-19>.

The term coronavirus derived from the crown-like spikes of the virus that appear when it is viewed by microscope. Kathy Katella, *Our New COVID-19 Vocabulary—What Does it All Mean?*, YALE MEDICINE (Apr. 7, 2020), <https://www.yalemedicine.org/stories/covid-19->

widely acknowledged serious problem⁴ that was deemed a “pandemic” by March 11, 2020.⁵ Beginning in March 2020, state and local governments began issuing

glossary/. It is a relative of the SARS-CoV (often referred to as “SARS” or Severe Acute Respiratory Syndrome) that caused substantial injury and death in a 2002-2003 worldwide outbreak. *Id.* Coronaviruses of various types can cause common colds as well as SARS and Middle East respiratory syndrome (MERS). *Id.* The variant emerging in 2019 “is believed to have started in animals and spread to humans. *Id.* Animal-to-person spread was suspected after the initial outbreak in December among people who had a link to a large seafood and live animal market in Wuahn, China.” *Id.*

COVID-19 is thus the name for the disease resulting from infection by the virus with the letters COVI standing for coronavirus, the D for disease, and the number 19 in the name resulting because this particular strain of the virus emerged in Wuhan in November 2019. Because the name is derived from initials, it is frequently abbreviated as “COVID-19” in capital letters.

⁴ See Christopher C. French, *COVID-19 Business Interruption Insurance Losses: The Cases for and Against Coverage*, 27 CONN. INS. L.J. 1 (2020) (acknowledging that COVID-19 infections were presenting serious problem). As is not common knowledge, governments exhibited a range of reactions to the COVID-19 problem. Some (e.g., Canada, New Zealand, Hawaii), ordered substantial comprehensive “lockdowns” as a means of retarding the spread of the disease. See, e.g., Lauren Vogel, *COVID-19: A Timeline of Canada’s First-wave Response*, CAN. MED. ASS’N J. NEWS (June 12, 2020), <https://cmajnews.com/2020/06/12/coronavirus-1095847>; Alexis Robert, *Lessons from New Zealand’s COVID-19 Outbreak Response*, THE LANCET (November 1, 2020), [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(20\)30237-1/fulltext](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30237-1/fulltext); Alejandro de la Garza, *Hawaii Is Riding Out the COVID-19 Storm. But Geographic Isolation Isn’t the Blessing it May Seem*, TIME (Nov. 25, 2020 10:07 AM), <https://time.com/5915084/hawaii-covid-coronavirus/>. Others, such as Sweden, adopted a system of modified restrictions that varied among states. Mariam Claeson & Stefan Hanson, *COVID-19 and the Swedish Enigma*, THE LANCET (January 23, 2021), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)32750-1/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)32750-1/fulltext).

⁵ The World Health Organization declared COVID-19 a pandemic on March 11, 2020. See *WHO Characterizes COVID-19 as a Pandemic*, WHO (Mar. 11, 2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen> (providing a timeline of COVID-19 developments and quoting WHO Director-General that the organization has “made the assessment that COVID-19 can be characterized as a pandemic” and is “the first pandemic caused by a coronavirus. And we have never before seen a pandemic that can be controlled, at the same time.”). See also Natasha Frost, *Coronavirus, QAnon, Trump: Your Monday Briefing*, N.Y. TIMES (Oct. 11, 2020), <https://www.nytimes.com/2020/10/11/briefing/coronavirus-qanon-trump-your-monday-briefing.html> (“More than six months since the start of the pandemic, European countries such as France, Spain and Britain are reporting daily infection numbers comparable to—and sometimes far beyond—those of their first peaks.”).

closure orders barring access to and operation of many facilities deemed insufficiently essential.⁶

The governmental orders varied, of course. Some demanded a stronger or more comprehensive shutdown than others. But many, if not most, precluded normal operation of “nonessential” business functions, perhaps most prominently indoor dining and entertainment, under pain of punishment for violation.⁷ Within days of government recognition (now widely seen as belated) that COVID was highly contagious and dangerous,⁸ insurance claims for business interruption were widely anticipated with additional anticipated coverage controversy involving other insurance products. The insurance coverage community was abuzz about the topic throughout Spring 2020, attention that continues only slightly abated today.⁹ Lawsuits followed relatively quickly, numbering more than 1,000 by Fall 2020.¹⁰

⁶ See French, *supra* note 4; Terry Spencer & Teresa Crawford, *US Moves Nearer to Shutdown Amid Coronavirus Fears*, AP (Mar. 16, 2020), apnews.com/article/1510caddee80ea2d73363fab76d55967 (“Officials across the country curtailed many elements of American life to fight the coronavirus outbreak. . . Governors and mayors closed restaurants, bars, and schools as the nation sank deeper into chaos.”).

⁷ See *infra* Part I(B) and Part II.

⁸ See *Death Rates from Coronavirus (COVID-19) in the United States as of December 22, 2020*, by State, STATISTA (Dec. 22, 2020), <https://www.statista.com/statistics/1109011/coronavirus-covid19-death-rates-by-state> (noting that, as of December 22, 2020, more than 319,000 American deaths were attributed to COVID-19 from a total of more than 20 million infections). Visible case studies of COVID-19 dangers were chronicled in often heart-wrenching news reports, see, e.g., *Those We’ve Lost*, N.Y. TIMES (Nov. 3, 2020), <https://www.nytimes.com/interactive/2020/obituaries/people-died-coronavirus-obituaries.html> (discussing as a regular feature in the Times since the onset of the pandemic), as well as being demonstrated rather dramatically and contemporaneously when President Donald Trump, three US Senators, White House employees, and Secret Service agents were afflicted during late September and early October 2020. The President was treated by a large team of physicians utilizing an array of antibiotics, steroids, and supplemental oxygen during the President’s 3-day hospitalization, with continuing treatment after discharge. See Katie Thomas & Denise Grady, *Trump Returns Home After Downplaying Disease, but Doctor Says He Isn’t ‘Out of the Woods,’* N.Y. TIMES (Oct. 7, 2020, 1:38 AM), <https://www.nytimes.com/live/2020/10/05/world/covid-trump>; Maggie Haberman & Annie Karni, *Trump’s Return Leaves White House in Disarray as Infections Jolt West Wing*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/us/politics/white-house-coronavirus.html>.

⁹ See *infra* Part II.

¹⁰ See Tom Baker, *COVID Coverage Litigation Tracker*, cclt.law.upenn.edu/author/tombaker/ (last visited December 31, 2020).

In the early spring days of the pandemic, the insurance industry began a remarkable media campaign to make known its position on the issue of coverage for virus-related losses: there is no coverage. In insurance industry publications, in lawyers' news media, and even in the news media consumed by the general public, the message of "no coverage for pandemic losses" was repeated again and again. This lies in stark contrast to the treatment of coverage for COVID-related losses in other jurisdictions such as Western Europe. But in America, however, the insurance industry repeated the mantra.

Policyholders only had to open a newspaper to see how the industry was advancing their views that claims would be denied, imposing motions to dismiss, at least before presumably favorable tribunals. And insurers began to win. Those wins were reported and highlighted in the media. This anti-coverage public relations media blitz forms a curious backdrop to what actually occurred in courts across the United States deciding COVID-related claims. In short, as this article discusses below, courts often fell short in their analyses in these coverage cases, ignoring time-tested principles of insurance policy interpretation and even of basic civil litigation rules. The spectre of the anti-coverage media blitz may well have primed the judiciary for the results to come.

By January 2021, roughly seventy-five of these cases had some sort of substantive court decision, most commonly the grant or denial of a motion to dismiss for failure to state a claim, particularly the latter, pro-insurer result.¹¹ Insurers prevailed in sixty-seven of the seventy-five cases, with courts granting Rule 12(b)(6) (or its state equivalent) dismissal on the basis of a lack of sufficiently triggering damage, a virus exclusion that ousts coverage, or both.¹² The speed of these decisions and the success of insurers should be regarded—at least on the triggering damage question—as surprising and erroneous.¹³ Although insurers have a significant array of arguments against coverage, we find them considerably less powerful than suggested by insurers and accepted by many judges to date.¹⁴

¹¹ *Id.* In what might be termed the "first wave" of COVID-19 property insurance and business interruption cases, the majority have been brought by policyholders as plaintiffs rather than by insurers seeking a declaratory judgment of no coverage. For clarity, this article will generally use the term "policyholders" to include both named insureds and all other insureds under a policy unless insured status is important to determination of a coverage issue.

¹² See Baker, *supra* note 10.

¹³ See *infra* Part IV.

¹⁴ See *infra* Part III. This is not to say that insurers deserve none of these early victories. Where policies contain a sufficiently broad virus exclusion, the facts of many cases will likely make the exclusion applicable and support a finding of no coverage. As Professor Baker has noted:

In our view, each insurance coverage case needs to be decided based upon not only its particular factual context but also according to the specific policy at issue. Some policies contain a virus exclusion (which of course makes a stronger, perhaps even irrefutable, case for no coverage)¹⁵ while many others lack any such limitation on coverage—a factor strongly favoring policyholders.¹⁶ But the “early returns” point toward excessively impulsive and overbroad (in our view) embrace

Of the seven cases in which a merits-based motion to dismiss has been denied, four involve insurance policies without any virus exclusion, one involves the Hartford’s Endorsement for Limited Fungi, Bacteria, or Virus Coverage (which contains a virus exclusion that could be read to apply only to losses involving defective materials), and two have virus exclusions that apply to sickness or disease.

By contrast, of the eighteen cases in which a court has granted a merits-based motion to dismiss, only two don’t have virus exclusions.

This matters, among other reasons because the presence of a virus exclusion inhibits policyholders from pleading their cases in ways that would help them meet the requirement that their business income losses result from “physical loss of or damage to” the premises in question.

Bottom line [as of Oct. 7, 2020]: insurers are winning, overwhelmingly, when their policies have virus exclusions. But they are losing, at least at the motion to dismiss stage, when their policies do not have virus exclusions.

Baker, *supra* note 10. We are, as discussed in Part IV, nonetheless disturbed by many of these early insurer victory cases because of their superficial and weak reasoning taking an excessively narrow view of what constitutes “physical loss or damage,” which may have negative implications for future coverage disputes.

¹⁵ See *infra* Part V.

¹⁶ If nothing else, the presence of an exclusion implies, sometimes strongly in light of the language of the insuring agreement, that in the absence of an exclusion, a claim or loss is covered. As discussed in Part IV, the virus exclusion was developed to avoid potential coverage pursuant to standard issue policies. If the insuring agreement or other exclusions in those policies had sufficiently precluded coverage, there logically would have been no need for a specific virus exclusion. We appreciate that insurers may want a “belt and suspenders” approach to policy drafting and that exclusions in some cases may be added simply to solidify widely accepted understandings and to foreclose unrepresentative judicial construction of policies. But courts should also appreciate that just as often (or perhaps more frequently), exclusions are added to policies because the policies provide coverage in the absence of such exclusions.

of an insurer-sponsored conventional wisdom that COVID claims are simply not insured.¹⁷

In particular, we are unimpressed with insurer arguments that COVID and attendant government closure orders do not—as a matter of law—constitute “direct physical loss or damage” to covered property. To date, the majority of judges hearing COVID cases disagree. Although their views are positive law and ours are not, we remain disappointed in the quality of analysis applied in many of the COVID coverage cases, which has often been reductionist, simplistic, crabbed, and overconfident regarding textual analysis, as well as insufficiently sensitive to the value of trial proceedings for resolving these disputes.¹⁸

Judges granting dismissal motions without any opportunity for discovery, and denying any possibility of coverage at the metaphorical starting gate, have undermined the traditional American commitment to jury trials as well as widely accepted legal principles of insurance policy construction such as interpreting ambiguous terms against the drafter and considering policyholder reasonable expectations.¹⁹ Where the issue is solely whether sufficient “loss” or “damage” has taken place, standard property insurance policy language is simply not as conclusive as purported by these courts. Although other defenses such as a virus exclusion may carry the day for some insurers, insurers have to date gotten much more mileage out of very weak “no-loss/no-damage” arguments than should be the case if trial judges were consistently doing a thorough job.

¹⁷ Consistent with discussion in Part II of this article regarding the (in our view) successful public relations efforts of insurers to paint COVID-19 business interruption claims as (to use a favorite phrase of the former President Trump) losers, the legal and insurance trade press has tended to under-report policyholder victories while giving significant attention to insurer victories, emphasizing judicial statements labeling policyholder coverage arguments as meritless. Having followed the legal and trade press thoroughly the pandemic, we were surprised upon reading Professor Baker’s COVID Coverage Litigation Tracker to find that policyholders had “prevailed” on as many dismissal motions as they have (which is still a tiny fraction of the total number of motions). Baker, *supra* note 10. We put the term “prevailed” in scare quotes to emphasize that that surviving a motion to dismiss is not the equivalent of obtaining coverage—and certainly does not reflect payments that small business policyholders state they desperately need to survive. By contrast, when an insurer obtains a Rule 12 dismissal, it really has won something. In all eighteen cases where insurers have to date prevailed on dismissal motions, the court has dismissed the entire case with prejudice, leaving the policyholder with the unattractive options of appeal or accepting defeat.

¹⁸ See *infra* Part IV.

¹⁹ See *infra id.*

Potentially aiding and abetting this judicial failure has been substandard briefing and advocacy by policyholder counsel, many of whom are not insurance specialists but tort lawyers prosecuting coverage cases with perhaps relatively little experience or expertise about the nuances of insurance coverage law.²⁰ In many of the cases with outcomes we criticize, insurers have been served by better advocacy, an important factor in cases where judges also lack insurance expertise. In some other cases, a judge's background formerly representing insurers may also foreshadow pro-insurer rulings.²¹ But we also posit that the bench was probably affected by widespread insurer efforts to "poison the well" against COVID-19 coverage claims through an early onslaught of pro-insurer, anti-coverage commentary in the legal press, the insurance trade press, and in mass circulation media.²²

A more extensive and nuanced analysis of COVID coverage issues suggests to us that policyholders should be winning most of these dismissal motion cases—at least on the loss and damage issues—and proceeding further in the adjudication process. Notwithstanding some shining exceptions,²³ the first wave of decisions in these cases has been largely disappointing and reflects poorly on the legal and hyper-textual analysis of the bench. If this trend continues, the insurance industry will have

²⁰ Insurers have taken the rare step of filing memoranda opposing amicus participation in Covid coverage cases, presumably because they wish the court not to have the benefit of analysis by more seasoned coverage counsel. *See, e.g.*, Defendant's Opposition to United Policyholders, National Independent Venue Association, and Washington Hospitality Association's Motion for Leave to Appear as Amici Curiae, *Vita Coffee, LLC v. Fireman's Fund Ins. Co.*, No. 2:20-cv-01079-JCC-DWC (W.D. Wash. 2020) (noted insurer side law firm opposes, *inter alia*, submission of United Policyholders amicus brief authored by Covington & Burling partner David Goodwin, a prominent policyholder coverage attorney).

²¹ *See, e.g.*, *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp.*, No. 20-cv-04434 JSC, 2020 U.S. Dist. LEXIS 174010 (S.D. Cal. Sept. 22, 2020) (granting of an insurer's dismissal motion by Magistrate Judge Jacqueline Scott Corley, formerly at DLA Piper, a firm known for representing insurers that has been involved in COVID coverage litigation, sufficiently aggressively that it has opposed judicial consideration of a proffered amicus brief by United Policyholders. *See also infra* Part II).

²² By legal press, we refer to media directed primarily at lawyers, such as *US Law Week*, *Law 360* and the like. By insurance trade press, we refer to periodicals such as *Insurance Journal*, *Business Insurance*, *National Underwriter*, *Best's Review* and electronic newsletters, bulletins, and blogs (*e.g.*, Randy Maniloff's *Coverage Opinions* or the Hunton & Williams newsletters). General circulation media is aimed primarily at laypersons and runs the gamut from individual blogs or websites to major newspapers of record.

²³ *See infra* Part IV(A) (discussing well-reasoned cases finding sufficient allegations of physical loss or damage for coverage claim to proceed).

obtained an undeserved victory that is inconsistent with the extent of coverage it promised to policyholders, particularly small businesses.

The remainder of this part of the article examines the risk management and insurability issues presented by pandemic claims and identifies the principal types of first-party property insurance that could be implicated. Part II recaps the remarkable public relations campaign of insurers designed to influence both judicial and lay perception of insurance coverage for COVID-related losses. Part III examines the crucial coverage issues of whether there has been direct physical loss or damage sufficient to create coverage, acknowledging that coverage may be taken away by certain virus exclusions or other aspects of the policy or situation. Part IV briefly raises the virus exclusion contained in many policies and some challenges with it.

We conclude with concerns regarding the success of a tightly packaged, insidiously executed, and albeit factually and legally incorrect adversarial position put forth in insurance media may well have affected the initial outcomes of COVID-related coverage litigation. While we of course hope that to be untrue, when one begins to stack together some of the bizarre and frankly un-judicial goings on in these early COVID coverage cases, one has to wonder whether and to what degree concerted insurer-directed media infected the judicial outcomes. If true, that lays a haunting precedent over future coverage litigation for insurance matters both about pandemic-related losses and beyond.

B. CONSIDERING COVID COVERAGE DISPUTES IN THE BROADER CONTEXT OF THE INSURABILITY OF PANDEMIC-RELATED LOSSES

A pandemic is a “clash event,”²⁴ like a war or nuclear accident. Losses flowing from this event are large, uniformly repeated amongst many policyholders, and simultaneously cut across multiple insurance product lines. Insurance is built as a risk-based product, designed to buffer chance happenings of loss-related events by pooling collective risk in a pool while knowing that not all policyholders in that risk pool will experience a loss at exactly the same time.

With a pandemic, “chance” may be frustrated in that the precise manner in which risks become losses may not be fully expected (or rather modelled) by insurers. This makes it difficult for the insurer to spread risk amongst the risk pool or even amongst various lines of insurance products. While some industries in a

²⁴ Michelle E. Boardman, *Known Unknowns: The Illusion of Terrorism Insurance*, 93 GEO. L.J. 783, 784 (2004) (dubbing “clash events” those large-scale losses like earthquakes and nuclear disasters that affect many policyholders at once and cut across multiple insurance lines).

pandemic can be severely affected (like the travel and hospitality industries in the current COVID-19 pandemic), and most at least significantly affected (such as retailers and services), there will be some industries that actually thrive in a pandemic (such as online retailers and delivery services). It may be fair to argue that it is the job of insurers to predict and price their insurance products accordingly, as part of building a solvent insurance framework. A failure to incorrectly build and price insurance in the wake of a clash event can leave only two outcomes: financial decimation for either the policyholder or the insurer. The stakes are high.

In a pandemic situation like that with COVID-19, a downturn in commercial activity is also often related to a resulting downturn in the financial markets. This challenges an insurer's ability to capitalize on investment returns for its retained insurance premium funds. The differential between premiums obtained and losses paid out—the spread—becomes tougher to profitably manage, because the financial markets unexpectedly reacted as a result of the very factor causing the losses insured.

But losses realized in a pandemic are not, by nature, impossible to insure. The difficulty is with estimating the correct pricing of the insurance products that tracks the realistic risks of payouts while still maintaining a profitable baseline for the insurer.

Anything that is fortuitous can be insured, in principle. The pandemic is an unexpected event. Whether insurers choose to insure pandemic-related losses as a matter of commercial choice is, of course, itself another matter.

Pandemic-relating losses are insurable in theory because the timing of the pandemic itself is a fortuitous event. We do not know when—or if—one will strike. But even in the wake of a full-blown pandemic, there are still fortuitous aspects making insurance a potentially profitable financial product to sell. Because, as noted above, not all industries will be affected at the same time and to the same degree, insurers may still be able to structure and price insurance profitably, even during a full-blown pandemic. This is because the degree and extent of loss experienced amongst individual policyholders is fortuitous. In fact, some policyholders may profit from the pandemic in their specific industries and may have no loss at all.

An insurer's ability to properly price an insurance product that appropriately accounts for pandemic-related losses based on the underwriting risk involves three factors:

- a) can the insurer properly rate the risk?
- b) is the premium for the risk affordable to policyholders?
- c) will the premium (along with investment income) exceed the loss?

As has probably occurred with COVID, insurance products were likely priced with the foresight of only a slight possibility of a pandemic. The insurer model may not have accounted for the various kinds of losses amongst policyholders (i.e. largely business interruption losses from governmental orders either closing businesses or telling customers to shelter at home to quell the spread of the virus).

Insurers cannot claim that the pandemic was completely unforeseen as an event. The world has seen its share of rising health epidemics in the recent decades, from Ebola to SARS to H1N1, swine flu, Zika, MERS, and HIV/AIDS. In fact, the insurance industry had a virus and bacteria exclusion approved by regulators for inclusion in property insurance policies in 2006, in direct response to the SARS virus (though this exclusion is not featured in all property policies).²⁵ The insurance industry also marketed specific insurance for pandemic-related losses, a product still available at the start of the COVID-19 pandemic in March 2020.²⁶

However, most insurers began the COVID-19 pandemic with blanket coverage denials for policyholders' COVID-related claims. And insurers did this not on the basis of the virus exclusion most logically relevant to the issue, but instead on the argument that the policyholder has suffered no physical loss or damage.

The insurance denials prompted some governments to propose legislation to mandate either government reinsurance for pandemic-related losses,²⁷ or insist that insurers cover such losses, even despite actual policy coverage wording.²⁸ In

²⁵ INSURANCE SERVICE OFFICE, ISO FORM CP 01 40 07 06 - EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA (July 6, 2006) [hereinafter ISO VIRUS EXCLUSION], <https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf> (mentioning specifically SARS, avian flu, and influenza, as well as anthrax).

²⁶ See, e.g., *PathogenRX, An Innovative Solution for Pandemic and Epidemic Risks*, MARSH, <https://www.marsh.com/us/campaigns/pathogenrx.html> (last visited Jan. 24, 2021) (which had almost no take-up prior to COVID-19); Stuart Collins, *Insurers Wary of Meeting Growing Demand for Specialist Pandemic Cover*, COM. RISK ONLINE (Apr. 9, 2020), <https://www.commercialriskonline.com/insurers-wary-meeting-growing-demand-specialist-pandemic-cover/>; see also Robert Hartwig, Greg Niehaus & Joseph Qiu, *Insurance for Economic Losses Caused by Pandemics*, 45 GENEVA RISK & INS. REV. 134, 138 (2020) (discussing the failed PathogenRX market).

²⁷ See, e.g., Pandemic Risk Insurance Act of 2020, H.R. 6983, 116th Cong. (2020).

²⁸ Various state governments in New Jersey, New York, Pennsylvania, Louisiana, Ohio, Massachusetts, and South Carolina all proposed bills mandating that insurers cover COVID-19 pandemic-related losses. See, e.g., The Gen. Assemb. of Pa., H.B. 2372, 2020 Sess. (Pa. 2020) ("Business Interruption Insurance Act"); State of N.Y. Assemb., A. 10226-B, 2020 Assemb. (N.Y. 2020) ("An Act in relation to requiring certain perils be covered under business interruption insurance during the coronavirus disease 2019 (COVID-19) pandemic"); State of N.Y. Senate, S. 8178, 2020 S. (N.Y. 2020) ("An Act in relation to

response, the National Association of Insurance Commissioners (NAIC) warned in correspondence to the U.S. House Committee on Small Business that such legislation requiring insurers to cover COVID-19 related losses would financially decimate the insurance industry.²⁹ The Insurance Commissioners argued that most insurance products were not designed or priced to provide coverage for pandemic-related losses. They also contended that “virtually every policyholder suffers significant losses at the same time.” But pandemic-related losses themselves are not uninsurable in principle. Insurers may just not have properly estimated how the particular losses of this pandemic have played out and may not have priced their products accordingly. Or, perhaps, the insurance products were not designed to cover pandemic-related losses at all.

C. INSURANCE IMPLICATED IN A PANDEMIC

A pandemic such as the COVID crisis can result in insurance claims across a variety of insurance product lines, including:

- a) property insurance, especially for contamination losses and business interruption losses, as well as losses arising from civil authority ‘stay at home’ orders or forced business closure orders;
- b) liability insurance, in the event an employee or customer takes legal action against the policyholder for injury suffered as a result of failure to take reasonable health precautions;
- c) workers compensation and employment insurance, for the sickness or quarantining or isolation of employees;
- d) directors and officers insurance, for any liability visited by corporate decisions as a result of the pandemic; and
- e) event cancellation insurance, triggered if a major event is cancelled (such as a sporting event or concert or film production).

requiring certain perils be covered under business interruption insurance during the coronavirus disease 2019 (COVID-19) pandemic”). These bills are currently winding their way through the legislative processes.

²⁹ Letter from Nat’l Ass’n of Ins. Comm’rs and the Cntr for Ins. Pol’y & Rsch to The Honorable Nydia M. Velázquez, Chairwoman, U.S. House Committee on Small Business (May 20, 2020), https://naic.org/documents/government_relations_200521.pdf.

1. Business Interruption Coverage

The most active area for insurance coverage issues at this stage of the COVID-19 pandemic has been litigation arising from business losses by commercial entities, as a result of policyholder claims for losses under business interruption and civil authority insurance provisions. This has triggered interpretive debates in the courts over the meaning of business interruption and civil authority coverage contained in commercial property policies. These types of insurance products are additional coverages to the standard all-risk commercial property insurance policy.³⁰

The standard commercial property policy provides coverage for losses arising from all risks to the policyholder's commercial property, save and except those risks that are specifically excluded in the policy. As a separate add-on, usually as an endorsement and for additional premiums, the policyholder can augment its property policy with various types of insurance coverage for other potential business-related losses.³¹

One such potential business-related loss is the interruption of a business' potential to generate income. This type of coverage is designed to protect the earning stream of the business in the event the business' capacity to earn income is interrupted as a result of a covered cause of loss. The coverage indemnifies the policyholder for income lost while the building restores its operations.³²

The coverage clause in the standard property policy typically covers "direct physical loss of or damage to" insured property.³³ The business interruption coverage clause typically dictates that the insurer will pay for the loss of business income "due to the necessary suspension or delay of operations caused by direct physical loss of or damage to property." To determine insurance coverage, the policyholder must prove it suffered some "direct physical loss of or damage to property." The archetypal scenario for triggering business interruption insurance is the fire at a commercial establishment. The fire damages the storefront and the

³⁰ See French, *supra* note 4, at 17–20; MARK S. DORFMAN & DAVID A. CATHER, INTRODUCTION TO RISK MANAGEMENT AND INSURANCE 346–47 (10th ed. 2013); EMMETT J. VAUGHAN & THERESE M. VAUGHAN, FUNDAMENTALS OF RISK AND INSURANCE 563–65 (11th ed. 2013).

³¹ See French, *supra* note 4, at 21–30; DORFMAN & CATHER, *supra* note 30, at 346–47; VAUGHAN & VAUGHAN, *supra* note 30, at 563–65.

³² See French, *supra* note 4, at 21–30; DORFMAN & CATHER, *supra* note 30, at 346–47; VAUGHAN & VAUGHAN, *supra* note 30, at 563–65.

³³ See JEFFREY W. STEMPER & ERIK S. KNUTSEN, STEMPER & KNUTSEN ON INSURANCE COVERAGE §15.01[D] (4th ed. 2015 & Supp. 2020).

business is unable to earn income until such time as the business can repair the fire-damaged storefront.

In a pandemic situation like COVID, however, the place of business is not physically destroyed but contaminated by virus, making use of the business property unsafe. Alternatively, access to the business' property may be curtailed due to governmental orders designed to curb the spread of the disease. For example, many restaurants have been ordered closed to dine-in customers and could only operate via take-out or delivery for a period of time. The question becomes whether the policyholder has suffered a "direct physical loss of or damage to" its commercial property by either contamination by virus or by a governmental order restricting property access or use.

Insurers will likely stress that commercial property policies are designed to cover physical damage to tangible property—like fire damage. One way of looking at the issue is that any loss of business income should be tied to the necessary interruption of a business' income stream as a result of something that harms the property in a way that would interfere with a policyholder using its property as a place to earn income. If the property itself is not damaged, the coverage should not be triggered.³⁴

Policyholders, however, likely believe that they purchased business interruption insurance as an add-on to their property coverage in order to insure a capital asset—the income-earning power of their business (hence the name "business interruption insurance"). If that income stream is interrupted due to an interference with their use of their property—whether by virus contamination or by orders of government—their reasonable expectation would be that the business interruption portion of their policy would cover such losses. The property policy is, after all, "all-risk" property insurance, and the business interruption coverage is tied to that "all-risk" concept. Policyholders who purchased business interruption insurance would expect coverage for an inability to use their property to earn business income.³⁵

2. Civil Authority Coverage

A common extension to the business interruption coverage in a commercial property policy is civil authority coverage. Under this coverage, a policyholder can insure its lost business income stream if access to its property is impaired or prohibited due to the order of some civil authority (i.e. a government). Some wordings of this coverage specifically require that the civil authority's order is due

³⁴ See French, *supra* note 4, at 51.

³⁵ See French, *supra* note 4, at 68–71.

to the direct physical loss of or damage to property adjacent to the policyholder's insured property as a result of a covered cause. A common coverage clause for civil authority insurance states: "... if an order of civil or military authority limits, restricts or prohibits partial or total access ... provided such order is the direct result of physical damage of the type insured."³⁶ The classic example is the burned warehouse that sits next to the policyholder's place of business. To keep people in the adjacent properties safe, a civil authority could ban access to a policyholder's property simply because it is close to another property exhibiting unsafe characteristics (like the unstable structure after a fire).

Business interruption insurance claims due to COVID have arisen under the civil authority coverage provisions, resulting from losses due to state or municipal "shelter in place" orders or the closure of non-essential businesses or the modification of the use of businesses, such as eliminating indoor dining at restaurants. The risk of COVID with its airborne and highly contagious quality prompted many civil authorities to issue various orders in an attempt to contain the disease.

Courts examining civil authority coverage tend to look to causation arguments: was the order the result of directly physical loss of or damage to property? If so, is such a covered cause of loss? Policyholders have argued that they suffered loss of use or loss of functionality of their property due to the civil authority orders, and that constitutes a direct physical loss of property. However, insurers have argued that the language of most coverage grants demands that policyholders must also prove that alleged property damage to some property adjacent to the policyholder's place of business actually led to the civil authority making the order.

3. Contingent Business Interruption Coverage

Contingent business interruption coverage is similar to business interruption coverage except that the policyholder's income stream is affected by loss or damage to a related business' property, and not the property of the policyholder. This coverage is commonly implicated in a manufacturer setting, where a supplier suffers a loss and the manufacturer cannot obtain a needed component in a timely fashion and suffers a business interruption.³⁷

For example, if a tire manufacturer suffers a fire at the tire plant and is unable to ship its tires to auto makers because of fire damage to the plant, the auto makers will likely have a business interruption loss due to the inability to get tires

³⁶ See STEMPER & KNUTSEN, *supra* note 33, at §28.04.

³⁷ See French, *supra* note 4, at 21–30; Dorfman & Cather, *supra* note 30, at 346–47; Vaughan & Vaughan, *supra* note 30, at 563–65.

in a timely manner from their supplier. The auto maker can then make a contingent business interruption claim in that, although it did not suffer the loss itself on its own property, its supplier did, and that loss to the supplier affected the policyholder's own business income stream. The key to coverage for contingent business interruption insurance is that, like business interruption insurance, the supplier must have suffered some "direct physical loss of or damage to" property as a result of a cause covered by the policyholder's all-risk insurance.

4. Ingress/Egress Coverage

Ingress/egress coverage is also sub-coverage that may be included in business interruption coverage. It provides coverage for losses arising if access to a policyholder's property is impeded through some reason other than by a civil authority order (i.e. blocked due to construction debris). To date, this coverage has not yet been implicated in any court decisions deciding COVID pandemic-related coverage issues. This makes sense as it was civil authority orders that largely affected property access for policyholders.

II. INSURER PUBLIC RELATIONS BLITZ: INSURERS PUSH THEIR ANTI-COVERAGE MESSAGE

As previously noted, COVID-19 became recognized as a major public health issue likely to adversely impact commerce in early March 2020. It was fairly clear at the outset, particularly when citizens began to stockpile supplies and stay indoors and when governments issued closure orders, that COVID would have a serious negative impact on many businesses, particularly entertainment, dining, and tourism.³⁸

³⁸ See French, *supra* note 4, at 1–3; *Why Are Markets Collapsing? How Bad Will COVID-19 Really Be?*, KNOWLEDGE@WHARTON (Mar. 16, 2020), <https://knowledge.wharton.upenn.edu/article/why-are-the-markets-collapsing-how-bad-will-covid-19-really-be/> ("markets are acting as if we are going to encounter the worst-case scenario") (italics removed). The actual downturn in these areas of commerce has perhaps been even worse than anticipated due to the difficulty in containing COVID, resulting in a quilted cycle of closures and declining customer patronage that has perhaps lasted even longer than predicted. See Zoe Wood, *How the Cineworld Closures Could Turn Leisure Parks into a Disaster Movie*, THE GUARDIAN (Oct. 10, 2020 03:00 EDT), <https://www.theguardian.com/business/2020/oct/10/how-the-cineworld-closures-could-turn-leisure-parks-into-a-disaster-movie> (describing massive movie theatre closures and layoffs and ripple effect on bars, restaurants, and shops that benefitted from entertainment traffic). Accord Julian Kozlowski, Laura Veldkamp, & Venky Venkateswaran,

In response to the COVID-19 pandemic, insurers quickly took control of the insurance coverage message in the media: there will be no coverage for COVID-19 related losses.³⁹ Typical of the industry line were statements by insurance executives that “[p]andemics are not insurable because they are too widespread, severe, and unpredictable to underwrite” and that “[c]ommercial-property insurance policies that include business-interruption coverage generally are not intended to cover disease- or pandemic-related losses.”⁴⁰

Another prominent insurer executive claimed to “see very minimal loss exposure from this” due to the addition of coverage-restricting language in policies

Scarring Body and Mind: The Long-Term Belief-Scarring Effects of COVID-19 (Nat’l Bureau of Econ. Rsch., Working Paper No. 27439, June 2020), https://www.nber.org/system/files/working_papers/w27439/w27439.pdf (finding that “long-run costs for the U.S. economy” from adverse psychological impact of pandemic will be “many times higher than the estimates of the short-run losses in output. This suggests that, even if a vaccine cures everyone in a year, the COVID-19 crisis will leave its mark on the US economic for many years to come.”).

³⁹ See, e.g., Caroline Glen, *Insurers Are Telling Businesses Their Policies Don’t Cover Coronavirus Shutdown. John Morgan Attorneys Say They’re Wrong*, ORLANDO SENTINEL (May 4, 2020), <https://www.orlandosentinel.com/coronavirus/jobs-economy/os-bz-coronavirus-insurance-denials-morgan-lawsuits-20200504-pbrpq6z7ofbevau67cpgq4nzqi-story.html>; Ellen Ioanes, *Does My Business-Interruption Insurance Cover Closing Because of COVID-19?*, BARRON’S (June 17, 2020 5:30 AM), <https://www.barrons.com/articles/does-my-business-interruption-insurance-cover-closing-because-of-covid-19-51592386201>; Leslie Scism, *Companies Hit by COVID-19 Want Insurance Payouts. Insurers Say No.*, WALL ST. J. (June 30, 2020 10:24 AM), <https://www.wsj.com/articles/companies-hit-by-covid-19-want-insurance-payouts-insurers-say-no-11593527047>. See also INS. INFO. INST., *Insurance Industry Provides Interactive ‘Explainer’ to Help Navigate Business Interruption Insurance*, III (Oct. 16, 2020), <https://www.iii.org/pres-release/insurance-industry-provides-interactive-explainer-to-help-navigate-business-interruption-insurance-101620>. The navigation tends to leave policyholders on the shoals of no coverage as the III Explainer consistently takes a narrow view of the scope of coverage and, in particular, contends that most all COVID-related coverage is not covered. *Accord Business Interruption Insurance: An Interactive Explainer Outlining the Case for a Federal Solution to Pandemic Relief*, FUTURE OF AM. INS. & REINSURANCE, https://fairinsure.org/business-interruption-insurance/?utm_source=Board+of+Directors&utm_campaign=5ca10385b4-EMAIL_CAMPAIGN_2018_08_15_11_45_COPY_01&utm_medium=email&utm_term=0_0934a86008-5ca10385b4-122588685.

⁴⁰ See Ioanes, *supra* note 39 (quoting David Sampson, president and CEO of the American Property Casualty Insurance Association (APCIA)).

because of “past pandemics and/or partial pandemics.”⁴¹ Swinging into attack mode, this industry leader also took the by-now almost obligatory insurer swipe at plaintiff counsel and made it clear that seeking coverage would not be for the faint of heart: “Lawyers and the trial bar will attempt to torture the language on standard industry forms and try to prove something exists that actually doesn't exist” “The industry will fight this tooth and nail. We will pay what we owe.”⁴²

Whether this evolved to be the message over a short period of time, or whether it was a concerted industry effort (likely the latter), we believe it made an impact on the subsequent insurance coverage court decisions about COVID-related claims. It provides an interesting example of insurers seizing the messaging opportunity to potentially affect legal decisions. Making use of extra-legal media messaging to impact the legal sphere is a useful tactic for prospective litigants and insurers seem to be good at it.

⁴¹ See Leslie Scism, *U.S. Businesses Gear Up for Legal Disputes with Insurers Over Coronavirus Claims*, WALL ST. J. (Mar. 6, 2020 10:00 AM), <https://www.wsj.com/articles/u-s-businesses-gear-up-for-legal-disputes-with-insurers-over-coronavirus-claims-11583465668> (quoting Chubb Ltd. CEO Evan Greenberg, however “Chubb declined to comment further” on the issue when asked by the Journal reporter). See also Maria Sassian, *Triple-I CEO Tells U.S. House—Global Pandemics are Uninsurable*, INS. INFO. INST. (May 21, 2020), <https://www.iii.org/insuranceindustryblog/triple-i-ceo-tells-u-s-house-global-pandemics-are-uninsurable/> (“An event like a global pandemic is uninsurable [said the executive.] Unlike a typical covered catastrophe, which is limited in terms of geography and time, pandemics have the potential to impact everywhere, all at once As such, this type of magnitude requires government resources to step in and provide support.”).

⁴² See Scism, *supra* note 39 (quoting Chubb Ltd. CEO Evan Greenberg).

Media targets included both the legal press,⁴³ the insurance trade press⁴⁴ as well as the business press,⁴⁵ and even the mainstream lay press read by the average public⁴⁶

⁴³ See, e.g., Larry P. Schiffer, *Does the Novel Coronavirus Cause Direct Physical Loss of or Damage to Property?*, NAT'L L. REV. (July 13, 2020), <https://www.natllawreview.com/article> (concluding that “[b]ased on the case law and the nature of the novel coronavirus, it appears unlikely that courts will conclude that viral contamination causes ‘direct physical loss.’”); *Insurers’ COVID-19 Notepad: What You Need to Know Now*, CROWELL MORING (June 9, 2020), <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/Insurers-COVID-19-Notepad-What-You-Need-to-Know-Now-Week-of-June-8> (suggesting that coverage unlikely for COVID-related claims); Lauraann Wood, *Insurer Says Policy Isn’t Triggered in COVID-19 Coverage Suit*, LAW360 (July 14, 2020 3:56 PM), <https://www.law360.com/articles/1291736/insurer-says-policy-isn-t-triggered-in-covid-19-coverage-suit>.

Even if the virus had been present on the covered businesses’ properties, it wouldn’t constitute direct physical loss or damage because it doesn’t cause ‘a tangible change to the physical characteristics of property,’ [the insurer argued]. COVID-19 isn’t incorporated into their properties’ physical structure, doesn’t require a building’s physical alteration for removal ‘and does not render the building unfit for use,’ it said.

‘Rather, the coronavirus can be removed from surfaces with soap and water and rendered inert with various common household disinfectants, including bleach,’ [said the insurer.] ‘[The insureds’] alleged losses are at most economic losses, not a direct physical loss or damage.’

The businesses also aren’t entitled to coverage under the civil authority provision for additional coverage under their policies, which ‘has a very specific set of terms and conditions that must be met,’ [the insurer represented to the court.]

Wood, *supra*.

⁴⁴ See, e.g., Jeff Dunsavage, *COVID-19 Wrap-up: BI Coverage Continues to Make Headlines*, TRIPLE-I BLOG (May 21, 2020), <https://www.iii.org/insuranceindustryblog/covid-19-wrap-upbi-coverage-continues-to-make-headlines> (“The *Post* interviewed Triple-I CEO Sean Kevelighan and Triple-I non-resident scholar Michael Menapace, who explained why the suits are unreasonable and threaten the insurance industry’s solvency. ‘The insurance business works by spreading risk around so the industry isn’t hit all at once with claims,’ Kevelighan says. ‘A pandemic disrupts business far and wide, with no end date in sight.’”); *Focus on Facts, Not Media Misinformation: Berkley*, CARRIER MGMT (June 7, 2020), <https://www.carriermanagement.com/news/2020/06/07/207575.htm?print> (“Arguing that the media has been fed misinformation by

the plaintiffs bar, the chief executive officer of a property/casualty insurer said facts will win out on debates over business interruption coverage disputes related to COVID-19 shutdowns.”) (referring to W. Robert Berkley, Jr., president and CEO of WR Berkley); Stephan Kahl, *Munich Re to Stop Selling Pandemic Business Coverage*, INS. J. (Sept. 11, 2020), <https://www.insurancejournal.com/news/international/2020/09/11/582141.htm>; *Beazley Hikes Estimate for COVID-19 Related Claims Amid Resurgence in Virus*, SHARES MAG. (Sept. 22, 2020 07:30), <https://www.sharesmagazine.co.uk/news/market/7092096/Beazley-hikes-estimate-for-Covid-19-related-claims-amid-resurgence-in-virus> (estimating range of exposure from \$170 to \$350 million net of reinsurance).

⁴⁵ See, e.g., Leslie Scism, *U.S. Businesses Gear Up for Legal Disputes with Insurers Over Coronavirus Claims*, WALL ST. J. (Mar. 6, 2020 10:00 AM), <https://www.wsj.com/articles/u-s-businesses-gear-up-for-legal-disputes-with-insurers-over-coronavirus-claims-11583465668>; Ioanes, *supra* note 39; Katherine Chiglinsky, *Virus Fight Insurers Thought They’d Dodged Is Looming Anyway*, WASH. POST (Mar. 24, 2020 11:20 AM), https://www.washingtonpost.com/business/on-small-business/virus-fight-insurers-thought-theyd-dodged-is-looming-anyway/2020/03/24/aef84e06-6de1-11ea-a156-0048b62cdb51_story.html; Kate Rogers & Betsy Spring, *On Main Street, Business Owners Push for Greater Protection from Coronavirus-related Lawsuits*, CNBC (June 15, 2020 1:37 PM), <https://www.cnbc.com/2020/06/12/on-main-street-a-push-for-protection-from-coronavirus-related-lawsuits.html> (“‘It turns out that business interruption insurance is not what it sounds like,’ [Robert Cresanti, president and CEO of the International Franchise Association] said. ‘Most of the insurance companies are telling our people that business interruption insurance is actually business destruction insurance. So if your business is burned down or destroyed by a flood, you’re covered. But you’re not [covered] in a crisis like this where your business is truly interrupted.’”); Karen Epper Hoffman, *Business Interruption: Insurers Balk at Paying Claims*, CFO.COM (Sept. 10, 2020), <https://www.cfo.com/risk-management/2020/09/pandemic-losses-out-in-the-cold> (“Robert Gordon, senior vice president for policy, research, and international for the American Property Casualty Insurance Association (APCIA), says that because government emergency orders closed businesses to limit human transmission of COVID-19 and not because there had been direct property loss or damage, business interruption policies are not relevant.”).

⁴⁶ See, e.g., Ron Hurtibise, *Sorry, That’s Not Covered: Insurers Fight Businesses Over COVID-19 Shutdowns*, S. FLA. SUN SENTINEL (Sept. 12, 2020 8:55 AM), <https://www.sun-sentinel.com/business/fl-bz-owners-losing-covid-related-business-interruption-suits-20200912-46jlyxsftjenvlyrxg4tfbqyam-story.html> (“the industry has reinforced its message by boasting about nearly every court ruling that has gone its way. ‘Another court agrees: Business Interruption Insurance Does Not Cover Pandemic-Related Losses,’ said the subject line of an email release by the Insurance Information Institute, a trade group created by the industry to educate consumers about insurance-related issues.”); Judith Bachman, *Judges Are Deciding Whether Business Interruption Policies Cover Pandemic-Related Losses*,

as well as scholarly journals.⁴⁷ When insurers prevailed in litigation, victory was quickly trumpeted.⁴⁸

A similar public relations campaign by small business policyholders was harder to mount given the disparate number and dispersion of random policyholders with potential claims.⁴⁹ Although plaintiff law firms fulfilled some of this function in banging the drum for coverage, their efforts were (in our view) problematic in that many of these lawyers were not insurance coverage specialists from experienced policyholder-side coverage firms. In addition, early pro-coverage efforts were (in our view) too grandiose and not well-targeted.

For example, plaintiff firms sought mass consolidation of claims, including a request for consolidation by the federal Judicial Panel on Multi-District Litigation

ROCKLAND CNTY. BUS. J. (Oct. 8, 2020), <https://rcbizjournal.com/2020/10/08/judges-are-deciding-whether-business-interruption-policies-cover-pandemic-related-losses>.

⁴⁷ See, e.g., Robert Hartwig, Greg Niehaus & Joseph Qiu, *Insurance for Economic Losses Caused by Pandemics*, 45 GENEVA RISK & INS. REV. 134, 134 (2020) (“Private insurance coverage for economic losses caused by pandemics is limited [due in large part] to the high levels of capital that would be required to credibly insure pandemic economic losses with cross-sectional pooling mechanisms.”).

⁴⁸ Leslie Scism, *Insurance Firms Gain Early Lead in Coronavirus Legal Fight With Businesses*, WALL ST. J. (Sept. 1, 2020 9:00 AM), <https://www.wsj.com/articles/insurers-gain-early-lead-in-covid-19-legal-fight-with-businesses-11598965200> (“Insurers say the policies are intended to help policyholders as they recover from events, such as fires, that lead to repairs and rebuilding, and were never intended to cover virus-related claims.”); Alison Frankel, *Latest COVID-19 Insurance Coverage Loss Shows Narrowing Path for Policyholders*, REUTERS (Sept. 15, 2020 6:54 PM), <https://www.reuters.com/article/legal-us-otc-insurance-idUSKBN2663HC>; Andrew G. Simpson, *Judges Nix Consolidating COVID Business Interruption Suits Against Big Insurers*, INS. J. (Oct. 4, 2020), <https://www.insurancejournal.com/news/national/2020/10/04/585092.htm>.

⁴⁹ This is not to say that the business community did not on occasion make itself heard on the issue. See, e.g., Stephen Gandel, *Companies Say Insurance Companies Are Stiffing Them Over Coronavirus Losses*, CBS NEWS (Sept. 21, 2020 11:16 AM), <https://www.cbsnews.com/news/covid-insurance-business-continuity-interruption-declined-coverage>; Kate Rogers & Betsy Spring, *On Main Street, Business Owners Push for Greater Protection from Coronavirus-related Lawsuits*, CNBC (June 12, 2020), <https://www.cnbc.com/2020/06/12/on-main-street-a-push-for-protection-from-coronavirus-related-lawsuits.html>. See also, Tim Carman, *Restaurants Are Suing Insurance Companies Over Unpaid Claims—And Both Sides Say Their Survival Is at Stake*, WASH. POST (May 19, 2020 1:37 PM), <https://www.washingtonpost.com/news/voraciously/wp/2020/05/19/restaurants-are-suing-insurance-companies-over-unpaid-claims-and-both-sides-say-their-survival-is-at-stake> (reporting both insurers and small businesses taking positions that adverse coverage decisions will be financially ruinous).

(MDL), which almost everyone (including the judges on the Panel) viewed as inapt unless confined to the same policy forms of a single insurer in light of the varying facts and policies of different cases.⁵⁰ More extremely, lawyers and legislators sympathetic to business sought to legislatively require coverage by insurers regardless of the policies at issue—a seemingly rather clear attempt to violate the Contract Clause of the U.S. Constitution that gave insurers a rather effortless public relations victory.⁵¹

As discussed below, we find the insurers’ industry-wide disparagement of coverage as legally misplaced as it may have been rhetorically brilliant. While we cannot help but admire the manner in which insurers moved quickly and uniformly to spin public opinion against coverage, we are dismayed that the tactic seems to have worked on judges. There are real arguments to be made about whether and how policyholders may have coverage for COVID-related losses. In fact, we think the insurance industry’s main contention about coverage—the “physical loss or damage” requirement—can be refuted in most cases. But this requires a more searching analysis of the question and less reflexive recoil than has been displayed in the bulk of court decisions to date.

In several states, legislation was introduced to require insurers to pay for lost policyholder revenue. There was also congressional inquiry pushing for such coverage without regard to the actual insurance policy terms at issue in a particular case. Predictably—and correctly in our view—insurers opposed any such legislative mandates or compulsion as violative of the Contract Clause of the U.S. Constitution.⁵² In doing so, they took the doctrinaire position—with which we

⁵⁰ See Andrew G. Simpson, *Judges Nix Consolidating COVID Business Interruption Suits Against Big Insurers*, INS. J. (Oct. 4, 2020), <https://www.insurancejournal.com/news/national/2020/10/04/585092.htm>. However, more limited consolidated treatment has been approved for particularized groupings of policies with the same operative language. See Jacob Rund, *Ski Pass Insurance Row Highlights Complex Route for Virus Suits*, BLOOMBERG L. (Oct. 20, 2020, 6:31 AM), <https://news.bloomberglaw.com/insurance/ski-pass-insurance-row-highlights-complex-route-for-virus-suits> (approving consolidation of 30 actions by policyholders against Society Insurance “for denying business interruption claims of restaurants and other hard-hit shops” as well as skiers’ lawsuits against Arch Insurance Co. and United Specialty Ins. Co. for denials of cancellation insurance purchased in connection with season-long ski passes). Regarding MDL proceedings generally, see DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL: PRACTICE BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION (2020 ed.).

⁵¹ See *infra* text accompanying notes 51–53.

⁵² See Letter from Nat’l Ass’n of Ins. Comm’rs & Ctr. for Ins. Pol’y and Rsch. to Members of Cong. (May 20, 2020) (supporting insurer arguments against legislation forcing

disagree—that business interruption insurance was never intended (apparently under any circumstances) to provide coverage for any losses related to infectious disease like COVID.⁵³

coverage). *See also* H.B. 589, 133d Gen. Assemb., 2019-2020 Sess. (Ohio 2019) introduced by Representatives Crossman and Rogers. The bill would “require insurers offering business interruption insurance to cover losses attributable to viruses and pandemics and to declare an emergency” that presumably would support further orders providing for government-mandated closure of non-essential businesses. *See also* Elizabeth Blossfield, *Despite Insurance Industry Concerns, More States Introduce COVID-19 BI Bills*, INS. J. (Apr. 15, 2020), <https://www.insurancejournal.com/news/east/2020/04/15/564920.htm> (“‘It’s just not constitutional,’ Don Hayden, co-founder and partner of Mark Migdal & Hayden, added. ‘I mean, what you’re essentially doing is creating insurance where there is nothing. You’re essentially throwing out the underwriting and the risk evaluation that insurance companies have done before writing a policy and saying, “You have to cover this. Even though you had expressly said that you would not cover it in your exclusion and in your insurance agreement.”’”). *But see* Mark A. Packman, *Constitutionality Under the Contracts Clause of Proposed Legislation Enabling Policyholders to Obtain Insurance Coverage for Coronavirus Claims*, 55 TORT TRIAL & INS. PRAC. L.J. 509 (2020) (concluding that such legislation is constitutional due to emergency nature of pandemic and economic harm to particular businesses).

⁵³ Erin Ayers, *Insurers Decline Congress’ Request To Pay All COVID-19 Business Interruption Claims*, ADVISEN FRONT PAGE NEWS (Mar. 23, 2020), https://www.advisen.com/tools/fpnproc/fpns/articles_new_1/P/363166470.html?rid=363166470&list_id=1 (responding to congressional inquiry re insurer coverage of COVID business loss claims, insurer interest groups state that “[b]usiness interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19”) (statement from leadership of American Property Casualty Insurance Association, National Association of Mutual Insurance Companies, Council of Insurance Agents and Brokers, and Independent Insurance Agents & Brokers of America) (also taking position that the members of these insurance industry organizations “include many small businesses and employers grappling with the same issues as many businesses.”). *See also id.* (acknowledging that COVID coverage claims will be brought concerning other types of insurance policies); Jeff Sistrunk, *4 Coronavirus Developments Insurance Lawyers Should Know*, LAW360 (Mar. 20, 2020, 5:31 PM), <https://www.law360.com/articles/1255415/4-coronavirus-developments-insurance-lawyers-should-know> (listing the four important topics with subheadings as follows: “Insurers Spurn Call to Expand Business Interruption Coverage”; “NJ Lawmakers Mull Business Interruption Coverage Bill”; “House Lawmakers Press Travel Insurers on Claim Denials”; and “Calif. Regulator Seeks ‘Grace Period’ on Policy Cancellations”).

Insurers also consistently maintained that they would go broke and the insurance industry would be destroyed if carriers were forced to provide COVID coverage.⁵⁴ Risk managers and brokers, who are normally viewed as representing policyholder interests, tended to align with insurers, presumably because they feared disruption of the industry more than denial of coverage to policyholder employers or clients, many of which were likely to fail in the absence of prompt payment of insurance coverage.⁵⁵ Regulators also sided with insurers,⁵⁶ in our view, without sufficient reflection and consciousness of their mission as public servants.⁵⁷ These entities also seemed to overlook the likely perception of policyholders who expected (perhaps with sufficient objective reasonableness to obtain coverage) that the premiums they had paid for years for something deemed “business interruption” coverage would provide at least some assistance in the face of the largest business interruption of this type in a century.⁵⁸

⁵⁴ See, e.g., Kate Smith, *Pandemic Partnerships*, BEST’S REV. (Aug. 2020), news.ambest.com/articlecontent.aspx?refnum=299433&altsrc=43 (“Even with pandemic excluded from most business interruption policies, COVID-19 is expected to cost the insurance industry more than \$200 billion.”). But see Kate Smith, *The COVID Catastrophe*, BEST’S REV. (June 2020), <http://news.ambest.com/ArticleContent.aspx?pc=1009&altsrc=158&refnum=297254> (stating that “The COVID-19 outbreak could dwarf other catastrophe losses insurers have seen. . . .” but also noting that “[e]ven with the economic downturn, the insurance industry, on the whole, is in a strong capital position”). Carman, *supra* note 49. Accord, Andrew G. Simpson, *P/C Insurers Put a Price Tag on Uncovered Coronavirus Business Interruption Losses*, INS. J., (Mar. 30, 2020), <https://www.insurancejournal.com/news/national/2020/03/30/562738.htm>.

“Pandemics are an extraordinary catastrophe that can impact nearly every economy in the world, so it is hard to predict and manage the risk,” Sean Kevelighan, CEO of the Insurance Information Institute, stated. “Pandemic-caused losses are excluded from standard business interruption policies because they impact all business, all at the same time.”

Moreover, he said, the exclusion for pandemic-caused losses have been incorporated into standard business interruption policies for years.

Simpson, *supra*. See also Elizabeth Pineau & Maya Nikolaeva, *Insurer AXA Must Pay Restaurant’s COVID-19 Losses*, French Court Rules, REUTERS (May 22, 2020, 2:08 PM) <https://uk.reuters.com/article/us-health-coronavirus-insurance-axa/french-court-orders-insurer-axa-to-pay-restaurants-covid-19-losses-idUKKBN22Y2LR>. (“AXA reacts to decision by stating that it would appeal.”); Elizabeth Blossfield, *Despite Insurance Industry*

Concerns, More States Introduce COVID-19 BI Bills, INS. J. (Apr. 15, 2020), <https://www.insurancejournal.com/news/east/2020/04/15/564920.htm>.

“I think in layman’s terms, [legislation forcing payment of covid claims] would implode the industry,” Doug Jones, managing director of JAG Insurance Group, told *Insurance Journal* in a March webinar on business interruption and the coronavirus. “At the end of the day, the ripple effect of what that would cause down the road, and I’m talking short-term, not long-term; I’m talking about months from now, not years from now. It would be difficult for anybody to buy any type of insurance.”

Additional concerns among the insurance industry about this type of legislation surround The Contracts Clause in the U.S. Constitution, which places limitations on states’ ability to interfere with private contracts.

“It’s just not constitutional,” Don Hayden, co-founder and partner of Mark Migdal & Hayden, added. “I mean, what you’re essentially doing is creating insurance where there is nothing. You’re essentially throwing out the underwriting and the risk evaluation that insurance companies have done before writing a policy and saying, ‘You have to cover this. Even though you had expressly said that you would not cover it in your exclusion and in your insurance agreement.’”

Blosfield, *supra*.

⁵⁵ The tone of reporting appears to suggest that this element of the risk management and insurance community tacitly accepted widespread lack of coverage and economic danger to the insurance industry. As reported in one publication geared toward risk managers and brokers only 14 percent of surveyed risk managers and corporate insurance buyers planning to add new pandemic coverage. Andy Toh, *2020 Property Insurance Survey*, BUS. INS. 31 (June 2020). But 27 percent state that their current policies provide coverage related to diseases and epidemics while 49 percent deny having such coverage. *Id.* 41 percent of policyholders are expecting to make a pandemic claim, with 28 percent not planning such claims. *Id.*

67% of risk professional expect direct business interruption losses due to COVID-19. 77% expect the losses to be over \$1 million, of which 36% estimate losses to be more than \$25 million. 91% support a federal backstop for pandemic risk insurance similar to the Terrorism Risk Insurance Act. 65% of risk professionals would be willing to pay up to 5% more in premium for pandemic risk insurance coverage.

Claire Wilkinson, *Pressure Builds for Pandemic Backstop*, BUS. INS. 4 (May 2020). A draft Pandemic Risk Insurance Act of 2020 then circulating “would establish a federal backstop

for business interruption losses resulting from a future pandemic and would be triggered when insurance industry losses exceed a \$250 million threshold and capped at \$500 billion . . .” *Id.* “The growing momentum among insurance buyers and others for a government backstop to cover pandemic risks comes as insurers continue to maintain that most commercial property policies do not provide coverage for business interruption losses arising from the COVID-19 pandemic.” *Id.*

The question of whether a potential Pandemic Risk Insurance Act should be retroactive to the COVID-19 pandemic is an issue RIMS is still exploring, she [Mary Roth, RIMS CEO] said

....

RIMS doesn’t want to ‘get into the business of’ altering contractual agreements that were ‘legally and freely entered into,’ said Whitney Craig, RIMS government relations director.

‘We would be very wary of supporting legislation that has that. We don’t want to bankrupt an industry that we as risk managers rely on,’ Ms. Craig said.

Id.

⁵⁶ See Leslie Scism, *Companies Hit by Covid-19 Want Insurance Payouts—Insurers Say No*, WALL ST. J. (June 30, 2020, 10:24 AM), <https://www.wsj.com/articles/companies-hit-by-covid-19-want-insurance-payouts-insurers-say-no-11593527047>. (“Insurers have some conceptual backing for their stance that business-interruption coverage isn’t meant for pandemics. The National Association of Insurance Commissioners, a standards-setting group for state regulators, says pandemics violate a cardinal principle of insurance, which is that large numbers of policyholders pool their risk to fund a few losses at any one time. In a pandemic, almost all policyholders suffer losses, and simultaneously.”).

⁵⁷ We appreciate NAIC’s concern that large coverage obligations could imperil the insurance system generally. But we remain more than a little puzzled that a regulatory group charged with protecting the public seems uninterested in supporting policyholders, particularly small business policyholders, in cases where there is arguable coverage. Insurers are in the business of risk transfer and insurance is one of the largest, most profitable industries in the world. Although it may be regrettable if an insurance company (or several or dozens) should fail, we consider it at least equally regrettable if policyholders who paid for coverage fail after wrongfully being denied coverage due to fears of bankrupting the insurance industry. Past insurer claims that their financial sky was falling proved to be exaggerated, something regulators should know and appreciate. See Jeffrey W. Stempel, *Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute*, 12 CONN INS. L. J. 349, 353 (2006) (citing asbestos mass torts, despite the massive costs, estimated to have been only a three percent drag on insurer earnings).

In addition, we note that there is more than a little disconnect between NAIC as an entity tending to back the insurer mantra that “everyone knows pandemics are not insured” while

As noted, insurers or their counsel campaigned in earnest to label COVID an uncovered loss in both the general media and what might be termed the insurance trade media.⁵⁹ Part of the insurer effort to disparage coverage claims was the continued assertion that nearly all property insurance with business interruption coverage also contained clear virus exclusions precluding coverage.⁶⁰ This claim may be overstated. In the COVID coverage decisions to date, more than twenty percent of the policies at issue lacked a virus exclusion.⁶¹ Thus, even if the insurer contention that “most” property policies have such an exclusion, there appear to be

some individual state commissioners have gone in the opposite direction and attempted to force coverage irrespective of the language, intent, and purpose of particular policies. Our preferred position is between these two extremes.

⁵⁸ Matthew Lerner, *Policy Wordings Tested by Interruption Losses*, BUS. INS. 27 (May 2020).

Business interruption claims have fast become one of the principal legal battlefronts between commercial policyholders and insurers since the outbreak of the coronavirus pandemic.

Dozens of businesses, including numerous restaurants, have filed state and federal lawsuits against their insurers seeking declaratory rulings that income lost due to the government-mandated lockdowns is covered by insurance.

Insurers argue that many of the policies include exclusions for virus related losses and most of those that don’t still won’t cover lost income because physical damage to an insured property must occur to trigger claims payments.

Id.

⁵⁹ See CARRIER MGMT, *supra* note 44. See, e.g., Larry P. Schiffer, *Does the Novel Coronavirus Cause Direct Physical Loss of or Damage to Property?*, X NAT’L L. REV. 114 (Apr. 13, 2020), <https://www.natlawreview.com/article/does-novel-coronavirus-cause-direct-physical-loss-or-damage-to-property> (concluding that “[b]ased on the case law and the nature of the novel coronavirus, it appears unlikely that courts will conclude that viral contamination causes ‘direct physical loss.’”).

⁶⁰ Erin Ayers, *Insurers Decline Congress’ Request to Pay All COVID-19 Business Interruption Losses*, ADVISEN FRONT PAGE NEWS (Mar. 23, 2020), https://www.advisen.com/tools/fpnproc/fpns/articles_new_1/P/363166470.html?rid=363166470&list_id=1 (“The vast majority of commercial property insurance policies contain not only direct physical damage, but also contain exclusions for viral/bacterial contamination due to the unpredictability of the risk.”).

⁶¹ See Baker, *supra*, note 10 (visited Oct. 21, 2020).

a large number of cases where policyholders have a substantially better chance of success than suggested by the insurance industry shibboleth of no coverage.

As part of its aggressive “no coverage” strategy, insurers did more than rest on the virus exclusion (which we agree can be a strong defense to coverage where the policy actually contains such a limitation) even when policies at issue contained the exclusion. Rather, insurers dug in on a remarkable first line of defense: that COVID did not and could not cause *any* direct physical loss or damage to property, which is a prerequisite to most commercial property and business interruption coverage.

[T]he mere **threat** of COVID-19 at the property or the **preemptive closure** of businesses due to the threat of COVID-19 should not be considered “direct physical loss or damage” to property. Additionally, neither **government-ordered closure** of businesses nor a **government’s official statement** regarding COVID-19 damage at properties generally should be sufficient for a court to find “direct physical loss or damage” to a particular property. However, those insured that can prove the actual presence of the virus on the surfaces of or otherwise in covered property may be able to establish “direct physical loss or damage” to property.⁶²

⁶² Edward M. Koch & Elizabeth C. Dolce, “Direct Physical Loss or Damage”: The Gatekeeper to Property Insurance Coverage and COVID-19, WHITE & WILLIAMS (Mar. 24, 2020), <https://www.whiteandwilliams.com/resources-alerts-Direct-Physical-Loss-or-Damage-The-Gatekeeper-to-Property-Insurance-Coverage-and-COVID-19.html> (emphasis in original). Accord, Randy Maniloff, *First Coronavirus Coverage Suit Filed for Business Interruption*, COVERAGE OPS. (Mar. 17, 2020), <https://www.coverageopinions.info/Vol9Issue2/FirstCOVIDcase.html>.

In general, and putting aside any precise policy language that may apply, one critical requirement, for the potential availability of business interruption insurance, is that there has been physical damage to property. This is either to the insured’s own covered premises, or, for purposes of losses on account of the actions of civil authority, another’s premises.

Either way, it will be necessary [for policyholders] to prove that the presence of the coronavirus causes physical loss to the affected premises. Thus, we can expect to see arguments, like the one being made [in the first filed case], that there has been physical loss to a premises because the virus stays on the surface of objects or materials—‘fomites’—for some amount of time.

[A]ny legislative action to compel insurers to pay business interruption claims arising out of the coronavirus [would be] breathtaking. To achieve their result, lawmakers would not only obviate the “virus” exclusion, but, in addition, the fundamental ‘physical damage’ requirement of business interruption coverage.

Maniloff, *supra*. See Randy J. Maniloff & Margo Meta, *New DJ Takes Different Tack on Business Interruption Coverage for COVID-19*, WHITE & WILLIAMS (Mar. 27, 2020) <https://www.whiteandwilliams.com/resources-alerts-New-DJ-Takes-Different-Tack-on-Business-Interruption-Coverage-for-COVID-19.html> (describing French Laundry Partners, LP v. Hartford Fire Ins. Co. case seeking declaration of coverage and noting that loss of business use was caused primarily by government ordered suspension rather than tangible property destruction. Maniloff & Meta are skeptical of the claim and argue that “in general, to implicate ‘Civil Authority’ coverage, there must be physical damage to property other than the covered premises. But businesses have been closed principally to foster social distancing and not on account of the presence of the virus inside a premises.” Maniloff & Meta also note that French Laundry is represented by the same attorney as policyholder Oceana Grill, a New Orleans restaurant, that filed the nation’s first COVID coverage case).

Policyholders will sometimes be asserting that insurers, that issued immediate denials for [COVID]-19 claims, did so in bad faith on account of an alleged failure to investigate the claim under applicable law[.]

One business interruption coverage theory in particular is getting attention from policyholders [what the author dubs the “public space” theory that the ubiquitous COVID-19 virus has filled the air and attached to tangible property, making it physically damaged—which in turn means that the injury trigger of the typical policy is satisfied].

Another business interruption coverage issue has not received a lot of attention. The biggest push for coverage has been for businesses that have been shut down by order of a civil authority. However, even if owed, such coverage is likely quite limited. Civil authority-based business interruption coverage, per policy language, is usually available for only up to four weeks.

The restaurant industry is beating the loudest drum in the pursuit of business interruption coverage.

Randy Maniloff, *Covid-19 And Coverage: Four Weeks and Four Takeaways*, COVERAGE OPS. (Apr. 5, 2020), <https://www.coverageopinions.info/COVID19ISSUE/COVIDandCoverage.html>. These comments are but from one law firm, albeit a particularly large and prestigious insurer-side firm. Many other lawyers representing insurers wrote in the same vein in various publications and on law firm and other websites.

The New Jersey legislature has premised its actions on the need to take out the “virus” exclusion from business interruption policies. But that’s a tonsillectomy compared to what it is really doing—removing the heart of the policy.⁶³

Although there were of course stories highlighting the difficulties faced by businesses and other policyholders due to the COVID pandemic,⁶⁴ insurers succeeded in simultaneously pooch-pooching the merits of business interruption claims and painting a scenario of risk management ruin if they were required (either by legislatures or courts) to provide coverage they purportedly never agreed to provide.⁶⁵

⁶³ Randy Maniloff & Edward Koch, *COVID-19: The Real Operation of New Jersey’s Proposed Insurance Legislation*, COVERAGE OPS. (Mar. 19, 2020), <https://www.coverageopinions.info/Vol9Issue2/COVIDOperation.html>.

⁶⁴ See, e.g., Suzanne Barlyn, *U.S. University Insured Chinese Student Tuition Against Virus. Then COVID-19 Hit*, REUTERS: BUS. NEWS (Aug. 17, 2020, 6:25 AM), <https://in.reuters.com/article/us-health-coronavirus-university-insuran-idINKCN25D15P> (reporting that despite paying annual premium of \$424,000 for coverage, University of Illinois found harder market emerging in early 2020, with only limited coverage and premiums increasing to nearly \$2 million).

⁶⁵ See, e.g., Lucca De Paoli & Franz Wild, *Don’t Be Tricky With Virus Clams, Watchdog Warns U.K. Insurers*, BLOOMBERG (Mar. 19, 2020, 10:49 AM), <https://www.bloomberg.com/news/articles/2020-03-19/u-k-fca-requests-coronavirus-contingency-plans-from-insurers> (noting that the U.K. Financial Conduct Authority [FCA] has stated that “insurers must also [like policyholders] be adaptable” in lieu of the problems posed by COVID and must take care to communicate clearly and nondeceptively with policyholder claimants).

The industry has worked to reduce its exposure to pandemics since the 2003 outbreak of SARS in Asia. Over the years, they’ve tightened up their policies, inserting communicable-disease exclusions to prevent potential losses. That means consumers and companies will bear the brunt of the cost for disruptions related to the virus—which has infected more than 217,000 people worldwide and left at least 9,000 dead.

Id. Laura Foggan & Michael A. Sabino, *Feeling the Effect*, BEST’S REV. (May 2020), <http://news.ambest.com/articlecontent.aspx?pc=1009&AltSrc=108&refnum=296290> (predicting claims across various lines of insurance, particularly property insurance with business interruption coverage, and stating that “[i]t is essential that legislators—and the courts—recognize the limits of insurance in accordance with policy terms and exclusions.”); Cheri Trites-Versluis, *Renewal Language Scrutiny: COVID-19 Litigation is Generating a*

Policyholder counsel noted and criticized the perceived insurer public relations campaign.⁶⁶ And some in the industry had reservations about the industry's aggressive and rather blanket opposition to coverage.⁶⁷ Some observers also

Resurrection of Arguments Asserted at the Height of Asbestos and Silica Coverage Litigation, NAT'L UNDERWRITER 1, 42–43 (Sep. 2020), https://www.sapiens.com/wp-content/uploads/2020/09/NUP_0920-dl.pdf (citing *Above It All Roofing & Construction, Inc. v. Security Nat'l Insurance Co.* and *RLI Insurance v. Gonzalez*, which found asbestos to be a “pollutant” within policy’s pollution exclusion, and *Garamendi v. Golden Eagle Ins. Co.*, which found silica dust to be a pollutant, implying similar approach apt for COVID cases). Mr. Trites-Versluis is identified in the article as “the director of policy analysis for RiskGenius,” the same company whose CEO is extensively quoted in the media disparaging policyholder claims for business interruption coverage. *Id.*

⁶⁶ See, e.g., Andrew G. Simpson, *P/C Insurers Put a Price Tag on Uncovered Coronavirus Business Interruption Losses*, INS. J., (Mar. 30, 2020), <https://www.insurancejournal.com/news/national/2020/03/30/562738.htm> (quoting policyholder attorney John Houghtaling II) (“To avoid payments for a civil authority shut down the insurance industry is pushing out deceptive propaganda that the virus does not cause a dangerous condition to property.’ [] ‘This is a lie, it’s untrue factually and legally.’”).

⁶⁷ See, e.g., Kate Smith, *Pandemic Partnerships*, BEST’S REV. (Aug. 2020), <http://news.ambest.com/articlecontent.aspx?refnum=299433&altsrc=43>.

Stephen Catlin’s mobile buzzed nonstop. It was early April, and he had just written a thought leadership piece on the need for a swift and coherent insurance industry response to pandemic. Frustrated by the falling reputation of the industry and the “clumsy” comments and defensive posture of some insurers, the Convex CEO called on the insurance community to be proactive in finding a long-term solution to pandemic. His message struck a chord.

Id. Mr. Catlin is a 50-year veteran of the insurance industry and founder of an insurer and consulting group as well as a member of the International Insurance Society Insurance Hall of Fame, he elaborated on his views in an Op-Ed piece.

[First,] insurers and brokers should do a much better job when communicating with the public and with governments, especially regarding the true value that insurance provides. Secondly, it’s in the nature of our business to focus on the past, and therefore we often neglect giving adequate thought about the future. Finally, I regret that—when an event occurs that causes extreme human suffering—the insurance industry often views the event primarily in terms of dollars and cents.

wondered whether the more receptive negotiable attitude of some European insurers might be more productive.⁶⁸ But in the main, American insurers were on the

Over the years, we have identified a list of potential ‘Big Ones,’ events that could cause severe financial stress for insurers and reinsurers. These events range from a Category 5 hurricane that strikes at the heart of Miami to a powerful earthquake devastating Los Angeles or Tokyo. Over the past two decades, an extreme act of terrorism was added to the list.

However, until recently, relatively few insurers would have guessed that a pandemic could be the costliest event the industry could face. I believe that neither governments nor insurers had truly contemplated the economic consequences of a pandemic, in part because the financial impact of such an event is extremely difficult to model.

Unfortunately, the coronavirus has amplified some of the things that I believe the industry often does poorly.

It is not my place to comment on whether individual policies provide coverage for potential claims arising from COVID-19. However, I can say that I was dismayed at the defensive nature of some insurers’ statements as the crisis began to expand. There always has been widespread public distrust—if not disdain—for the insurance industry, and the comments uttered by some insurers did not help our relationships with governments and our customers.

As I often have said, it’s not what you say, but how you say it.

Now that it appears that COVID-19 may be the costliest event in the industry’s history, we must begin to think ahead. Will society face pandemics of a similar magnitude in years to come? While I hope we will not, I suspect that we will. If so, what should be the role of the insurance industry? Should we simply adopt policy wording that make it crystal clear that insurance coverage will be of little benefit to policyholders for future losses arising from a pandemic? Or should we think about how insurers can play a meaningful role in economic recovery while still protecting the industry’s capital base?

Stephen Catlin, *Setting the Right Tone: Insurers Must Clarify the Role Insurances Can Play in Recovering from Future Pandemics*, BEST’S REV. (Aug. 2020), <http://news.ambest.com/articlecontent.aspx?refnum=299423&altsrc=43>.

⁶⁸ See, e.g., Sergio F. Oehninger & Daniel Hentschel, *Will European Insurers’ Positive Response to COVID-19 Claims Influence US Insurers?*, HUNTON INS. RECOVERY BLOG (July 13, 2020), <https://www.huntoninsurancerecoveryblog.com/2020/07/articles/business-interruption/will-european-insurers-positive-response-to-covid-19-claims-influence-us-insurers/>.

The positive response in Europe is in stark contrast with the insurance industry's preliminary positions in the United States. The headlines on this side of the hemisphere demonstrate certain insurers' attempts to avoid liability for COVID-19 related losses, despite accepting billions in premiums from policyholders in exchange for broad coverage promises.

In addition, the regulatory structure abroad may make for more collaborative attack on coverage problems. Describing the role of the Financial Conduct Authority [FCA] in England regarding COVID coverage, one article noted:

Business interruption insurance generally only covers losses where a company is forced to close temporarily from property damage, like a fire. The FCA said those types of policies did not offer protection from pandemics, but it was interested in the minority that have so-called nondamage extensions.

Those extensions can protect against the closure of a property either from the outbreak of an infectious disease or by the denial of access by a public authority.

The FCA said it had examined more than 500 policies from 40 insurers and narrowed down its selection to just 17 policy wordings it felt were both the most contentious and representative.

Id. Martin Croucher, *FCA Picks 8 Insurers for Pandemic Coverage Test Case*, LAW360 (June 1, 2020), <https://www.law360.com/articles/127811> ("Colin Edelman QC of Devereux Chambers, Leigh-Ann Mulcahy QC and Richard Coleman QC of Fountain Court Chambers will represent the FCA in the case, instructed by Herbert Smith Freehills LLP."). For additional background on the Financial Conduct Authority, see Daniel Schwarcz, *Redesigning Consumer Dispute Resolution: A Case Study of the British and American Approaches to Insurance Claims Conflict*, 83 TUL. L. REV. 735 (2009).

In the test case litigation in the U.K., policyholders largely prevailed, but upon somewhat different issues and policy language than has to date been litigated in the United States. See *The Fin. Conduct Auth. v. Arch In. (UK)* [2020] EWHC 2448 (Comm) (UK).

In addition, continental insurers may have been nudged toward a less confrontational style due to judicial decisions supporting policyholders. See, e.g., Oehninger, *supra* (noting that after initially stating it would appeal trial court ruling requiring it to provide business interruption coverage to policyholder with lost revenue due to COVID-19, AXA has relented and agreed to provide coverage; "AXA reportedly has already agreed to pay over 200 COVID-19 related claims."). See also *id.* ("Despite initially denying liability, Swiss insurance company, Helvetia Insurance, announced that most of its policyholders in the hospitality industry have accepted settlements following coverage disputes for COVID-19 related business interruption losses. The settlements reportedly included policyholders from Switzerland, Austria, and Germany.").

defensive. COVID business interruption claims were to be strongly resisted, even where policies lacked a virus exclusion, on the ground that these claims failed to satisfy the “physical loss or damage” trigger for coverage. And, to perhaps state the obvious, insurers were denying COVID claims.⁶⁹ Unsurprisingly, this produced litigation by upset policyholders on the brink of financial ruin.⁷⁰

⁶⁹ For an example of rather brusque insurer denial of coverage, see Letter from Susan Sabouni, Property Claims Supervisor, Philadelphia Indemnity Insurance Company, to Steve Powell, Chief Officer of Policyholder, The Goddard School (May 7, 2020) (on file with author). The Letter repeats portions of the policy verbatim for nine pages and then simply states that the insurer “considers the issues outlined above to be dispositive of coverage” and that the insurer’s “Policy does not provide coverage to the Goddard School for the Claim” and thus “respectfully [?] declines coverage for the Claim” in connection with the school’s forced closure due to government order because of the COVID pandemic, even though the policy also contained a “Communicable Disease Endorsement.” See *id.* at 10. The insurer stated that the policyholder’s loss was “not ‘due to an outbreak of a ‘communicable disease’ . . . that caused[d] an actual illness” at the School. The insurer did, however, agree to “reimburse the Goddard School for the cost of disinfecting the insured premises due to reported symptoms of COVID-19 within the premises.” *Id.* at 10.

⁷⁰ See Randy Ellis, *Coronavirus in Oklahoma: Tribes Sue Insurance Companies Over Business Interruption Coverage*, THE OKLAHOMAN (Mar. 25, 2020 1:22 AM), <https://oklahoman.com/article/5658477/coronavirus-in-oklahoma> (describing Chickasaw and Choctaw nations suits involving various insurers); *Coronavirus Coverage Issues Loom: Policy Details Crucial to Determine Success of Commercial Claims*, BUS. INS. 4 (April 2020) (surveying possible COVID-related claims implicating Property Business Interruption insurance, Directors and Officers Liability insurance, Cyber Risk insurance, Medical Malpractice insurance, and Workers Compensation insurance); Joseph P. Monteleone, *COVID-19’s Management Liability Concerns*, INS. EXCH. AGENCY (Sept. 14, 2020), <https://www.ieagency.com/post/covid-19s-management-liability-insurance-concerns> (noting that COVID-related losses will prompt substantial coverage claims involving D&O Insurance, Transactional Risk, and EPL insurance as well as Property Insurance); Patricia Vowinkel, *An Insurance Journey: Significant Coronavirus-Related Losses and Legal Battles Over Coverage May Force Some Insurers to Rethink Their Strategic Game Plans*, BEST’S REV., 1 (May 2020); Bob Reville, *Making Waves: COVID-19 Reveals a Possible Future Upwell of Liabilities for Insurers*, BEST’S REV., 16 (Aug. 2020); Celeste Bott, *Coronavirus Litigation: The Week in Review*, LAW360 (Oct. 8, 2020 7:15 PM), <https://www.law360.com/articles/1318126/coronavirus-litigation-the-week-in-review> (summarizing recent legal developments, including several insurer wins; also noting that the “Judicial Panel on Multidistrict Litigation has centralized in Illinois over 30 lawsuits accusing Society Insurance Co. of wrongfully denying coverage for business losses during the COVID-19 pandemic, but declined to create MDLs to group similar cases against The Hartford, Travelers, Cincinnati Insurance Co., and Lloyd’s of London underwriters.”); Lauren Berg, *In-N-Out Sues Zurich To Cover COVID-19 Shutdown*, LAW360 (May 29, 2020

To be sure, policyholder counsel were not silent during the time of insurer pleas of poverty and assertion of absolute defenses to coverage. But they seemed to have reduced prominence in both insurance trade and lay media.⁷¹

10:56 PM), <https://www.law360.com/articles/1278397>.; See also Hannah Smith, *A Closer Look: Coronavirus Insurance Lawsuit Trends*, PROPERTY CASUALTY 360 (Sept. 4, 2020 12:00 AM), <https://www.propertycasualty360.com/2020/09/04/a-closer-look-coronavirus-insurance-lawsuit-trends/?slreturn=20210107191656> (“The main issue that courts must decide in addressing these claims is whether businesses whose operations were shut down during the crisis can demonstrate ‘direct physical loss or damage.’”) (describing several lawsuits where insurers had prevailed in motions to dismiss, including *French Laundry Partners, LP v. Hartford Fire Ins. Co.*, *In-N-Out Burgers v. Zurich American Ins. Co.*, and several claims where insurers had prevailed in motions to dismiss including *Plastic Surgeons of Lexington, PLLC v. Liberty Mut. Ins. and Ohio Sec. Ins. Co.* and noting that in *Gavrilides Management Co. v. Michigan Ins. Co.*, the “plaintiff alleged that the physical requirement of the policy was met because customers could not physically use the dine-in services. The judge denied this allegation, determining that in order to meet the requirement, the insured must show a physical alteration of the premises.”). See also *id.* (“So far, courts have ruled in favor of insurers in cases of business interruption coverage vs. COVID-19. But the vast majority of these cases are still yet to be seen.”). For additional examples of COVID coverage complaints, see Complaint and Demand for Jury Trial, Prime Time Sports Grill, Inc. v. DTW1991 Underwriting Ltd, No. 8:20-cv-00771-CEH-JSS (M.D. Fla. May 4, 2020); see also, Motion to Dismiss Pursuant to Rule 12(b)(6), *supra* (contending that plaintiff restaurant was not “ordered to close” by Florida Gov. Ron DeSantis Order of March 17, 2020 but was permitted to continue operating restaurant at fifty percent occupancy).

Insurers of course approve of the *Gavrilides Management* decision and were undoubtedly pleased that the insurance trade press has given prominent display to the case even though it is a “mere” state trial court case, albeit one of the first decisions in the area. See Wilson Elser, *Michigan Judge Rules Direct Physical Loss Required to Trigger Business Interruption Coverage*, LEXOLOGY (Jul. 23, 2020), <https://www.lexology.com/library/detail.aspx?g=a9de8e82-e549-44f9-83df-7b66cfd10009> (noting that “Judge [Joyce Draganchuk] stated that direct physical loss [of or damage to the property] must be something ‘with material existence . . . that alters the physical integrity of the property.’”).

⁷¹ See, e.g., Christine Spinella Davis, *Business Interruption Coverage for COVID-19 Losses: You Can Satisfy the “Physical Loss or Damage” Requirement in Your Commercial Property Policy*, BRADLEY (Apr. 24, 2020), <https://www.itpaystobecovered.com/2020/04/business-interruption-coverage-for-covid-19-losses-you-can-satisfy-the-physical-loss-or-damage-requirement-in-your-commercial-property-policy/> (“Temporary loss of use and loss of functionality alone may satisfy the physical loss or damage requirement in a property policy.”); Mark Packman & Jason Rubinstein, *COVID-19 Claims May Survive Insurers’ Physical Loss Defense*, LAW360 (Sept. 1, 2020), <https://www.law360.com/articles/1306134>

Because COVID-19 does not destroy or tangibly alter the structure of property, the insurers have asserted there is no coverage for claims arising from the pandemic. Initial decisions on this issue broke the insurance industry's way. But the litigation of disputes has barely begun. There is significant evidence to suggest there are many legal paths available to plaintiffs as they struggle with losses related to COVID-19. We explore the findings and implications to date.

Policyholder counsel, for example, argued:

In most property insurance policies, business interruption coverage is triggered when the property at issue suffers "direct physical loss or damage." Structural damage to the property, however, is not a requirement for coverage; proof that contamination or other relatively intangible conditions like bacteria, gases, and fumes that "rendered the insured property temporarily or permanently unusable or uninhabitable may support a finding that the loss was a physical loss to the insure property."

Additionally, many insurance policies include civil authority coverage, which covers losses that occur when government authorities restrict access to the area where a business is located or that the business depends on for its operations.

Many property insurance policies also provide contingent business interruption coverage, triggered by damage to or disruption of a business's suppliers, customers, or other key partners. While the policyholder itself need not be physically damaged, it does need to have coverage for the type of damage that affected its suppliers, business partners, or customers.

Packman & Rubinstein, *supra*. Pamela D. Hans & Marshall Gilinsky, *Insurance Coverage for Losses Stemming from the Coronavirus*, INS. J. (Feb. 26, 2020), <https://www.insurancejournal.com/news/national/2020/02/26/559383.htm> (citing *Mellin v. Northern Sec. Ins. Co.*, 115 A.3d 799, 805 (N.H. 2015) and also citing *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 U.S. Dist. LEXIS 165232, *15-17 (D.N.J. Nov. 25, 2014) "[C]ourts considering non-structural property damage claims have found that buildings rendered uninhabitable by dangerous gases or bacteria suffered direct physical loss or damage.").

Business owners are submitting claims for business interruption insurance losses, but many insurance companies' knee-jerk reaction is to deny. This has led to a proliferation of lawsuits. While the viability of these suits depends on each business's unique circumstances and policy language, the prospects look very good for many Pennsylvania business owners.

There has also been, in our view, something of a race-to-the-courthouse problem in that a number of the initial policyholder claims appear to be brought by counsel without substantial experience in insurance coverage litigation, something that more seasoned coverage lawyers noted with some dismay (along with voicing concerns that the efforts of some plaintiff counsel to consolidate proceedings was hurtful to the COVID coverage cause).⁷²

Many Pennsylvania businesses bought all-risk commercial property insurance policies that contain business interruption coverage. The coverage provisions are broad . . .

Many insurance companies will dispute that COVID-19 losses satisfy the direct physical loss or damage requirement. . . . Courts have rejected this view on numerous occasions in numerous contexts.

Patrick Campbell, Charles Casper & Brett Waldron, *Pa. Insureds' Path to Pandemic Biz Interruption Coverage*, LAW360 (May 19, 2020 5:50 PM), <https://www.law360.com/appellate/articles/1274214/pa-insureds-path-to-pandemic-biz-interruption-coverage> (also arguing that there should be coverage even if policy has virus exclusion due to rule that exclusions are construed narrowly and government shutdown orders rather than the virus itself are the cause of business interruption).

⁷² See, e.g., Chip Merlin, *What is Multidistrict Litigation (MDL) and Will It Impact Virus Business Income Claims?*, PROP. INS. COVERAGE L. BLOG (May 10, 2020), <https://www.propertyinsurancecoveragelaw.com/2020/05/articles/commercial-insurance-claims/what-is-multidistrict-litigation-mdl-and-will-it-impact> (writing by noted policyholder coverage attorney expresses some doubt about efficacy of consolidation). A large and prominent policyholder firm was less tentative and more critical of consolidation.

Savvy policyholders and experienced counsel may also find consolidated and class action proceedings ill-suited to the resolution of insurance coverage disputes. That is because claim-specific differences are likely to predominate over common issues in three fundamental respects: (1) the specific facts of any particular insurance claim, and how that claim is best presented and substantiated, often vary greatly from claim to claim, place to place, and industry to industry; (2) the specific language of any given insurance policy is critical, and there can be enormous variation in policy language on the material issues implicated by COVID-19; and (3) insurance coverage is a matter of state law, which varies widely across jurisdictions on issues of importance for many policyholders.

For these reasons, sophisticated insureds should carefully review their own insurance policies, claims, and circumstances before signing on to any

As discussed in the next section, we take issue with the insurance industry's rush to judgment opposing COVID-related coverage across the board. We also are concerned that insurers are exaggerating both their potential financial responsibility if COVID coverage claims succeed and the industry's purported inability to absorb such claims.

First, the estimated costs. Insurers have suggested that if covered, the costs of business interruption claims would range as high as \$800 billion per month.⁷³ But

of the current efforts to aggregate coronavirus-related insurance cases into MDL or class action proceedings.

David Goodwin, Allan B. Moore & Rani Gupta, *Policyholders Beware: The Risks of Multi-District and Class Action Treatment of COVID-19 Insurance Claims*, COVINGTON, 1–2 (May 4, 2020), <https://www.cov.com/-/media/files/corporate/publications/2020/05/policyholders-beware-the-risks-of-multidistrict-and-class-action-treatment-of-covid-19-insurance-claims.pdf>.

Strong claims should be timely noticed and pursued aggressively by experienced insurance coverage counsel, particularly if insurers do not meet their obligations to pay promptly. Decisions to pursue coverage litigation must take into account the most favorable jurisdictions, procedures, and timing to maximize recovery for policyholders affected by COVID-19. In knowledgeable counsel is able to litigate the strongest claims first, those cases will set appropriate precedents that will establish insureds' rights to recover COVID-19 losses and benefit other policyholders.

Id. at 5.

In addition, despite being defendants, insurers have considerable power to shape early case outcomes by making motions to dismiss when presented with favorable facts, policy language, or courts while simply answering the complaint when faced with unfavorable facts, policy language or tribunals, thereby delaying any legal rulings from these less favorable forums until the industry could accumulated the momentum of early Rule 12 victories.

⁷³ As reported in one prominent industry periodical:

It's hard to quantify the full financial impact COVID-19 will have on the industry. But one thing is certain, this pandemic is on track to become the largest event in insurance history.

"It is truly a catastrophic event the proportion of which we have not seen before," Stefan Holzberger, chief rating officer for AM Best, said. "The breadth and depth of the event, how it is affecting multiple

geographics and multiple segments of the insurance market—this is really something that dwarfs the other major events in recent history.”

...

And yet, the insurance industry has been prepared to handle this event.

...

There is a caveat to this, however. The industry’s ability to absorb the impact of COVID-19 hinges on business interruption. As of early May, seven states had introduced legislation requiring insurers to provide retroactive business interruption coverage, in some cases regardless of whether policies included a virus exclusion, as most do.

If forced to pay retroactive BI, the insurance industry could be facing losses of \$150 billion to \$200 billion per month, according to the Best’s Commentary, *Legislation to Nullify BI Exclusions Poses Existential Threat to P/C Insurers*. The Insurance Information Institute’s estimates are even higher. The III [Insurance Information Institute] forecasts costs of up to \$380 billion per month, which it said would “break” the insurance industry within months. That scenario, however, is unlikely [because of lack of coverage.]

If you take business interruption out of the equation, the industry as a whole is on solid financial footing.

Kate Smith, *The COVID Catastrophe: The Global Pandemic is on Track to be the Costliest Event in Insurance History. It’s also a Defining Moment for the Industry Special Risk Section Sponsored by Lexington Insurance*, BEST’S REV. (Jun. 2020), <http://news.ambest.com/articlecontent.aspx?refnum=297254&altsrc=123>. See also Robert Hartwig, Greg Niehaus & Joseph Qui, *Insurance for Economic Losses Caused by Pandemics*, 45 Geneva Risk and Ins. Rev. 134, 135 (2020) (estimating losses at one trillion dollars per month for business interruption alone).

We like hyperbole as well as the next authors, but we think it is a bit much to suggest that possible business interruption coverage would “dwarf” the financial consequences of major insurance events such as the asbestos mass tort or pollution claims. We are not dismissive of the potential magnitude of COVID claims but remain concerned that the insurance industry has been a bit cavalier in suggesting such large losses and generally wailing gloom and doom in the event of coverage. It may be a good public relations strategy that will gain sympathy from the courts but strikes us as overblown. And, as discussed later in the article, there is something concerning about attempts to convince courts and policymakers that insurers are too vulnerable to be saddled with COVID losses when the alternative is saddling much more vulnerable small businesses with these losses. If that is the fate decreed by contractual agreement, perhaps there is no escape (save for invocation of reasonable expectations, unconscionability, and public policy canons for construing those

at this juncture, we have not seen any detailing of this estimate or the methodology behind it. We remain skeptical, particularly so in light of the commonly found sublimits (either temporable or monetary) on coverage for business interruption occasioned by government order that insurers contend is contained in most policies and which appears popular in policy forms. One article provides a flavor of the industry's tone.

The Insurance Information Institute and American Property Casualty Insurance Association place the estimates much higher: The APCIA forecast losses of up to \$668 billion per month, while the III estimated retroactive BI could cost the industry up to \$380 billion per month. "That's an industry-breaking event," James Lynch, chief actuary for the II, said. "That would break the industry in two directions. One, the financial load it would place on companies to have to pay claims they had priced the business for, and had specifically excluded, would create financial ruin. Moreover, that intervention into clear policy language would call into question the entire insurance business model."

....
"They're trying to make the case that they're shutting down because of physical loss and damage from the virus," said RiskGenius CEO Chris Cheatham, whose company uses software to help insurers evaluate policy language. "That's not an accident. That's not how people talk."

Bob Hartwig, director of the Risk and Uncertainty Management Center at the University of South Carolina's Darla Moore School of Business, said politicians were fed such language from plaintiffs' attorney groups who are "looking at this as a potentially huge payday."

....
"The State of New York cannot alter the laws of physics to satisfy its trial lawyer masters," Hartwig said. "That's essentially what happened. They developed this language in an attempt to overrule the virus exclusion."

"All legal scholars agree this will fail a Constitutional test. There's no question about it."

contracts) from this bothersome result. But, as discussed later, the insurance industry's extreme anti-coverage position is incorrect.

The battle over business interruption will, without doubt, make its way into the courts. And most agree the courts will side with insurance companies.

“The exclusion for viruses is not an ambiguous one,” Lynch said. “It’s an exclusion of loss due to virus or bacteria. When it was filed, the filing specifically mentioned the potential for a pandemic similar to SARS CoV-1. And the current pandemic is SARS CoV-2. So I don’t think there’s a lot of ambiguity here about what the exclusion was meant to exclude.

Stefan Holzberger, chief rating officer of AM Best, agreed.

“Those well-defined, long-instituted, regulator-approved exclusions for pandemics or viruses should hold,” Holzberger said. “The business interruption policies that have that exclusion, which is the vast majority in the U.S., should not have to honor claims associated with a loss of revenue related to COVID-19.

[Holzberger further predicted that if legislation negating virus exclusions was enacted and upheld in court] we would see widespread insolvency because the magnitude of lost revenue in relation to the capital surplus is so great. The insurance industry could not bear those losses. Which is why they weren’t covered in the first place.”⁷⁴

⁷⁴ Smith, *supra* note 73. Best’s Review loved the inflammatory quote about trial lawyers so much, it was emphasized in a pull-quote from the sidebar in large print, complete with a 20-year-old picture of Professor Hartwig, a former insurer lobbyist before entering academia.

The property/casualty industry estimates that business interruption losses from the coronavirus just for small businesses in the U.S. could be between \$220-\$383 billion per month—or a quarter to half of total industry surplus available to pay all P/C claims.

David A. Sampson, president and CEO of the American Property Casualty Insurance Association, said the \$200-383 billion per month loss estimate assumes there could be as many as 30 million claims from small business that suffered coronavirus-related losses. According to APCIA, that is 10 times the most claims ever handled by the industry in one year. The industry processed more than three million from the 2005 hurricane season that included Hurricanes Katrina, Rita, Wilma and several other storms, the trade group said.

Second, as to insurer ability to pay: if the insurance industry were a sovereign nation, it would have the third largest economy in the world.⁷⁵ Insurers receive hundreds of billions of dollars in premium income alone each year,⁷⁶ which in turn has usually been invested for some time before the funds are required to be paid in claims. Insurance is generally a more consistently profitable business than most, advantaged by its ability to amass large sums that can be invested, perhaps for years (or decades in the case of liability insurance) before payment. This “float,” as Warren Buffett calls it, enables even insurers with weak underwriting to survive and even thrive. Insurers with sound underwriting and investment do particularly well.⁷⁷

So, what of the effect of the insurance industry’s initial media messaging? We are not in a position to pinpoint entirely the impact of the industry’s anti-coverage messaging on legal developments to date. We cannot count the claims that

Sampson said the combined capital of the top business insurance underwriters represents only a fraction of the amount that might be expected in coronavirus losses from just small businesses.

“Insurance stability is especially important in a time of increased natural catastrophes. Spring flood season is underway, hurricane season is around the corner, and wildfires pose a threat year-round,” he said.

Simpson, *supra* note 66.

⁷⁵ See Richard V. Ericson, Aaron Doyle & Dean Barry, Insurance as Governance, 1, 4 (2003) (noting the degree to which insurance shapes behavior by setting contours of coverage and conduct in order to obtain insurance).

⁷⁶ Ranked by 2019 net premiums written, the smallest of the Top 200 (HCI Ins. Group) collects \$228,488,000 in annual premiums; 82 insurers have \$1 billion or more in annual premium income. See *Top 200 U.S. Property/Casualty Writers*, BEST’S REV. (July 2020), http://www.ambest.com/review/displaychart.aspx?Record_Code=274586&src=43&_ga=2.171650912.1123988532.1612739172-73892297.1612560642. Some household name insurers have astounding volumes of premium income, e.g.: State Farm (\$65.1 billion); Berkshire Hathaway (\$53.75 billion); Progressive (\$37.6 billion); Allstate (\$34 billion); Liberty Mutual (\$32.3 billion); Travelers (\$27.2 billion); USAA (\$23 billion); Chubb INA (\$18.2 billion); Nationwide (\$18 billion); AIG (\$14.8 billion); Farmers (\$14.5 billion); Harford (\$11.9 billion); American Family (\$11.8 billion); Auto-Owners (\$8.6 billion); Fairfax (\$7.6 billion); Erie (\$7.5 billion). *Id.* Cincinnati Insurance, a defendant in several prominent COVID coverage actions, received almost \$5.4 billion in premiums in 2019. *Id.*

⁷⁷ See Jeffrey W. Stempel, Erik S. Knutsen & Peter N. Swisher, Principles of Insurance Law § 1.06 (5th ed. 2020) (“A Note on Insurer Operations”); Stempel & Knutsen, *supra* note 33, at § 1.01 (describing insurer operations, using in part description provided by Buffett (who is typically ranked as one of the world’s ten richest people) in his annual letter to Berkshire Hathaway shareholders; Berkshire’s success, according to Buffett, is due in large part to investment funds generated by its insurance and reinsurance operations).

were not filed because a business or a business' lawyer read in the newspaper that "COVID claims are not covered." Nor can we precisely discern the effect on judges as the majority of COVID-related claims were dismissed in favor of insurers at the pleadings stage (though we find that result quizzical). We have yet to learn the effect of the messaging on lay juries, as these cases have not yet made it far enough in litigation (because most are bounced out on the pleadings alone).

But we are able to say that perhaps it is more influential to get out in front of a story and control the narrative than to be correct. If nearly every insurance trade publication, lawyers' publication and popular news press sees the same message, surely there must be some even subliminal effect on how one approaches the insurance coverage question for COVID cases. Moreover, and most concerning to us, there appear to be absolutely no ramifications if the message proffered in the media is actually incorrect! Are we entering a new phase of insurer public relations tactics that are, at least in part, designed with a motive to affect coverage results in legal cases?

In Part III below, we explain how the main coverage question of "direct physical loss or damage" is counter to the main thrust of the insurance industry's message in the media to date. We conclude with our thoughts as to where the issues will resolve in the end.

III. THE KEY COVERAGE ISSUE: DISCERNING THE (REASONABLE) MEANING(S) OF "DIRECT PHYSICAL LOSS OR DAMAGE"⁷⁸

A. THE INSURER ARGUMENT FOR REQUIRING TANGIBLE DESTRUCTION TO TRIGGER COVERAGE

Insurer efforts to dismiss business interruption claims as strained have resonated with most in the industry, including respected authorities who should in our view be less dismissive of claims of loss or damage. A prominent editor of the Fidelity, Casualty & Surety (FC&S) organization has, for example, approached the question as follows.

When policies don't define a term, courts generally refer to a standard dictionary. Merriam-Webster defines damage as "loss or harm resulting from injury to person, property or reputation." This

⁷⁸ In this article, we focus almost exclusively on coverage issues concerning first-party property insurance and its business interruption component as these policies have been those at issue in the first wave of coverage litigation. We expect significant coverage litigation concerning liability insurance to emerge in the future.

is not definitive, so we look at the definitions of loss and harm. Loss is defined as “destruction, ruin,” and harm is defined as “physical or mental damage.”

The virus does not harm physical property. The virus may be cleaned off like other germs or bacteria. The property does not need to be replaced or repaired, just sanitized as advised by public health authorities.⁷⁹

Continuing in this vein, and seeking a trifecta of sorts of no coverage pursuant to government order provisions plus the prevalent pollution exclusion, she wrote:

ISO has a mandatory virus and bacteria exclusion, but what about carriers not using ISO forms? What about carriers that have adopted parts of ISO forms, such as the business interruption language, but have not adopted the rest and did not adopt the mandatory endorsement?

....

The issue at hand with the virus is business interruption and action of civil authority. Is there coverage when local authorities require bars, restaurants, gyms and other establishments to close because of the chances of spreading the virus? For this, we need to look at an endorsement; for the sake of discussion, we are looking at the Business Income (and Extra Expense) Coverage Form CP 00 30. Coverage is provided for the actual loss of business income due to the necessary suspension of business operations during the period of restoration. The period of restoration must be due to direct physical loss of or damage to coverage property. Also covered is loss triggered by a civil authority prohibiting access to the insured property because of damage to other property, but two conditions must apply. That other property must be within one mile of the insured property, and the action of the civil authority is taken in response to dangerous physical conditions resulting from the loss, continuation of the covered cause of loss that caused the damage, or to allow the authority unimpeded access to the property.

⁷⁹ Christine G. Barlow, *Does COVID-19 Cause Physical Loss?*, NAT’L UNDERWRITER 1, 10 (May 2020), <https://www.property-casualtydigital.com/propertycasualty/202005?pg=12#pg12>.

So herein lies the rub. Coverage is provided only when a property has been physically damaged. COVID-19 does not cause physical damage to property. Even if it is considered physical damage, then you have the pollution exclusion to deal with, and the virus is a pollutant. Pollutants are excluded when they are dispersed, discharged, seep, migrate or otherwise escape. So it comes down to whether an individual can be considered to be dispersing, discharging, or otherwise releasing the virus, action that would trigger the pollution exclusion.

Recently a physician from San Francisco attended a conference with hundreds of other physicians in New York. Upon returning home, he felt ill and was tested for the virus, which came back with positive results. Those people attending the conference were possibly exposed to the virus. Does this count as dispersing the virus, even though unintentionally? It seems so.

This is different from closing businesses, because the threat of the threat of exposure or spread of the virus, a threat is not physical damage, and therefore there is no coverage.⁸⁰

B. THE FLAWS OF THE INSURER-ADVANCED CONVENTIONAL WISDOM

1. Dictionary Fetishism: Improperly Collapsing “Loss” and “Damage”

Notwithstanding our respect for this author and the FC&S organization,⁸¹ we are constrained to disagree. Although the “Order of Civil Authority” coverage provided in many policies is limited to four weeks of lost income⁸² and the presence of the basic ISO virus exclusion may typically preclude coverage,⁸³ the FC&S

⁸⁰ *Id.* at 10–11.

⁸¹ And Ms. Barlow’s dismissiveness toward COVID claims may be mild compared to what is coming from another prominent coverage expert. *See* Bill Wilson, WHY INSURANCE DOESN’T COVER THE COVID-19 PANDEMIC (2020) (e-book format released Oct. 29, 2020). Mr. Wilson is the author of the widely celebrated coverage analysis WHEN WORDS COLLIDE: RESOLVING INSURANCE COVERAGE AND CLAIMS DISPUTES (2018).

⁸² *See supra* notes 30–35 and accompanying text discussing order of civil authority coverage.

⁸³ *See infra* notes 180–202 and accompanying text discussing virus exclusion.

analysis is severely deficient regarding the question of physical loss or damage and utterly absurd regarding application of the pollution exclusion.⁸⁴

Property insurance policies can vary significantly. While many do not include business interruption or “business income” coverage (a plus for insurers in light of the lost business revenue caused by COVID), many also lack a virus exclusion (a plus for policyholders). But almost all make a finding of “direct physical loss or damage” an initial requirement for coverage.⁸⁵ As discussed below, in decades of coverage litigation preceding COVID claims, courts have divided over the meaning of these terms. But prior to examining case law, courts might profitably examine the facial clarity of these terms, neither of which is usually defined in the insurance policy despite its separate “Definitions” section that normally contains specifically defined terms.

FC&S’s analysis tends not to look to case law but to focus on policy text. This is historically a typical insurer response, as a contextless reading of insurance policy terms most often favors the insurer. This is so because the policyholder litigating the claim probably suffered a loss within the grey areas of coverage (otherwise, why litigate?). The potential pitfalls of the standard insurer textual approach are reflected in its analysis above: seek out the plain meaning of policy terms so as to have the interpretive analysis stop at the plain meaning stage of determining policy coverage—and thus avoid any interpretive ambiguity in the meaning of those terms (otherwise, the policyholder-favoring tools of *contra proferentem* or reasonable expectations are visited upon the entire analysis).

First, the insurer COVID coverage language assessment tends to collapse the terms “loss” and “damage” into one—a rhetorical move that is both unwarranted

⁸⁴ Due to space limitations, we will not present a full examination of the pollution exclusion in the context of COVID-19 in this article. But for reasons we have set forth at length elsewhere, it is absurdist textual literalism to argue that infection of premises by a virus (or bacteria, fungus or the like) is “pollution” as the term is ordinarily understood. It is similarly laughable to suggest that a conference attendee is “dispersing” “pollutants” when sneezing. What, pray-tell, is next, insurers asserting that an attendee’s nausea at the office cocktail party is a pollution event? Such broad construction of an exclusion—part of the insurance policy upon which the insurer bears the burden of persuasion must be narrowly and strictly construed against the insurer who—would operate to undermine the basic purpose of property insurance or liability insurance. See STEMPEL & KNUTSEN, *supra* note 33, at § 14.11; Jeffrey W. Stempel, *Reason and Pollution: Construing the “Absolute” Pollution Exclusion in Context and in Light of its Purpose and Party Expectations*, 34 TORT & INS. L.J. 1 (1998); Jeffrey W. Stempel, *Unreason in Action: A Case Study in the Wrong Approach to Construing the Liability Insurance Pollution Exclusion*, 50 FLA. L. REV. 463 (1998).

⁸⁵ See French, *supra* note 4, at n. 21–22 and accompanying text.

(we think the two words are distinct) and misleading in its use of “the dictionary.” As the fetishism of textualism in American judicial interpretation of insurance policy terms rages on, we think that taking the insurer-led textual charge head-on leads to the opposite result that the insurers advocate. Indeed, this is doubly bizarre because historically, insurers have favored a textualist and literalist approach to policy language—probably because historically they have benefitted from such application. But here, in determining coverage for “direct physical loss or damage,” the use of one of the key textualist interpretive tools—the use of dictionary definitions to discern the ordinary lay meaning of policy terms—actually spins counter to insurer interests, when deployed properly.

Regarding the distinction between the words “loss” and “damage”, it should be noted that courts typically subscribe to the “surplusage” canon of construction, which posits that each word in a document (statute, contract, regulation) should be given its own meaning and not treated as a mere repetition by synonym.⁸⁶ Although it is in some ways a problematic canon,⁸⁷ it is nonetheless one of the “rules” of interpretation. And insurers, when it suits their purpose, embrace the surplusage canon.

For example, when litigating the application of the pollution exclusion, insurers routinely argue that each of the seventeen words in the exclusion (e.g., irritant, contaminant, chemical, waste) deserves independent meaning rather than reinforcing a core concept of pollution,⁸⁸ with courts frequently agreeing and giving

⁸⁶ The “surplusage” canon of construction posits that “[i]f possible every word and every provision should be given effect (*verba cum effectu sunt accipienda*). None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence. ‘These words cannot be meaningless, else they would not have been used.’ ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174 (2012) (citing *U.S. v. Butler*, 297 U.S. 1, 65 (1936) (Roberts, J.)).

⁸⁷ See Laurence Solan & Jeffrey W. Stempel, *Rethinking Redundancy: The False Premises and Practices of the Surplusage Canon* (Jan. 2020) (manuscript on file with author) (describing drawbacks of surplusage and tendency for drafters to use redundancy as a means of attempting to achieve clarity). Accord, Ethan J. Leib & James Brudney, *The Belt-and-Suspenders Canon*, 105 IOWA L. REV. 735 (2020) (suggesting that in practice many courts treat drafting repetition as clarifying a particular intent rather than using each word to convey its own concept).

⁸⁸ The typical definition of “pollutants” in a standard form general liability, which has been widely used for thirty years or more, includes “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste” with wasted “include[ing] materials to be recycled, reconditioned or reclaimed.” See, e.g., Commercial General Liability Policy Form CG 00 01 01 96, in DONALD S. MALECKI & ARTHUR L. FLITNER, *COMMERCIAL GENERAL LIABILITY* 271 (6th ed. 1998).

the words literal application even though they are contained in an exclusion that is, according to contract construction rules, supposed to be strictly and narrowly construed against the insurer with the insurer bearing the burden of persuasion to demonstrate the applicability of the exclusion.⁸⁹ If the insurers are to be consistent in their interpretative arguments, the word “loss” should be viewed as meaning something different than “damage.”

Perhaps more important, if one is “making a fortress” out of the dictionary (something cautioned against by the great Second Circuit Judge Learned Hand),⁹⁰ that fortress provides quite a lot of protection to policyholders—and this should be conceded by insurer advocates, who have to date disappointingly taken a self-serving view of the terms “loss” and “damage,” with too much acquiescence from courts. Even if one is not ready to concede that dictionary definitions favor policyholders more than insurers, it seems to us undeniable that there are many dictionary entries supporting the policyholder perspective. This in turn means that policyholder textual arguments are reasonable. And this further means that the term

⁸⁹ See, e.g., *Quadrant Corp. v. Am. States Ins. Co.*, 110 P.3d 733 (Wash. 2005) (taking broad view of pollution exclusion as precluding coverage for policyholder negligence in application of sealant exposing apartment resident to noxious fumes). See William P. Shelley & Richard C. Mason, *Application of the Absolute Pollution Exclusion to Toxic Tort Claims: Will Courts Choose Policy Construction or Deconstruction?*, 33 TORT & INS. L.J. 749 (1998) (detailing a prominent insurer counsel advocate’s broad application of the exclusion to cover claims of policyholder negligent injury with any involvement of chemicals).

⁹⁰ See *Cabnell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (“But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”) By this, Judge Hand sensibly meant that words should be construed in accord with party intent and overall purpose rather than through textual assessment alone. We agree and also note that there may well be extrinsic evidence supporting the insurance industry’s view that when drafting property policies, it intended to provide coverage only for the sort of tangible structural injury that comes from external forces such as fire, windstorm, a sudden flooding, vandalism or other actions that wreak palpable destruction on property. But to date, insurers have not done so, preferring to fight on the metaphorical “hill” of ahistorical, acontextual textualism. In COVID decisions to date, they have been holding that hill. Should they start to die on the hill (e.g., if courts begin in greater degree to recognize that “physical loss or damage” does not inexorably mean tangible destruction), one would expect them to proffer supporting extrinsic evidence that this is what was meant or intended or required by sound risk management practice. If they cannot provide such evidence, policyholders deserve to win on the “physical loss or damage” question, even in jurisdictions with a weak application of the *contra proferentem* principle.

“physical loss or damage” is sufficiently ambiguous that policyholders should enjoy the benefit of the *contra proferentem* principle and avoid dismissal of their claims on this basis unless insurers can proffer sufficient extrinsic evidence to support their preferred meaning of the term—something insurers have not done to date.

2. Dictionary Definitions Support Policyholders as Least as Much as Insurers

In arguing that coverage requires tangible destruction that can not be easily rectified, FC&S refers to the Merriam-Webster dictionary, editions of which are on our respective desks, but selects and presents the definitions in a pronouncedly anti-policyholder fashion. The more complete excerpt of key terms presented below provides an alternative meaning of “loss” that distinguishes it from “damage.”

damage [means] **1** : loss or harm resulting from injury to person, property, or reputation . . .

loss [means] **1** : DESTRUCTION, RUIN **2 a** : the act of losing possession **b** : the harm or privation resulting from loss or separation **c** : an instance of losing . . . **4 a** : failure to gain, win, obtain, or utilize . . . **5** : decrease in amount, magnitude, or degree. . .

lose [means] **1 a** : to bring to destruction . . . **3** : to suffer deprivation of: part with esp. in an unforeseen or accidental manner . . . *vi* **1**: to undergo deprivation of something of value . . .

physical [means] **1 a** : having material existence : perceptible esp. through the senses and subject to the laws of nature . . . **b** : of or relating to material things . . .⁹¹

Applying this mix of Merriam-Webster definitions suggests that one might reasonably find a “physical loss” when a policyholder is deprived of something material—such as use of one’s business, especially if the loss takes place in an unanticipated manner through something like a pandemic that spurs government-ordered use of the business property.

Similarly, it is perfectly reasonable to state that one’s physical property has been lost or harmed or injured by a virus on surfaces or in the air on the property. Insurers argue that because the virus can be “wiped off,” there has been no loss or

⁹¹ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 291, 689, 689, 877 (10th ed. 1996).

damage. The “virus damages lungs, not property”⁹² has become an insurance industry aphorism akin to “the CGL [commercial general liability] policy is not a performance bond,” a cliché invoked by CGL insurers seeking to avoid coverage for damage inflicted by defective construction.⁹³ Actually, the damages-lungs-not-property mantra is more misleading.

The not-a-performance-bond trope is true as a general rule. But, as courts have come to recognize almost uniformly, this general rule is not applicable where a CGL policyholder’s negligence inflicts damage (defined as “physical injury to tangible property”) upon other property and the CGL coverage is not based on merely correcting substandard work but compensating victims for damage done to other property by the substandard work.⁹⁴

The damages-lungs-not-property trope is not true—period—or is only true if one excises the word “loss” from the trigger term “physical loss or damage.” Even under the view that a cleaning will make infected property “as good as new” (which may not be the case), the property has nonetheless been lost to its owner for at least some period of time, perhaps a significant period of time depending upon the cleaning and public health requirements to which the property is subject (let alone serious public relations issues with regard to perceived safety of the premises).

Further, a facility in which COVID has been found is, at least temporarily, “damaged” goods. The susceptibility of COVID to cleaning is relevant to questions of the degree of injury and the period of restoration required for a COVID-infected business. COVID infection is not the same as a fire or explosion, and in many cases is more easily rectified than water damage from a burst pipe. But there nonetheless is at least some physical damage and considerable physical loss of property if the cleaning and disinfecting is time-consuming or if government authorities restrict operation of the facility.

In addition, remediation of COVID damage to property is likely to be fleeting in many situations. COVID-inflicted injury may be susceptible to

⁹² Transcript of Teleconference Order to Show Cause at 5:3–4, *Soc. Life Magazine, Inc. v. Sentinel Ins. Co.*, No. 20 Civ. 3311 (S.D.N.Y. May 14, 2020).

⁹³ See Jeffrey W. Stempel, *Rediscovering the Sawyer Solution: Bundling Risk for Protection and Profit*, 11 RUTGERS J. OF L. & PUB. POL’Y 170, 210, n. 89 (2013) (noting the prevalence of this argument by liability insurers in defective construction cases). See, e.g., *Nationwide Mut. Ins. Co. v. Wenger*, 278 S.E.2d 874 (Va. 1981) (exemplifying a general liability insurer arguing to receptive court that coverage for construction defects, absent injury to non-policyholder property, would improperly convert the liability policy into a performance bond).

⁹⁴ See STEMPEL & KNUTSEN, *supra* note 33, at § 14.13; STEMPEL, SWISHER, & KNUTSEN, *supra* note 77, 657–61. See, e.g., *Am. Family Mut. Ins. Co. v. Am. Girl*, 673 N.W.2d 65 (Wis. 2004).

disinfection but may be repeated within hours as customers or employees return to a restaurant, bar, retail outlet, or factory. COVID damage may even be re-imposed almost as quickly as it first struck if members of the cleaning crew are COVID-positive, which may be the case even if the workers show no detectable symptoms of infection.

A brief survey of other dictionaries reveals a nesting of definitions of the key words of COVID coverage disputes that is more consistent with our broader view of the meaning of the terms “physical loss or damage” than the seemingly cherry-picked FC&S emphasis on irreversible tangibility as a prerequisite to finding such loss or damage. Consider the following entries, all from mainstream sources.

damage [means] [i]mpairment of the usefulness or value of person or property . . .

loss [means] **b.** The condition of being deprived or bereaved of something or someone . . .

lose [means] **2.a.** To come to be deprived of the ownership, care, control of (something one has had) . . . ⁹⁵

or

damage [means] **1.** Harm or injury to property or a person, resulting in loss of value or the impairment of usefulness.

loss [means] **1.** The act or an instance of losing . . . **b.** The condition of being deprived or bereaved of something or someone.

lose [means] **2a.** To be deprived of (something one has had).

physical [means] **2.** Of or relating to materials things . . . ⁹⁶

or

damage . . . See breakage, harm [as a noun]. See injure [as a verb].

loss [means] The act or an instance of losing something : losing, misplacement. . . . See also deprivation.

deprivation [means] The condition of being deprived for what one once had or ought to have : deprival, dispossession, divestiture, loss, privation.

lose [means] To be unable to find : mislay, misplace.

⁹⁵ THE AMERICAN HERITAGE COLLEGE DICTIONARY 350, 801, 1031 (3rd ed. 1993).

⁹⁶ THE AMERICAN HERITAGE COLLEGE DICTIONARY 357, 817, 818, 1050 (4th ed. 2004).

physical [means] **1.** Composed of or relating to things that occupy space and can be perceived by the senses: concrete, corporeal, material, objective, phenomenal, sensible, substantial, tangible.⁹⁷

or

damage [means] **1.** Impairment of the worth or usefulness of person or property: harm.

loss [means] **1.** The damage or suffering that is caused by losing.
2. One that is lost.

lose [means] **3.** To be deprived of . . .

physical [means] **1.** Of or relating to the body rather than the emotions or mind. **2.** Material rather than imaginary. **3. a.** Of, pertaining to, or produced by nonliving matter and energy.⁹⁸

Perhaps most surprising is that many standard-fare dictionaries actually use the term “damage” in defining the term “loss” to indicate that “loss” can mean “loss of use” or deprivation of property.

3. Apt Use of Dictionaries in COVID Coverage Controversies Often Supports Coverage

This is perhaps the time to note that in most every dictionary, the order of definitions does not proceed from most popular to least used, as many people (including lawyers) often mistakenly think. Rather, the presentation proceeds from earliest usage to most recent usage.⁹⁹ The first definition presented is simply the oldest and not the primary or best or most widely used or accepted definition. In many cases, the oldest definition may be considerably less popular or representative or “correct” than definitions listed later in the dictionary entry. As a result, we believe it is inappropriate for courts or commentators to argue that a term is clear and unambiguous based on presentation order in the dictionary. For example, a lawyer’s argument that definition number one is what was meant because it is the first definition seems to us quite misplaced.

Insurers might seize upon this to suggest that a definition of “loss” that includes “destruction” or “ruin” is *the* clearly correct definition because it emerged

⁹⁷ ROGET’S II: THE NEW THESAURUS 105, 265, 117, 265, 314 (3d ed 1995).

⁹⁸ WEBSTER’S II NEW RIVERSIDE DICTIONARY 177, 407, 406, 515 (rev. ed. 1996).

⁹⁹ WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 19 (9th ed. 1984) (the “[o]rder of senses [in the dictionary] is historical.”).

relatively later in the usage. But that is too ambitious a claim. Rather, each of the different definitions in a dictionary entry would appear to us to be per se reasonable constructions of the word, at least in the absence of context. Contextual material may make it clear that Definition X should prevail rather than Definition Y. But to claim that the words of the definitions themselves admit of clear choice strikes us as simply incorrect.

In examining dictionary definitions, it is also important to remember the dangers of motivated reasoning. As noted D.C. Circuit Judge Harold Leventhal apparently observed when discussing court use of legislative history, it can be a bit like “looking out over a crowd and spotting your friends.”¹⁰⁰ But the same, of course, is true regarding selection of a preferred dictionary definition. Insurers (and, of course, policyholders as well) know what they want to be the answer and will naturally be drawn, at least subconsciously, to the definition that best meets their coverage dispute and litigation needs. In addition, dictionary use may mislead through simple happenstance when a judge (or law clerk or counsel writing a brief that influences the judge) reaches for the dictionary that just happens to be on the closest desk or shelf or reads only the first dictionary entry resulting from a browser search. To the extent that there are differences in dictionaries, this human foible of taking the path of least resistance may mislead. In addition, it has been our experience that many dictionary users operate under the false impression that the first definitional entry in a dictionary is the primary or main meaning of a term when, as noted above, it is merely the earliest use of the term.

Thus, decision by dictionary is more than a little problematic. Notwithstanding this human tendency, we think the above excerpts (and we could have listed another dozen or two of similar definitions or associations) establishes that the words “physical loss or damage” admit of construction quite favorable to policyholders.¹⁰¹ FC&S and others supporting insurers in the COVID coverage

¹⁰⁰ See, e.g. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (citing a conversation with Judge Leventhal), *quoted in* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005); Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (paraphrasing Leventhal); Abner J. Mikva, *Statutory Interpretation: Getting the Law to Be Less Common*, 50 OHIO ST. L.J. 979, 981–82 (1989); Adam M. Samaha, *Looking Over a Crowd—Do More Interpretive Sources Mean More Discretion?*, 92 N.Y.U. L. REV. 554 (2017) (discussing the genealogy and meaning of the quote attributed to Judge Leventhal).

¹⁰¹ Another possible avenue for assessing the meaning of text is corpus linguistics analysis, which involves assessing the collates and clusters of words as an aid to interpretation. See Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 6 B.Y.U. L. REV. 1311, 1315 (2017). Although in our view, it would be a mistake to attach talismanic power to the use of big data in assessing insurance policy

battles are simply not being fair or reasonable in arguing that this key coverage provision “clearly” or “unambiguously” requires some sort of structural change of insured property as a prerequisite to coverage. Too many courts have accepted this unsupportable shibboleth. Even if their decisions finding no coverage are correct (due to the presence of a virus exclusion or other bar to coverage), these courts have done unnecessary “damage” to norms of insurance policy construction that impacts not only COVID coverage claims but construction of insurance policies as a whole.

As discussed below, insurers typically argue that “damage” entails a requirement of structural change in covered property and that “loss” is largely a synonym for “damage.” In our view, the term “loss” connotes something quite different than “damage.” For example, dictionaries commonly define “loss” as deprivation of something (whether as a result of “damage,” or theft or something else). Government shutdown orders (described below) by definition deprive policyholders of the use of their property—property that is physical, corporeal, choate, and tangible. Although alternative definitions of loss are also common in dictionaries, definitions connoting deprivation, lack of access, or the like are sufficiently common that a reasonable interpreter must concede that the concept of “loss” proffered by a policyholder forced to curtail operations is at least a reasonable meaning of the term.

According to well-established ground rules for insurance policy interpretation, if both policyholder and insurer have set forth reasonable constructions of a term, the term is ambiguous and questions of meaning should be resolved against the insurer that drafted the policy and in favor of the policyholder.

When this interpretative debate takes place at the motion to dismiss stage of litigation, *contra proferentem* (which translates as “against the drafter”) logically should have particular force. An early ruling favoring the insurer’s implicit argument (that “loss” or “damage” requires structural change in property) effectively involved the court ruling as a matter of law that a definition of loss drawn from dictionaries is not reasonable—an absurd result. If such a construction of the term “loss” was not reasonable, it presumably would not be in a published dictionary.

4. Prior Insurer Industry Action Contradicts Insurers’ Current Interpretation Angle

In addition to taking an insurer-serving approach to defining “physical loss or injury,” the FC&S assertion that COVID claims fail to involve triggering loss is

term meaning, this sort of broader based linguistic analysis may be superior to simply “looking it up” in the dictionary at random due to the potential unconscious bias or happenstance of dictionary use.

inconsistent with prior FC&S action. Consider, for example, the following FC&S assessment that predated the COVID pandemic by eight years. An insurance agent made the following inquiry.

Our insured accidentally threw away some digital x-ray sensors in the trash. Now, they want to be compensated for them. The BOP policy, Section 1 Property, Coverage agreement states, “We will pay for direct physical loss”

I believe the coverage agreement precludes coverage as this is not “direct physical loss.” Nothing happened to them—they were simply thrown away.

Do you believe coverage exists?

Oregon Subscriber¹⁰²

FC&S replied as follows.

There is no exclusion that applies to this loss. There does not need to be any impact on or damage to the items themselves for there to be a direct physical loss—just like when items are stolen. But ***there is a loss in that they are no longer available to the insured.***¹⁰³

If FC&S was being consistent with this prior analysis, it would have to acknowledge that businesses forced to close due to either site-specific infection or government mandate have suffered a loss in that the physical business facilities are “no longer available” to them, at least until a government order is lifted or infected property is cleaned and otherwise rehabilitated.

This prior inconsistent statement in the insurance press raises the spectre of how important it is to view all media on an issue in its context and not simply that purpose-built for a particular cause. If insurers wish to flood the current press with commentary, past press on the same and related issues will require defense or acknowledgement, to be fair.

¹⁰² *Direct Physical Loss Under BOP*, NAT’L UNDERWRITER (June 27, 2011), <https://www.nuco.com/fcs/2011/07/12/direct-physical-loss-under-bop-422-12966>.

¹⁰³ *Id.*

5. Prior Judicial Treatment of the “Physical Loss or Damage”
Clauses Has Been More Favorable to Policyholders than Initial
COVID Coverage Decisions Suggest

The COVID insurance coverage cases to date have shown that courts prefer some allegations of tangible physical harm to property that alters its essential character and structure in order to trigger business interruption or civil authority coverage for pandemic-related losses. “Direct physical loss of or damage to property” thus seems to require that some external force touches the property and alters it in order for insurance coverage to attach. There is no definition of the coverage clause or its individual composite words in any property insurance policy. In attempting to provide meaning to the coverage clause, courts may have inadvertently hyper-focused on the parsed-out words of the clause as standing alone (i.e. “physical,” “loss” and “damage”). The dictionary sections noted in the prior section underline the problems with doing so, because dictionary definitions are inconsistent, are presented in chronological and not frequency order, and can be cherry-picked to “say” what one wants.

Review of the current batch of COVID coverage cases shows that it is possible in some jurisdictions that a policyholder does not need tangible structural harm to property in order to trigger the coverage clause in the policy. The virus does not need to “wreck” some property; it just has to be present to make the property unusable to the policyholder. This reasoning tracks the better-reasoned decisions of courts interpreting “direct physical loss” in other property insurance contexts.¹⁰⁴ Courts have held that the following causes of loss are covered as “direct physical loss or damage:”

- a) noxious particles post-9/11 World Trade Center disaster;¹⁰⁵
- b) contamination with radioactive dust and radon gas;¹⁰⁶

¹⁰⁴ See Scott G. Johnson, *What Constitutes Physical Loss or Damage in a Property Insurance Policy?*, 54 TORT TRIAL & INS. PRAC. L.J. 95 (2019) (surveying caselaw and finding trend and dominance of better reasoned decisions finding loss or damage without palpable destruction or tangible structural alteration of property); Steven Plitt, *Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alternation*, CLAIMS J. (Apr. 15, 2013), <https://www.claimsjournal.com/magazines/idea-exchange/2013/04/15/226666.htm>.

¹⁰⁵ Schlamm, Stone & Dolan, LLP v. Seneca Ins. Co., 800 N.Y.S.2d 356 (Sup. Ct. 2005).

¹⁰⁶ Am. All. Ins. Co. v. Keleket X-Ray Corp., 248 F.2d 920, 925 (6th Cir. 1957).

- c) smoke from wildfires cancelling a theatre performance;¹⁰⁷
- d) unpleasant odor making premises uninhabitable (i.e. “locker room” smell, cat urine, or meth lab);¹⁰⁸
- e) drywall releasing poisonous gas rendering home uninhabitable;¹⁰⁹
- f) asbestos in carpeting impaired building’s function;¹¹⁰
- g) asbestos in buildings;¹¹¹
- h) mold spores and bacteria rendering home uninhabitable;¹¹²
- i) release of unknown substance in sewage treatment plant causing plant shutdown;¹¹³
- j) hidden building decay due to seawater damage;¹¹⁴
- k) e-coli contamination in a well;¹¹⁵
- l) carbon monoxide poisoning;¹¹⁶
- m) trace amounts of benzene in beverages;¹¹⁷
- n) metal parts contaminated with lead;¹¹⁸
- o) salad dressing exposed to vaporized agricultural chemicals;¹¹⁹

¹⁰⁷ Or. Shakespeare Festival Ass’n v. Great Am. Ins. Co., No. 1:15-cv-01932-CL, 2016 WL 3267247, at *5 (D. Or. June 7, 2016).

¹⁰⁸ Essex Ins. Co. v. BloomSouth Flooring Corp., 562 F.3d 399 (1st Cir. 2009) (“locker room” smell); Mellin v. N. Sec. Ins. Co., Inc. 115 A.3d 799 (N.H. 2015) (cat urine odor); Farmers Ins. Co. of Or. v. Trutanich, 858 P.2d 1332 (Or. 1993) (meth lab odor).

¹⁰⁹ TRAVCO Ins. Co. v. Ward, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010).

¹¹⁰ Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co., 615 N.W.2d 819, 826 (Minn. 2000).

¹¹¹ Yale Univ. v. Cigna Ins. Co., 224 F. Supp. 2d 402, 413 (D. Conn. 2002); Bd. of Educ. of Twp. High School Dist. No. 211 v. Int’l Ins. Co., 720 N.E.2d 622, 625–26 (Ill. App. Ct. 1999).

¹¹² Sullivan v. Standard Fire Ins. Co., 956 A.2d 643 (Del. 2008); Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts, No. CV-01-1362-ST, 2002 WL 31495830, at *8–10 (D. Or. June 18, 2002) (applying Oregon law).

¹¹³ Azalea, Ltd. v. Am. States Ins. Co., 656 So. 2d 600, 602 (Fla. Dist. Ct. App. 1995).

¹¹⁴ Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co., 250 F. Supp. 2d 1357, 1360–61 (M.D. Fla. 2003).

¹¹⁵ Motorists Mut. Ins. Co. v. Hardinger, 131 F.App’x 823, 823 (3d Cir. 2005).

¹¹⁶ Matzner v. Seaco Ins. Co., No. Civ. A. 96-0498-B, 1998 WL 566658 (Mass. Super. Aug. 12, 1998).

¹¹⁷ National Union Fire Ins. Co. of Pittsburgh v. Terra Indus., 346 F.3d 1160 (8th Cir. 2003).

¹¹⁸ Stack Metallurgical Servs., Inc. v. Travelers Indem. Co. of Conn., No. 05-1315-JE, 2007 WL 464715, at *2 (D. Or. Feb. 7, 2007).

¹¹⁹ Henri’s Food Prods. Co. v. Home Ins. Co., 474 F. Supp. 889, 892 (E.D. Wis. 1979) (applying Wisconsin law).

- p) loss of soil supports due to adjacent landslide, even though home itself not damaged;¹²⁰
- q) buildup of gas beneath church rendering church uninhabitable;¹²¹
- r) ammonia release;¹²²
- s) infestation of brown recluse spiders;¹²³
- t) organisms in canned creamed corn;¹²⁴ and
- u) cereal oats treated with a non-FDA approved pesticide, even though chemically identical to approved pesticide.¹²⁵

There are also a much smaller group of cases which deny claims for what appear to be very similar or even identical causes of loss like:

- a) mold, which apparently could be removed by cleaning;¹²⁶
- b) odors or bacteria in an HVAC system;¹²⁷ and
- c) asbestos contamination which apparently did not alter the structure of the building.¹²⁸

The reasoning featured in the first list of cases finding coverage for more ephemeral physical losses also tracks the better-reasoned decisions in recent cases involving coverage for cyber-losses under property policies. Insurance claims for electronic data losses also went through a similar wave as COVID insurance claims as courts wrestled with whether or not electronic data stored on a computer could experience a “direct physical loss or damage” because it appears to be intangible and

¹²⁰ Hughes v. Potomac Ins. Co. of D.C., 199 Cal. App. 2d 239, 248 (1962).

¹²¹ W. Fire Ins. Co. v. First Presbyterian Church, 437 P.2d 52, 55 (Colo. 1968).

¹²² Gregory Packaging, Inc. v. Travelers Prop. & Cas. Co. of Am., No. 2:12-cv-04418, 2014 WL 6675934 at *5–6 (D.N.J. Nov. 25, 2014) (applying New Jersey and Georgia law).

¹²³ Cook v. Allstate Ins. Co., No. 48D02-0611-PL-01156, 2007 Ind. Super. LEXIS 32, at *7–9 (Ind. Super. Ct. Nov. 30, 2007).

¹²⁴ Pillsbury Co. v. Underwriters at Lloyd's, 705 F. Supp. 1396, 1401 (D. Minn. 1989).

¹²⁵ Gen. Mills, Inc. v. Gold Medal Ins. Co., 622 N.W.2d 147, 152 (Minn. Ct. App. 2001).

¹²⁶ Mastellone v. Lightning Rod Mut. Ins. Co., 884 N.E.2d 1130, 1144–45 (Ohio Ct. App. 2008).

¹²⁷ Universal Image Prods. v. Chubb Corp., 703 F. Supp. 2d 705, 713 (E.D. Mich. 2010).

¹²⁸ Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass'n, 793 F. Supp. 259 (D. Or. 1990), *aff'd*, 953 F.2d 1387 (9th Cir. 1992).

is unseen by the naked eye, existing as data on a hard drive or in the online cloud.¹²⁹ Courts have treated losses relating to electronic data and computer equipment in sometimes strange ways.

The more reasonable and now widely accepted approach has been to find that electronic data losses are capable of being covered as a “direct physical loss” under a property policy when the data is corrupted, lost or damaged. Many courts have found that, although data cannot be seen or touched, it nevertheless exists in some fashion electronically and microscopically as property and can suffer a direct physical loss.¹³⁰ Indeed, it would be foolish to have a property policy cover data loss if the data were stored in hard paper copy and destroyed, but then deny coverage for a similar loss if the data exists in electronic form. That would make for perverse record-keeping incentives.

Holding that a virus like COVID-19 can at least potentially damage property makes sense in this regard. The virus does render surfaces unusable to humans for a period of time. It is potentially deadly and spreads quickly, through touched surfaces or the air. One would assume insurers would not want business owners putting employees and customers in infected stores if such would vastly increase the risk of an even larger claim if a person became ill or died (though such a claim would be made under a different insurance product: liability insurance or workers compensation).

The long list of cases that have considered various external forces’ impact on property as a “direct physical loss” demonstrate that courts are willing to find coverage if the force is a disease-causing agent or poison, if it is purely airborne, and if it does not permanently affect or even alter in any way the physical property insured. “Loss” or “damage” can mean “lost to the policyholder” in terms of use, in a variety of ways that do not involve actual physical destruction of the property.

The case law supports a conclusion that physical damage from a virus does not have to be permanent; it can be transient.¹³¹ With a virus like COVID-19, an

¹²⁹ See Stempel & Knutsen, *supra* note 33, at §23; Erik S. Knutsen & Jeffrey W. Stempel, *The Techno-Neutrality Solution to Navigating Insurance Coverage for Cyber Losses*, 122 PA. STATE U. L. REV. 645, 646–47 (2018).

¹³⁰ See, e.g., *Ashland Hosp. Corp. v. Affiliated FM Ins. Co.*, No. 11-16-DLB-EBA, 2013 WL 4400516, at *5 (E.D. Ky. Aug. 14, 2013) (finding disk drive damage due to excessive temperatures is a “direct physical loss” at a microscopic level); *Se. Mental Health Ctr., Inc. v. Pac. Ins. Co.*, 439 F. Supp. 2d 831, 837 (W.D. Tenn. 2006) (finding data corrupted by power loss at pharmacy is a covered “direct physical loss”).

¹³¹ See, e.g., *Phibro Animal Health Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, No. A-5589-13T3, 2016 WL 3884255, at *9–10 (N.J. Super. Ct. App. Div. July 14, 2016) (finding that medicine given to chickens that stunted their growth constituted

insured property may be impacted, and a loss may ensue in two typical scenarios: immediately after an infected customer or employee becomes ill on the premises or, more broadly, while the virus itself is highly prevalent in the community in question and therefore must be on the premises.

For the first scenario—that of immediate infection of an employee—it would seem that physical loss or damage would be simple to prove. There was virus present on the property. No one can tell where it spread or on what surfaces. It may well be in the air or ventilation system. Entry to the property is thus dangerous until the illness reasonably subsides, decontamination has occurred, and it is again safe to enter.

But for the second scenario—that of virus generally prevalent in the community—can coverage attach simply because the illness is potentially ‘out there?’ In that instance, reasoning such as that featured in the *Studio 417, Inc. v. Cincinnati Insurance Company*¹³² case is helpful: where the virus is so highly prevalent such that a large proportion of the population is ill (and sometimes without any knowledge of being ill) to the degree that civil authorities are making orders restricting both use of property and peoples’ movement, then one can probably assume actual presence of virus on the property somehow, especially at a place of business open to the public. At a certain point in time, the harm will of course subside. Those cases holding that physical damage does not have to be permanent to trigger coverage support reasoning that coverage would last as long as the danger is rendering the property unfit for use.

A number of cases have found coverage due to the imminent threat of physical loss or damage:

- a) government shutdown due to impending riots;¹³³
- b) evacuation from an imminent building collapse;¹³⁴
- c) an impending hurricane;¹³⁵

property damage, despite the possibility of the chickens being restored to their original conditions, because property damage need not be permanent).

¹³² No. 20-cv-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020) (applying Missouri law).

¹³³ See, e.g., *Sloan v. Phoenix of Hartford Ins. Co.*, 207 N.W.2d 434, 437 (Ct. App. Mich. 1973) (finding loss of use due to government shutdown in response to riots is covered even though there is no direct physical loss to property).

¹³⁴ See, e.g., *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986).

¹³⁵ See, e.g., *Houston Cas. Co. v. Lexington Ins. Co.*, No. H-05-1804, 2006 WL 7348102, at *6 (S.D. Tex. June 15, 2006) (finding coverage for business interruption due to

- d) imminent landslide;¹³⁶
- e) imminent threat of release of asbestos fibres.¹³⁷

However, other cases have found that fears of future threats did not constitute a covered loss because there was no loss to property.¹³⁸

The threat of something can make property uninhabitable. The threat of COVID-19 is quite serious: the virus is highly contagious, spreads through the air and surfaces, and can be deadly. Those in close indoor quarters to the virus also have a high possibility of contracting the disease. To that end, the COVID-19 situation perhaps differs from those cases that have found that future threats did not equate to a loss in property. The possibility of damage in the COVID-19 situation is relatively high if virus is in the vicinity. It is not like taking a preventative measure after an event out of concern for a follow-up event (like ordering a curfew after a socially disruptive event). Rather, it is a highly likely scenario that putting someone in close indoor proximity to the virus will make that person ill. It is more similar to the impending earthquake and hurricane cases where one knows the event is on its way, than it is to those where losses stemmed from concerns of more vague future events occurring. With COVID-19, a significant number of people sufficiently exposed indoors will get sick.

This highlights one other area of coverage concern: actual physical damage versus loss of use or function of property to the policyholder. There is support in

evacuation arising from impending Hurricane Floyd, even though policyholder did not suffer physical damage to property from hurricane).

¹³⁶ See, e.g., *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 16–17 (W. Va. 1998) (finding threat of imminent landslide enough to satisfy “direct physical loss” for coverage to attach).

¹³⁷ *Port Auth. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002).

¹³⁸ See, e.g., *United Air Lines v. Ins. Co. State of Pa.*, 439 F.3d 128, 133–35 (2d Cir. 2006) (finding no civil authority coverage where a government halt of airport operations is based on fears of future attacks after Sept. 11, 2001 and no property damage to adjacent property); *Paradies Shops, Inc. v. Hartford Fire Ins. Co.*, No. 1:03-CV-3154-JEC, 2004 WL 5704715, at *6–8 (N.D. Ga. Dec. 15, 2004) (finding no property damage from air ground stop order after Sept. 11, 2001 as the order did not prohibit access to airports and their businesses); *Syufy Enters. v. Home Ins. Co. of Ind.*, No. 94-0756 FMS, 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995) (finding curfews imposed to curb looting were not the result of damage to adjacent property); *Two Caesars Corp. v. Jefferson Ins. Co. of N.Y.*, 280 A.2d 305, 307–08 (D.C. Cir. 1971) (finding acts of avoiding civil unrest had no causal relation to damage to property).

case law such as *Gregory Packaging*¹³⁹ where loss of use or function of a particular property can equate to direct physical loss without tangible physical harm to the property. While property may not be permanently damaged by COVID-19, a policyholder loses the use of that property in a reasonable fashion if there is an infection on the premises or the virus present in the surroundings. Some courts have held that the disjunctive “or” between “physical loss of or damage to” property must mean that “loss” must mean something different than “damage” (typically it is held to mean an absence of property, as in theft). In that regard, “loss” could mean “loss of use” or “loss of function” such that it renders the property useless to the policyholder (i.e. if you lost the useful use of the property, it is as if you lost it, even though it did not physically go away). In fact, the textualist dictionary analysis as noted above also provides support for “loss” equating to “loss of use.”

There is, however, a line of cases often cited by courts adjudicating this first wave of COVID insurance coverage cases—from *Source Food Technology, Inc. v. United States Fidelity and Guaranty Co.*¹⁴⁰ and *Mama Jo’s, Inc. v. Sparta Insurance Co.*¹⁴¹—that would hold that only tangible physical alteration of property would qualify as “direct physical loss or damage.” But unlike in those cases, where the courts held respectively that an import ban did not damage imported beef or construction dust did not damage music speakers, the COVID-19 situation has a dangerous substance actually physically present on the property, either in the air or through employees and customers spreading it. This tracks the reasoning in COVID insurance coverage cases finding for the policyholder like *Studio 417*,¹⁴² *Blue Springs Dental Care v. Owners Ins. Co.*¹⁴³ and *Mudpie, Inc. v. Travelers Casualty Ins. Co. of America*,¹⁴⁴ where the courts there held that pleading actual physical presence of the virus made the analytical difference in proving coverage through a “direct physical loss.”¹⁴⁵ Indeed, in many of the past non-COVID cases that found a “direct physical loss” due to the invasion of some harmful substance, the substance

¹³⁹ *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-CV-04418 WHW, 2014 WL 6675934, at *8 (D. N.J. Nov. 25, 2014) (applying New Jersey and Georgia law).

¹⁴⁰ 465 F.3d 834 (8th Cir. 2006) (applying Minnesota law).

¹⁴¹ 823 Fed. App’x 868 (11th Cir. 2020) (applying Florida law).

¹⁴² 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020) (applying Missouri law).

¹⁴³ No. 20-CV-00383-SRB, 2020 U.S. Dist. LEXIS 172639 (W.D. Mo. Sept. 21, 2020).

¹⁴⁴ No. 20-CV-03213-JST, 2020 WL5525171 (N.D. Cal. Sept. 14, 2020) (applying California law).

¹⁴⁵ We discuss these cases, particularly *Studio 417*, *supra* note 142, in more detail in the next section, *infra*, as we find their reasoning quite superior to that of most of the courts dismissing policyholder claims on grounds of no physical loss or damage—as a matter of law.

merely resulted in the property owner not being able to use the property until decontamination occurred. This strongly suggests that dismissing COVID claims merely because property can be disinfected is incorrect.

In some jurisdictions, merely partially restricted access to a property does not equate to a prohibition of access by civil authority.¹⁴⁶ In other instances, a recommendation from a civil authority (as opposed to a direct command) may be not enough to provide coverage because access was not “prohibited.”¹⁴⁷ For COVID-19-related losses, it can be challenging to argue that government ordered alterations in service provision—such as a mandated move from in-person dining to take-out and delivery only—results in lost or restricted access to the property or even use of the property.¹⁴⁸ However, on balance, a restaurant faced with this imposed condition could certainly argue that a large proportion of its property typically used for dine-in customers has been rendered entirely unusable by a civil authority.¹⁴⁹

As the cases now stand, courts appear to be receptive to finding coverage for direct physical loss or damage if the policyholder alleges some factual aspects of physical presence of the virus on the commercial premises. The courts in *Studio 417* and *Blue Springs Dental Care* found the possibility of coverage for this reason and

¹⁴⁶ See, e.g., *Ski Shawnee, Inc. v. Commonwealth Ins. Co.*, No. 3:09-CV-02391, 2010 WL 2696782 (M.D. Pa. July 6, 2010) (stating there is no coverage when Department of Transport closed main route to policyholder’s ski resort because customers could travel to the resort via an alternate route); *Abner, Herrman & Brock, Inc. v. Great N. Ins. Co.*, 308 F. Supp. 2d 331 (S.D.N.Y. 2004) (noting that after World Trade Center disaster, civil authority coverage only provided where order completely prohibited access to property and not during periods where traffic restrictions made access merely more difficult); *54th St. Ltd. Partners v. Fid. & Guar. Ins. Co.*, 306 A.D.2d 67 (asserting that although traffic to property was diverted, the public was not denied access).

¹⁴⁷ See, e.g., *Kean Miller LLP v. Nat’l Fire Ins. Co. of Hartford*, No. 06-770-C, 2007 WL 2489711, at *6 (M.D. La. Aug. 29, 2007) (holding that an advisory to stay off streets during Hurricane Katrina did not prohibit access; no civil authority coverage).

¹⁴⁸ See, e.g., *Phila. Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280 (S.D.N.Y. 2005) (finding that government order eliminated need for policyholder’s parking services but did not prohibit access to its garage).

¹⁴⁹ Although this line of argument was unsuccessful in *Henry’s La. Grill, Inc. v. Allied Ins. Co. of Am.*, No. 1:20-cv-2939-TWT, 2020 WL 5938755 (N.D. Ga. Oct. 6, 2020) (applying Georgia law), where the policyholder restaurant argued that a physical change to the property had occurred because the restaurant had to reconfigure its premises for take-out, not dine-in, as a result of governmental orders. The court held that “loss” means “total destruction” and simply moving things around was not a “loss” or “damage.” See also *Hajer v. Ohio Sec. Ins. Co.*, No. 6:20-cv-00283, 2020 WL 7211636 (E.D. Tex. Dec. 7, 2020) (applying Texas law) (finding no damage and dismissing case after policyholder argued it had to physically alter its rug business to follow governmental safety order).

the court in *Mudpie* notes it would have, had the policyholder alleged the presence of the virus.

At its heart, this logic follows the case law stemming from *Gregory Packaging* as opposed to the *Source Foods/Mama Jo's* line of reasoning. Whether or not there needs to be tangible physical damage to property in order for coverage to be triggered, there must be some invasion of the virus physically on the premises in question for coverage to attach.

IV. THE DISAPPOINTING EARLY CASELAW CONCERNING COVID-19 BUSINESS INTERRUPTION CLAIMS

A. THE PREVAILING ANALYSIS

Cases testing the extent of business interruption insurance coverage for COVID-19 pandemic-related losses are still winding their way through the legal system. To date, court decisions have been made largely in the context of motions to dismiss a policyholder's claim on the pleadings, with no factual record except the pleadings taken by the court as true. Thus, the emerging caselaw is currently limited in its predictive ability as a fulsome canvassing of the issues.

Two distinct lines of reasoning and factual trends have emerged thus far in the case law. Courts are split as to whether the main coverage clause which requires "direct physical loss of or damage to" covered property is even triggered as a result of COVID-19 business interruption losses.

The majority of decisions to date have held that, for "direct physical loss of or damage to" property to have occurred, the property in question must have been physically altered in some tangible fashion. As COVID-19 does not permanently alter the physical characteristics of property, but rather makes people ill by infecting through the air or on touchable surfaces, most courts have found that there is thus no coverage for business interruption losses unless the policyholder specifically alleges the actual physical presence of the virus was on its premises (i.e. on surfaces, in the air, or through infected customers or employees).

If a policyholder alleges physical presence of the virus, some courts to date have found that the covered property was requisitely affected directly and physically by the alleged presence of the virus, even though the virus is microscopic and the property itself appears to be capable of decontamination. The loss of use of the property either through necessary decontamination or as a result of virus presence was enough for those courts to hold that business interruption coverage was triggered as a result of "direct physical loss of or damage to" property.

When determining coverage for losses resulting from civil authority orders, courts have split along the same line. If a policyholder can allege the actual physical presence of the virus on adjacent property that resulted in the order being made, the claim is not dismissed. However, if there are no allegations of the physical presence of the virus on other or adjacent property that prompted governmental authorities to restrict property access, governmental orders to quell the spread of the virus are not enough to trigger loss of use of the property to a degree that it is “direct” and “physical.” These courts denying coverage rest their reasoning on a causation analysis: the virus, not the orders, caused the loss and the virus does not cause direct physical loss unless actual tangible property damage is alleged.

If a property policy has an exclusion for losses caused by viruses or bacteria, courts appear to be ready to deny coverage to policyholders on the face of the exclusionary language, without much more than a cursory analysis. Courts appear to link the cause of any governmental orders restricting property access to the reason for those orders: the virus, an excluded cause of loss. If the virus exclusion has an anti-concurrent cause clause, courts appear even more ready to deny coverage for business interruption or civil authority claims without much substantive analysis.

The cases wrestling with coverage for pandemic-related losses due to COVID-19 commonly engage with lines of reasoning from three prior precedents: the 11th Circuit 2020 decision in *Mama Jo’s, Inc. v. Sparta Insurance Co.*¹⁵⁰ (applying Florida law), the 2014 U.S. District Court for the District of New Jersey case of *Gregory Packaging, Inc. v. Travelers Property and Casualty Co. of America*¹⁵¹ (applying New Jersey and Georgia law), and the 8th Circuit 2006 decision in *Source Food Technology, Inc. v. United States Fidelity and Guaranty Co.*¹⁵² (applying Minnesota law). These cases highlight the tension between two possible approaches to pandemic-related insurance coverage issues: a strict requirement that the insured property suffer tangible physical alteration to property as a result of some external force (the *Mama Jo’s* and *Source Food* approach) versus the notion of loss of “use” of the property equating to physical loss or damage to property, even though the physical property itself is not permanently altered by some external force (the *Gregory Packaging* approach).

In *Mama Jo’s*, the policyholder restaurant was denied its business interruption and remediation claims when the restaurant’s lighting and audio equipment was coated with dust from outside road construction. Under Florida law, the court held that surfaces that can be cleaned have not suffered a direct physical

¹⁵⁰ 823 Fed. App’x 868 (11th Cir. 2020) (applying Florida law).

¹⁵¹ No. 2:12-CV-04418, 2014 WL 6675934 (D. N.J. Nov. 25, 2014) (applying New Jersey and Georgia law).

¹⁵² 465 F.3d 834 (8th Cir. 2006)(applying Minnesota law).

loss: the damage must be tangible and physical, resulting in an actual change in the property. Although dust in the accumulations involved in that case is a tangible contaminant, the court regarded the property as undamaged because it could be wiped away, even though cleaning on this scale exceeded that required for normal business operations.

In *Source Food Technology*, a beef wholesaler brought a claim for business interruption insurance due to lost revenue resulting from an embargo of Canadian beef after reports of “mad cow” disease. Source Food’s sole supplier of beef was located in Ontario, Canada. The beef was not contaminated by mad cow disease. The claim for losses was as a result of the inability to ship the beef across the border. The court held that there was no direct physical loss or damage to the beef—it simply could not be shipped across the border. Thus, there was no coverage for the loss. The court specifically refused to adopt the position that “direct physical loss or damage is established whenever property cannot be used for its intended purpose.”¹⁵³

A different approach was taken by the court in *Gregory Packaging*.¹⁵⁴ In that case, the accidental release of ammonia in a juice box manufacturing plant required that the facility be decontaminated and evacuated. According to the court, the ammonia release physically transformed the air within the manufacturer’s facility to make it unsafe. Because the facility was unusable for a period of time, the court held that the property suffered a direct physical loss. Even though, under Georgia law, coverage requires an actual physical change in property, the court held that that requirement was satisfied because the ammonia release physically changed the facility’s condition to such a state that it needed repair.

B. MISAPPLYING TRADITIONAL CONTRACT AND INSURANCE LAW

Our own preference is for the *Gregory Packaging* approach rather than the *Mama Jo’s* or *Source Foods* approach. But we find the early cases dismissing policyholder COVID claims disturbing not only because of their doctrinal choices but also because they in our view reflect a reductionist view and absence of judicial humility. In particular, the courts finding no “direct physical loss or damage” have been insufficiently appreciative of the range of meanings for these words that in turn makes it inappropriate for courts to declare a lack of triggering loss or damage as a matter of law.

¹⁵³ *Id.* at 838 (citing *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 98 N.W.2d 280 (Minn. 1959)).

¹⁵⁴ 2014 WL 6675934 (applying New Jersey Law).

1. Glib Tautology and False Consensus Bias

Particularly troubling examples are *Social Life Magazine, Inc. v. Sentinel Insurance Company*,¹⁵⁵ (in which the court blithely declared that there was no loss or damage to covered property because COVID “damages lungs. It doesn’t damage printing presses”), *Sandy Point Dental, PC v. Cincinnati Insurance Company*,¹⁵⁶ *Gavrilides Management Company. v. Michigan Insurance Company*,¹⁵⁷ and *Rose’s I, LLC v. Erie Insurance Exchange*.¹⁵⁸

The *Social Life Magazine* statement may make for a clever punchline but it is not even particularly accurate as a medical statement, let alone as an analysis of potential insurance coverage.¹⁵⁹ COVID’s impact is not confined to lungs but includes many other organs such as kidneys and the brain as well as senses of hearing and smell.¹⁶⁰ More to the point for insurance purposes, viral infestation of a printing

¹⁵⁵ No. 1:20-cv-03311-VEC (S.D.N.Y. Apr. 29, 2020).

¹⁵⁶ No. 20 CV 2160, U.S. Dist. LEXIS 171979 (N.D. Ill. Sept. 21, 2020).

¹⁵⁷ No. 20-000258-CB (Mich. Cir. Ct., Ingham Cty. July 1, 2020) (explaining that direct physical loss to property requires tangible alteration or damage that impacts the integrity of the property, and dismissing the case because plaintiff failed to allege that the coronavirus had any impact to the premises).

¹⁵⁸ No. 2020 CA 002424 B, 2020 WL 4589206, at *5 (D.C. Super. Aug. 6, 2020) (granting summary judgment for insurer on restaurant’s claims of lost business caused by coronavirus closure orders because there was no direct physical loss to property).

¹⁵⁹ A similar sort of reasoning featured in *Plan Check Downtown III, LLC v. Amguard Ins. Co.*, No. cv 20-6954-GW-Skx, 2020 WL 5742712 (C.D. Cal. Sept. 10, 2020) (applying California law), where a restaurant’s claim was dismissed because the court anchored its finding that “loss” requires tangible alteration to property because otherwise any regulatory change from any governmental order that affected any business in any fashion would trigger business interruption insurance. It went further to opine that even a snowstorm interferes with “use” of premises for the business by customers and employees and surely covering losses from snowstorms would make business interruption coverage far too broad.

¹⁶⁰ The same concept was picked up by the court in *Uncork & Create LLC, v. Cincinnati Ins. Co.*, No. 2:20-cv-00401, 2020 WL 6436948 (S.D.W. Va.) (applying West Virginia law) which denied coverage and went so far as to state that it would deny coverage even if there was physical presence of the virus. The court held that COVID-19 does not harm inanimate structures, can be eliminated with disinfectant and routine cleaning. *Id.* at 5. The court went so far as to state that even the actual presence of the virus on the property is not enough to trigger the coverage clause “physical damage or physical loss to the property.” *Id.* at 6. See also *Promotional Headwear Int’l v. Cincinnati Ins. Co.*, No. 20-cv-2211-JAR-GEB, 2020 WL 7078735 (D. Kan. Dec. 3, 2020) (applying Kansas law) where the court (on a motion to dismiss on the pleadings!) does not accept the policyholder’s allegations that the virus contaminated its property, citing both *Source Food Technology, Inc.* and *Mama Jo’s, Inc.*;

facility does, for the reasons discussed above, damage the facility's air quality and its equipment. Although the "fix" may be relatively straight-forward cleaning, it is damage nonetheless and renders the facility unusable until cleaned—a process that may become so repetitive due to re-infection as to constitute long-term damage and loss of use. More important, if this and other pandemic injury result in government-ordered limitations on operation of the policyholder's property, this produces rather direct physical loss to the policyholder.

Sandy Point Dental makes a similarly breezy and overly restrictive reading of the direct physical loss or damage trigger. Although the court recognizes that Illinois law is applicable, it cites no Illinois cases regarding loss or damage¹⁶¹ even though there are important state law decisions finding that adulterated air or surfaces can constitute physical damage to property.¹⁶² If *Sandy Point Dental* had merely

Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co., No. 1:20-cv-665-RP, 2020 WL 7351246 (W.D. Tex. Dec. 14, 2020) (applying Texas law) (citing Uncork & Create, LLC and holding that, even assuming the virus is present, the court held it can be cleaned).

¹⁶¹ The *Sandy Point Dental* court's citation of Illinois law is limited to general pronouncements, including the axiom that a court construing an insurance policy should be "giving effect to every provision, if possible, because it must be assumed that every provision was intended to serve a purpose." No. 20-cv-2160, 2020 U.S. Dist. LEXIS 171979, at *3-4 (quoting *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 860 N.E. 307, 314 (Ill. 2006)). But this "surplusage" canon of construction (discussed *supra* text accompanying notes 85-86) augers in favor of giving "loss" a sufficiently distinct meaning from "damage." But instead of doing this, the *Sandy Point Dental* court treats the words as synonyms but then focuses only on the term "damage," which connotes more tangibility than "loss." The court also notes that Illinois requires words in a policy to be giving their "plain, ordinary, and popular meaning." See U.S. Dist. LEXIS 171979 at *4 (citing *Central Ill. Light Co. v. Homes Ins. Co.*, 821 N.E.2d 206, 213 (Ill. 2004)). As previously discussed, (see *supra* text accompanying notes 90-99), there is ample evidence in dictionaries and thesauruses suggesting the plain and ordinary meaning approach augers in favor of finding loss when a policyholder's use of property is restricted by viral infection or government order.

¹⁶² Illinois has had more than its share of asbestos coverage cases, the bulk of which have concluded that the presence of asbestos materials in a structure or in the interior air of a building constitutes physical damage. See, e.g., *J.R. French Auto. Castings, Inc. v. Factory Mut. Ins. Co.*, No. 02-c-9479, 2003 U.S. Dist. LEXIS 13060 (N.D. Ill. July 23, 2003) (noting that the presence of human remains in a press machine constituted contamination that was physical damage even though equipment not tangibly structurally altered but no coverage because of exclusionary language in policy); *Affiliated FM Ins. Co. v. Board of Educ.*, No. 90-c-6040, 1992 U.S. Dist. LEXIS 15151 (N.D. Ill. Oct. 5, 1992) (noting that contaminated air is physical damage and the inability to use because of contamination is physical loss); *Lapham-Hickey Steel Corp. v. Prot. Mut. Ins. Co.*, 655 N.E.2d 842 (Ill. 1995) (finding no duty to defend because a formal lawsuit was not filed but suggesting that contamination can

followed this applicable law, it would have reached a correct decision on the motion to dismiss. But the court simply failed to locate (whether due to deficient advocacy or something else) or examine these precedents.

In addition, the *Sandy Point Dental* court seems to have forgotten that even in a world of heightened pleading requirements, the court faced with a Rule 12(b)(6) motion to dismiss must (absent extreme circumstances) treat the allegations of the plaintiff's complaint as true.¹⁶³ Instead, the court in essence second-guessed those allegations, with the judge refusing to accept them at face value.

And in perhaps its lowest moment of judicial craft, *Sandy Point Dental* sought to distinguish an important decision favoring the policyholder.

Plaintiff heavily relies on *Studio 417 Inc. v. The Cincinnati Insurance Company*, 20 C 3127-SRB, 2020 U.S. Dist. LEXIS 147600 (S.D. Mo. Aug. 12, 2020), a Missouri case that found that the coronavirus caused a physical loss to property warranting insurance coverage. That court rested its decision on that policy's expansive language, language very different from the policy in the instant case. The unambiguous language in the instant policy warrants a different conclusion—physical damage that demonstrably alters the property is necessary for coverage, and the coronavirus does not cause physical damage.¹⁶⁴

Unfortunately, *Sandy Point's* characterization is simply not true. The Cincinnati policy form at issue in *Studio 417* (and the *KC Hopps* and *Blue Springs Dental* cases also decided in the Western District of Missouri) is the same (at least regarding the direct physical loss requirement and the absence of a virus exclusion) as the Cincinnati policy at issue in *Sandy Point*.

In an opinion read from the bench, *Gavrilides Management*,¹⁶⁵ like *Sandy Point*, conflates the term “loss” and the term “damage,” robbing them of their respectively different connotations and emphases. Worse yet, it engrafts on the term

be physical damage and lack of access can be physical loss of property); *Universal Underwriters Ins. Co. v. LKQ Smart Parts, Inc.*, 963 N.E.2d 930 (Ill. Ct. App. 2011) (noting that the deprivation of use of a vehicle is physical loss) (but there was also tangible physical damage to vehicle); *Board of Educ. v. Int'l Ins. Co.*, 720 N.E.2d 622 (Ill. Ct. App. 1999) (finding that the presence of asbestos fibers in air constituted physical damage to property).

¹⁶³ See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); BROOKE D. COLEMAN, ET AL., *LEARNING CIVIL PROCEDURE* 285–302 (3d ed. 2018).

¹⁶⁴ No. 20-cv-2160, 2020 U.S. Dist. LEXIS 171979, at *7 n. 2.

¹⁶⁵ No. 20-000258-CB (Mich. Cir. Ct., Ingham Cty. July 1, 2020).

(having collapsed loss and damage into one) a requirement that property must have been permanently, structurally altered to be considered sufficiently “damaged” to merit coverage from the property insurer that, in return for premium dollars (sometimes years of premium dollars), promised to indemnify the policyholder from property loss and attendant business revenue loss.

Although one can argue that this was a correct reading of Michigan law, we are not convinced in that there appears to be no controlling Michigan precedent requiring this approach, which essentially denies coverage unless property is crushed.¹⁶⁶ Consequently, although not compelled to take a more nuanced view of the loss-or-damage requirement, the *Gavrilides Management* judge could (and in our view should) have done so.

Rose’s I, LLC v. Erie Insurance Exchange,¹⁶⁷ is disturbing in that, as that court acknowledges, the policyholder proffered definitions of the terms “loss” and “damage” that supported its position. But the court essentially ignored these definitions and adopted definitions it prepared—refusing to recognize that reasonable alternative constructions of a term or provision create ambiguity requiring resolution against the insurer. This is certainly true at the pleading stage. Although *Rose’s I* was a summary judgment decision, we think the same caution in terminating a case in the face of reasonable conflicting constructions of a policy should govern.

It appears that despite the summary judgment posture of the case, the record before the court did not include any extrinsic or discovery-unearthed evidence illuminating the meaning of policy language. Rather, the parties appear to have briefed the case based on textual argument alone, making the posture of the case akin to a 12(b)(6) motion. But instead of deferring to the facts as alleged and resolving any reasonable doubts against the nonmovant, the *Rose’s I* court granted summary judgment after it concluded—based on nothing we can discern—that “loss” requires “a direct physical intrusion on to the insured property.”¹⁶⁸ As we

¹⁶⁶ Although there are federal trial court cases requiring structural change to property to constitute sufficient physical loss or damage, there does not appear to be state court precedent binding on the *Gavrilades* court. *But see* *Universal Image Prod. v. Chubb Corp.*, 703 F. Supp. 2d 705 (E.D. Mich. 2010) (finding that intangible harms such as odor or mold contamination insufficient to constitute physical loss or damage even though property was rendered unusable).

¹⁶⁷ No. 2020-CA-002424-B, 2020 WL 4589206 (D.C. Super. Ct. Aug. 6, 2020) (granting summary judgment for insurer on restaurant’s claims of lost business caused by coronavirus closure orders because there was no direct physical loss to property).

¹⁶⁸ *Id.* at *7.

hope we have demonstrated, government orders limiting or forbidding use of physical facilities constitute a physical loss to the owner.

*Diesel Barbershop, LLC v. State Farm Lloyds*¹⁶⁹ displays a similarly disturbing approach to textual analysis. The court, like others finding for insurers, collapses what should be the distinct terms “loss” and “damage” and despite the many dictionary and thesaurus entries supporting a reading of the policy favorable to policyholders, selects the entries most favorable to the insurer contention requiring tangible and rather substantial, long-lasting, structural and character altering injury before there can be coverage. Likewise, the real loss of a physical facility due to COVID-spurred government restriction is given short shrift. To be fair, the *Diesel Barbershop* court recognizes cases that “some courts have found physical loss even without tangible destruction to the covered property.”¹⁷⁰ However, “[e]ven so,” *Diesel Barbershop* found “that the line of cases requiring tangible injury to property are more persuasive here.”¹⁷¹ That was in essence the scope and depth of the court’s “analysis.”

The problem with the court’s conclusion is that it was to a large degree not the court’s decision to make if it was following the rules of insurance policy construction. Because ambiguities are to be resolved in favor of the policyholder that did not draft the language at issue, a policyholder that proffers a reasonable construction of disputed language (such as “loss” or “damage”) is entitled to the benefit of the doubt—at least regarding a Rule 12(b)(6) motion where another well-established “rule” is that the allegations of plaintiff policyholder’s complaint must be accepted as true. Discovery may later provide information refuting those allegations and supporting the defendant insurer. But until such time as such discovery takes place, the factual universe upon which the court decides is supposed to be limited to the complaint.

Although research (such as reading dictionaries or cases) may bring extrinsic material into the inquiry, the policyholder need not shoulder the ultimate burden of persuasion at this stage of the litigation. It need only set forth a reasonable construction of the policy language that supports its claim for coverage. Policyholders seeking COVID coverage have done that. They may ultimately lose

¹⁶⁹ No. 5:20-CV-461-DAE, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020) (granting a motion to dismiss because the coronavirus did not cause a direct physical loss, and “the loss needs to have been a ‘distinct, demonstrable physical alteration of the property.’”) (citing *Hartford Ins. Co. of Midwest v. Mississippi Valley Gas Co.*, 181 F.App’x 465, 470 (5th Cir. May 25, 2006)).

¹⁷⁰ *Id.* at *14–15.

¹⁷¹ *Id.* at *15–16 (concluding that “the other cases [finding loss or damage] are distinguishable.”).

due to further factual development establishing lack of loss or damage or due to application of a virus exclusion or other factors. But they should not lose on the loss/damage issue at this stage of litigation.

These and other decisions¹⁷² in which courts are willing to declare as a matter of law that the words “direct physical loss or damage” require structural

¹⁷² See, e.g., *Mark’s Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, No. 2:20-cv-04423-AB-SK, 2020 WL 5938689 (C.D. Cal. Oct. 2, 2020) (applying California law) (involving a restaurant that claimed losses due to orders requiring take-out or delivery service only); *Promotional Headwear Int’l v. Cincinnati Ins. Co.*, No. 20-cv-2211-JAR-GEB, 2020 WL 7078735 (D. Kan. Dec. 3, 2020) (applying Kansas law) (citing both *Source Food* and *Mama Jo’s* to hold that physical alteration of property required for coverage to attach); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd’s London*, No. 8:20-cv-1605-T-30AEP, 2020 WL 5791583 (M.D. Fla. Sept. 28, 2020) (applying Florida law); *Hillcrest Optical, Inc. v. Cont’l Cas. Co.*, No. 1:20-CV-275-JB-B, 2020 WL 6163142 (S.D. Ala. Oct. 21, 2020) (applying Alabama law); *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-cv-22833-BLOOM/Louis, 2020 WL 6392841 (S.D. Fla. Nov. 2, 2020) (applying Florida law); *Palmer Holdings & Invs., Inc. v. Integrity Ins. Co.*, No. 4:20-cv-154-JAJ, 2020 WL 7258857 (S.D. Iowa) (applying Iowa law); *T&E Chicago LLC v. Cincinnati Ins. Co.*, No. 20 C 4001, 2020 WL 6801845 (N.D. Ill. Nov. 19, 2020) (applying Illinois law); *Whiskey River on Vintage, Inc., v. Ill. Cas. Co.*, No. 4:20-cv-185-JAJ, 2020 WL 7258575 (S.D. Iowa Nov. 30, 2020) (applying Iowa law); *Zwillo V, Corp. v. Lexington Ins. Co.*, No. 4:20-00339-CV-RK, 2020 WL 7137110 (W.D. Mo. Dec. 2, 2020) (applying Missouri law); *Water Sports Kauai, Inc. v. Fireman’s Fund Ins. Co.*, No. 20-cv-03750-WHO, 2020 WL 6562332 (N.D. Cal. Nov. 9, 2020) (applying Hawai’ian law); *Long Affair Carpet & Rug, Inc. v. Liberty Mut. Ins. Co.*, No.: SACV 20-01713-CJC(JDEx), 2020 WL 6865774 (C.D. Cal. Nov. 12, 2020) (applying California law); *Michael Cette, Inc. v. Admiral Indem. Co.*, 20 Civ. 4612 (JPC), 2020 WL 7321405 (S.D.N.Y. Dec. 11, 2020) (applying New York law); *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, No. 2:20-cv-00087-KS-MTP, 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020) (applying Mississippi law); *Henry’s Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, No. 1:20-CV-2939-TWT, 2020 WL 5938755 (N.D. Ga. Oct. 6, 2020) (applying Georgia law); *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, No. CV 20-1869, 2020 WL 7395153 (E.D. Pa. Dec. 17, 2020) (applying Pennsylvania law); *Brian Handel DMD, PC v. Allstate Ins. Co.*, No. 20-3198, 2020 WL 6545893 (E.D. Pa. Nov. 6, 2020) (applying Pennsylvania law); *Hajer v. Ohio Security Ins. Co.*, No. 6:20-cv-00283, 2020 WL 7211636 (E.D. Texas Dec. 7, 2020) (applying Texas law); *Terry Black’s Barbecue, LLC v. State Auto. Mut. Ins. Co.*, No. 1:20-CV-665-RP, 2020 WL 7351246 (W.D. Tex. Dec. 14, 2020) (applying Texas law); *Santo’s Italian Café LLC v. Acuity Ins. Co.*, No. 1:20-cv-01192, 2020 WL 7490095 (N.D. Ohio) (applying Ohio law); *Graspa Consulting, Inc. v. United Nat’l Ins. Co.*, No. 20-23245-CIV-WILLIAMS, 2021 WL 199980 (S.D. Fla. Jan. 20, 2021) (applying Florida law); *S. Fla. ENT Assocs, Inc. v. Hartford Fire Ins. Co.*, No. 20-23677-Civ-WILLIAMS/TORRES, 2020 WL 6864560 (S.D. Fla. Nov. 13, 2020) (applying Florida law); *Plan Check Downtown III, LLC v. AmGUARD Ins. Co.*, No. Cv 20-6954-GW-SKx, 2020

alteration of the property only reflect judges succumbing to false consensus bias—the tendency of humans to be overconfident that others see things as they do. Significant research suggests this is a particular problem in the interpretation of contracts and other writings. For example, in one study, respondents were given contract language to read and construe. They then were asked whether they thought other readers could reach a different interpretation.¹⁷³

Overwhelmingly, they expressed confidence that others would agree with their reading of the words and that there was no significant interpretive issue as to the document’s meaning. Overwhelmingly, they were wrong. The same contract language was being read by other respondents who were reaching a different conclusion as to the meaning of the words.

This tendency, which also accords with cognitive traits such as self-serving bias (the tendency for people to think they are better at things than is actually the case),¹⁷⁴ can be particularly pernicious in judges who by job description need to be decisive (and move on to the next case), and are consistently the object of deference or even adulation (e.g., more likely to be invited to be graduation speakers or faculty in residence than all but a few celebrity lawyers), and who by definition in an adversary system have half the disputants praising each decision.

The net result can often be a brusque, reductionist, insufficiently reflective approach to reading documentary text, including but not limited to statutes, regulations, rules, exhibits, and contracts in addition to insurance policies. The judge, despite frequently reading the text in a vacuum without background contextual information, the aid of a linguist, or more than the closest dictionary or those cited by counsel, quickly determines that she “knows” what the disputed language means. More troublingly, the judge “knows” this so well that she dispenses with further inquiry and dismisses the case.

WL 5742712 (C.D. Cal. Sept. 10, 2020) (applying California law); *Kirsch v. Aspen Am. Ins. Co.*, No. 20-11930, 2020 WL 7338570 (E.D. Mich. Dec. 14, 2020) (applying Michigan law); *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, No. 20-cv-03461-MMC, 2020 WL 7495180 (N.D. Cal. Dec. 21, 2020) (applying California law). *But see, e.g.*, *Seifert v. IMT Ins. Co.*, No. 20-1102 (JRT/DTS), 2020 WL 6120002 (D. Minn. Oct. 16, 2020) (applying Minnesota law) (holding that Minnesota law does not require a showing of structural damage to qualify for coverage).

¹⁷³ See Lawrence Solan, et al., *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268 (2008).

¹⁷⁴ See Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSPECTIVES 109 (1997) (describing phenomenon and its impact in prompting disputants or negotiating parties to overvalue their own skills, conduct, and position in transactions or litigation).

Although this is troubling to us in any case, it is particularly troubling in the insurance context, where the ground rules of adjudication discussed below, if properly followed, are essentially designed to give policyholders the benefit of the doubt. To borrow a baseball term, “ties” are supposed to “go to the runner.” But like the umpire whose right thumb jerks upward if the ball is in the vicinity of first base before the runner has clearly planted a foot, courts taking an aggressively self-reverential view about the meaning of policy language bend the rules in the opposite direction.

In a world where reasonable people may debate the meaning of “direct physical loss or damage” in various contexts, courts should be reluctant to declare meaning as a matter of law. In view of the differing dictionary definitions and case outcomes, such an approach ordinarily amounts to error in COVID claims.

We realize of course that where controlling law provides a clear precedent, it must be followed. If, for example, the Supreme Court of State X has declared in no uncertain terms that both “loss” and “damage” in the property insurance setting always requires tangible, permanent (unless repaired by more than cleaning) injury to the structure or character of property, that precedent must be followed by trial courts no matter how much a trial judge thinks it incorrect. But where case law is mixed, unclear, or absent, trial courts should be taking the more modest approach to perceived certainty of textual meaning.

To be fair, many, perhaps even most, of the courts dismissing policyholder COVID claims have at least considered caselaw taking the broader view of “direct physical loss or damage.” But they have then quickly pivoted to the narrower view certainty unwarranted in light of the dictionary definitions favoring the broader view. Couple this with the established insurance policy interpretation principles favoring policyholders that have been given short shrift by courts dismissing COVID coverage claims and the result is error—at least on the questions of whether loss or damage has occurred (and most certainly at the motion to dismiss stage of litigation).

Depending on the specifics of each case, insurers may prevail on any number of other defenses to coverage such as the virus exclusion or non-COVID defenses such as misrepresentation or intentional destruction or insurers may limit their liability based on calculation of lost business income as well as policy limits or sub-limits. But they generally should not be prevailing on the loss/damage question to the extent reflected in opinions to date. A brief review of a few important insurance concepts underscores this assessment.

2. Reasonable Policyholder Expectations of Coverage for Pandemic-related Losses

Consider policyholder and insurer expectations of coverage for pandemic-related losses. If there is rampant confusion as to the scope of coverage such that litigation is arriving at mixed results, perhaps there is a more insidious problem with what is driving that litigation. The reasonable policyholder likely expected that a product marketed and labelled as “business interruption insurance” or “civil authority coverage” would extend coverage to the policyholder’s income stream in the event the policyholder was unable to access or reasonably use its business premises. The reasonable policyholder purchasing an “all risk” policy likely would not have thought that such coverage would hang on how the damage—if any—to the property occurred. Rather, their focus would likely be on their income loss due to either virus contamination or prevention of use of their property due to governmental orders.

Particularly in the case of civil authority coverage, few policyholders would likely expect that, in many instances in order to trigger coverage, there would have to be some physical damage to adjacent property that would prompt a civil authority to restrict access to the policyholder’s property. Policyholders may ironically be better off if their property or adjacent property had burned down, rather than operations ceased by a virus, strange though it may seem. By the mere label of the product alone—“business interruption insurance”—there are likely many policyholders who simply believe that the insurance insures their profit stream. The impetus for that belief may well, in the end, rest with issues of misleading nomenclature by insurers and misleading sales by brokers and agents.

From an insurer’s standpoint, the reasonable insurer may well not have meant nor expected to cover losses relating to a pandemic like COVID-19 in the contexts of business interruption insurance included in commercial property policies. By its nature, a pandemic is a clash event that has the potential to seriously strain insurer resources. Yet surely the industry had modelled a pandemic because it has already seen the effects of SARS, MERS, Ebola, H1N1, swine flu, and HIV/AIDs. And there were products on the market specifically designed to cover pandemic-related losses. The existence of related products like event cancellation insurance makes the generalized insurer contention of “whoever would have predicted COVID-19?” a bit strained.

The more compelling insurer response to pandemic-related losses is perhaps to assert that the business interruption product was never meant to be “guaranteed

profit insurance.”¹⁷⁵ It is an insurance add-on coverage to property insurance. There surely must be some risks in commerce that are not covered by a property policy. For example, no one would expect business interruption coverage for profit losses in a nuclear war (though of course there are exclusions for nuclear causes of loss). But what of, say, a zombie apocalypse or alien invasion, that required governments to issue “stay at home” orders or risk being eaten by green beings? Would the standard business interruption coverage tied to commercial property policies kick in then? Is there then a direct physical loss of or damage to property? Likely not. There are zombies or aliens running about. The property is likely just fine. But again, property owners may have difficulty accessing their property or even be barred from it due to civil authority orders or otherwise.

Some insurers included a virus exclusion in their policy wording before the pandemic struck. Does that mean that those insurers without a virus exclusion did not mean to exclude such losses? Is the virus exclusion itself a rock-solid denial of coverage, under all loss scenarios?

Perhaps instead the business interruption (and by corollary, the civil authority) insurance product needs to be retooled and re-messaged to communicate precisely what is and what is not meant to be covered. Otherwise, in the insurance world, if coverage is unclear, ties go to the policyholder—or at least they should. The insurer must provide coverage until new policy language is drafted in new versions of insurance policies.

3. Causation, Civil Authority Coverage and the Virus Exclusion

The trigger of coverage for civil authority business interruption losses rests largely on arguments of insurance causation. Policyholders continue to allege that a civil authority order caused their pandemic-related business interruption losses by restricting their access to their property. To date, courts have perhaps incorrectly declined coverage because they have held that the cause of the policyholder’s losses is not the order and that no physical loss or damage occurred to prompt the order in the first place.

It is important to keep in mind how causation works in the insurance law context and how it is different than principles of tort causation. In assessing insurance causation in a property loss context, one should work backward from the

¹⁷⁵ A notion picked up by the court in *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, No. 2:20-cv-00087-KS-MTP, 2020 WL 6503405, at *8 (S.D. Miss. Nov. 4, 2020) (emphasis omitted) (applying Mississippi law), which held that “this is a commercial property policy, not a stand-alone business interruption policy—Plaintiff’s operations are not what is insured—the building and the personal property in or on the building are.”

loss claimed (here, the loss of profit) and ask what external force affected the property to result in the loss and thus potentially trigger the coverage claimed? The analysis is not a temporal one (i.e. last in time) but rather one of effect: what “hurt” the policyholder such that it suffered the loss claimed? For property claims, the answer to insurance causation questions is usually straightforward: what external force damaged the property? The insurance causation analysis does not involve analyzing chains of causation, as one might do in a tort analysis. Fault, blame, or responsibility play no part in insurance causation. Instead, a court is to determine what external force “hurt” the policyholder such that it triggered the particular loss claimed. The inquiry is decidedly contractual.

The loss to the policyholder is the lost profit from an inability to operate the business. The “hurt,” so to speak, in the civil authority coverage case, is actually arising from the order of the civil authority restricting access to the property (whether employee or customer access). The virus did not need to touch any of the policyholder’s property to result in the economic loss that affected the policyholder. Even the threat of the virus is not necessary. The cause of the loss is thus the civil authority order which restricted access to the policyholder’s property.

In a jurisdiction that adheres to the proximate cause doctrine of insurance causation, the proximate cause of the loss in this scenario—for civil authority coverage insurance purposes—is the governmental order. It is analytically incorrect to chase down what made the governmental authority issue the order in the first place—unless the coverage provisions specifically require such a causal inquiry.

In some cases, such an inquiry is necessary if—and only if—the coverage grant requires a finding that the loss must flow from a covered cause which results in direct physical loss or damage to adjacent property. Only if the coverage granting language specifically asks for such an analysis should a court attempt to ask “why” a governmental order was issued. And even then, it should only ask the simple question: was the order issued due to a covered cause which resulted in direct physical loss or damage to property adjacent to the policyholder?

In the case of a civil authority coverage case where there is a virus exclusion in the policy, the causation analysis is a bit more nuanced. If the coverage grant for civil authority insurance does not require direct physical loss or damage to property, but merely the restriction of access to the property, then the virus exclusion has no effect on coverage for the policyholder. The cause of the loss is the governmental order, not the virus.

While the prevention of the virus was the impetus for the order, coverage cannot be ousted simply because the “topic” of the order was “about” the COVID-19 virus. The topic did not harm the policyholder, nor did the virus; the actual effect of the order did. Policyholders should not lose coverage because of the topic of the

times behind a governmental order or even the reasoning behind the order. Coverage should only be ousted when the order did not cause the harm claimed.

However, if the coverage grant for civil authority insurance requires direct physical loss or damage to property, then the policyholder would apparently need to prove that the reasoning behind the civil authority order was indeed related to property damage which occurred. Such can be alleged with the COVID-19 virus by indicating the virus was present in frankly any adjacent property that was in an area affected by COVID-19, so long as that jurisdiction will consider that the presence of the virus can constitute direct physical loss or damage.

The issue is, of course, less clear if the property policy contains a virus exclusion. Some virus exclusions have an anti-concurrent cause clause such that coverage is ousted as long as virus contamination played some role in the ensuing loss. One can argue that the virus did not play a concurrent role in the loss (although it may have been a reason for the order—but the exclusion does not ask about the ‘story’ behind the order—its focus is the cause of the loss claimed for insurance purposes).

An example of such a scenario occurred when the policyholder massage spa in *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Company*¹⁷⁶ was forced to close due to a specific governmental order that mandated the closure of spas and massage services due to the inability of those particular businesses to maintain safe social distancing in a time of particularly serious virus spread. The spa and massage business was thus forced to close as a direct result of this specific order. The spa also voluntarily closed even after the order was lifted, because it could not maintain the required social distancing measures and still conduct its business. The policyholder argued the order, not the virus, caused its losses. The court agreed, because the policyholder’s specific type of business was targeted by the order—it was not just a general health measure. The court also noted that Virginia does not support anti-concurrent causation clauses; insurers must draft specific language to oust coverage and there must be a direct connection between the exclusion and the loss (not some tenuous connection anywhere in the chain of causation).

The catch-22 is realized when a coverage grant tied to direct physical loss to property is coupled with a virus exclusion. In that instance, alleging that the civil authority coverage is a result of virus contamination may well trigger the virus exclusion.¹⁷⁷

¹⁷⁶ No. 2:20-cv-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020) (applying Virginia law).

¹⁷⁷ Professor Dan Schwarcz has been quoted as taking the view that where a policy has a virus exclusion, the case against coverage is “open and shut.” Caroline Glenn, *Insurers Are Telling Businesses Their Policies Don’t Cover Coronavirus Shutdown*, *John Morgan Attorneys Say They’re Wrong*, ORLANDO SENTINEL (May 4, 2020),

4. Ambiguity in Property Coverage for Pandemic-related Losses

It may well be that the coverage clause “direct physical loss of or damage to property” is by now so tortured and unpredictable in caselaw as to be rendered ambiguous in terms of insurance policy construction. Indeed, three courts have found just that.

In *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Company*,¹⁷⁸ the court noted that the coverage clause does not overtly require structural damage for coverage to attach. Because there was such a “spectrum” of meanings of “direct physical loss of or damage,” the court interpreted the clause in a light most favourable to the policyholder. If the property (here, a spa which requires close contact with, and touching of, patrons) was deemed uninhabitable, inaccessible and dangerous to use as a result of governmental orders because of the high risk for spreading COVID-19, then the policyholder suffered direct physical loss. The court drew analogies to those cases where the policyholder could not use its property due to toxic gasses from drywall or odor or asbestos.

In *North State Deli, LLC v. The Cincinnati Insurance Co.*,¹⁷⁹ the court scoured the wide variety of dictionary definitions and determined that “loss” can equate to the loss of a full range of rights and advantages of property use. It held the coverage clause was ambiguous and thus settled on a reasonable definition which favours coverage: that “direct physical loss” can mean loss of use or access, even if the property is not structurally altered.

Finally, in *Hill and Stout PLCC v. Mutual of Enumclaw Insurance Company*,¹⁸⁰ the court held that physical “loss” must mean something different than physical “damage.” “Loss” could mean “deprivation.” The dental practice at issue in that case had direct physical deprivation of its premises as a result of the

<https://www.orlandosentinel.com/coronavirus/jobs-economy/os-bz-coronavirus-insurance-denials-morgan-lawsuits-20200504-pbrpq6z7ofbevau67cpgq4nzqi-story.html>. Although one of us (Stempel) tends to agree that coverage is probably inapt in most such cases, the other (Knutsen) is hesitant. In any event, we think the issue is closer than commonly thought because of the long history of causation doctrine that tends not to look beyond the immediate cause of loss if the cause is a sufficiently dominant factor in bringing about the loss. See Erik S. Knutsen, *Confusion About Causation in Insurance: Solutions for Catastrophic Losses*, 61 ALA. L. REV. 957 (2010); Peter Nash Swisher, *Insurance Causation Issues: The Legacy of Bird v. St. Paul Fire & Marine Ins. Co.*, 2 NEV. L.J. 351 (2002).

¹⁷⁸ 2020 WL 7249624 (E.D. Va. Dec. 9, 2020) (applying Virginia law).

¹⁷⁹ *North State Deli, LLC v. The Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281507 (N.C. Super. Oct. 9, 2020) (Trial Order).

¹⁸⁰ No. 20-2-07925, 2020 WL 6784271 (Wash. Super.) (Trial Order).

governmental order stopping dental visits because the practice could not see patients or practice dentistry. To that end, because the pleadings were silent about the meaning of “loss,” the court held that physical “loss” is an ambiguous phrase, and the case could proceed.

A review of the various dictionary definitions above for these terms certainly should be leading other courts to also consider ambiguity. In some cases, asbestos contamination is a direct physical loss. In others, it is not. In some cases, prevention of access to property by a government order is a direct physical loss. In others, it is not. Under the doctrine of *contra proferentem*, a finding of ambiguity leads to the policy terms being interpreted in favor of the policyholder. If policyholders and insurers alike—and clearly courts—cannot predict the meaning of the phrase and what it is supposed to do as the main coverage trigger for perhaps the most prevalent insurance product on the market, and if so much litigation is produced resulting from this confusion, then ambiguity of the coverage clause may be a reasonable conclusion for courts to make.

C. THE POTENTIAL FOR COVID INSURANCE COVERAGE CASES AS A BLUEPRINT FOR BETTER DECISION-MAKING

A few cases (three decided by the same Western District of Missouri court) have found coverage for COVID-related losses, albeit in a motion to dismiss context and without a full factual record: *Studio 417, Inc. v. Cincinnati Insurance Company*,¹⁸¹ *K.C. Hopps v. Cincinnati Insurance Company*,¹⁸² *Blue Springs Dental Care v. Owners Insurance Company*,¹⁸³ and *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Company*.¹⁸⁴ The other cases denying coverage have attempted to distinguish these cases on a number of grounds primarily related to the specific facts plead by the policyholders (i.e. the presence of a virus-specific exclusion or the specific allegations of virus particles actually physically present on insured property).

¹⁸¹ No. 20-cv-03127-SRB, 2020 WL 4692385 (W.D. Mo. Sept. 12, 2020) (applying Missouri law).

¹⁸² 2020 U.S. Dist. LEXIS 144285 (W.D. Mo. Aug. 12, 2020) (applying Missouri law). *K.C. Hopps v. Cincinnati* is a short opinion that incorporates the Court’s analysis in *Studio 417* because that case “involves the same Defendant, similar insurance provisions, and similar factual allegations as those asserted in this case. Defendant also moved to dismiss *Studio 417* under Rule 12(b)(6) based on similar legal arguments that it presents in this case.” *Id.* at *2.

¹⁸³ 2020 U.S. Dist. LEXIS 172639 (W.D. Mo. Sep. 21, 2020).

¹⁸⁴ 2020 WL 7249624 (E.D. Va. Dec. 9, 2020) (applying Virginia law).

The *Studio 417* and *Elegant Massage* cases remain the most analytically satisfying decisions to date,¹⁸⁵ as they most thoroughly deal with competing precedents and convey a broader understanding of the importance of insurance as a risk-based commercial product packaged to commercial policyholders. The other decisions denying coverage, in the main, tend to resort to a restrictive line of case precedents that narrow insurance recovery based largely on a purely textual parsing of insurance policy language, on a “know it when I see it” basis. Those decisions do not convey a broader understanding of what the coverage clause or property policies generally are meant to do in the consumer marketplace.

The *Studio 417* case more fully accounts for the historical caselaw interpreting the “direct physical loss or damage” coverage clause—both for and against coverage. The case also demonstrates the most doctrinally defensible analysis of the insurance causation elements of the claim. The policyholders in that case operated restaurants and hair salons. They claimed for pandemic-related losses under their business interruption and civil authority coverage contained in their all-risk property policies. Their claims were denied. The policy in question provided coverage for a “direct loss,” which is defined as “accidental physical loss or accidental physical damage.” Notably, there was no virus exclusion in this policy.

The policyholders alleged that customers and employees were infected with COVID-19 and the insured property became contaminated with the virus as a result. They argued that the virus is a physical substance that is active on tangible surfaces, and renders property unsafe and unusable. This quality of the virus forced the policyholders to suspend operations or at least reduce them. The policyholders also alleged that civil authorities in Missouri and Kansas issued orders that required suspension of businesses at various places, including closure orders. The policyholders alleged that both the presence of COVID-19 on the property plus the government closure orders resulted in direct physical loss or damage to the property and denied the policyholders the full use of the property.

The court found that there is a possibility of coverage despite the fact that the virus could be cleaned from physical surfaces or dies naturally within a few days. The fact that access to the property was prohibited or severely restricted was enough to find a possibility of coverage at this stage. In this regard, the court relied on the *Gregory Packaging, Inc. v. Travelers Property and Casualty Co. of America*¹⁸⁶ case,

¹⁸⁵ This is not said in derogation of *Blue Springs Dental v. Owners Ins.*, which unlike *K.C. Hopps* contains extensive discussion and analysis. Although *Blue Springs Dental* involved somewhat different policy language and business activities, its analysis is heavily shaped by *Studio 417*, discussed at length in this section.

¹⁸⁶ No. 2:12-cv-04418 (WHW)(CLW), 2014 WL 6675934, at *1 (D.N.J. Nov. 25, 2014) (applying New Jersey law).

where ammonia contamination at a juice packaging plant triggered insurance coverage because the manufacturer's buildings were uninhabitable due to the contamination. Even though the policyholders in *Studio 417* likely could not prove that COVID-19 was specifically on their premises, the fact that the virus was so widespread was enough to obviate the issue for the court.

The court held that COVID-19 is a physical substance which lives on surfaces and is transmitted through the air. COVID-19 makes property unsafe and unusable, resulting in "direct physical loss of or damage to" property. One does not need to prove tangible physical alteration of property to trigger coverage.

The court also held that loss of use of property is different than "damage;" otherwise, the word "damage" would be rendered superfluous in the coverage clause. The fact that the property could not be used due to COVID-19 was enough for the court to hold the policyholders had suffered a potential loss of the property. The court distinguished the line of cases that require policyholders to prove a tangible physical alteration to the property in order to trigger the coverage clause. The court distinguished the *Source Food Technology, Inc. v. U.S. Fidelity & Guarantee Company*¹⁸⁷ case, which granted summary judgment to an insurer who denied coverage when the policyholder's meat could not cross the Canadian border due to meat infection concerns. The *Studio 417* court held that the policyholders' allegations posit contamination of the property with a physical substance: the COVID-19 virus. This was therefore a different situation than the *Source Foods* case where there was no evidence the beef was actually contaminated by mad cow disease.

The policyholders also had potential coverage under a claim for civil authority insurance. According to the court, government orders affected hair salons by forcing their closure and affected restaurants by not allowing diners to dine inside the premises. Only drive-through or pick-up or delivery orders were allowed for restaurants. This was sufficient for the court to find that access was prohibited to such a degree as to trigger the civil authority coverage. The court held that the virus was physically present in property other than the policyholder's, because it was "everywhere" and therefore that satisfied the "direct physical loss or damage" coverage requirement.

The court specifically held that the civil authority coverage clause required access to be prohibited but the language did not mandate that all access had to be fully prohibited. The fact that access to the policyholders' property was impeded to a significant degree was sufficient for coverage to attach. Along the same logic, the court held that the policyholders also had potential coverage under the property policy's ingress and egress, dependent property, and sue and labor provisions.

¹⁸⁷ 465 F.3d 834, 835 (8th Cir. 2006) (applying Minnesota law).

The same federal court denied an insurer's motion to dismiss the claims of policyholder dental clinics in *Blue Springs Dental Care v. Owners Insurance Company*¹⁸⁸. The dental clinics claimed business interruption and civil authority losses when Missouri and corresponding counties issued 'stay at home' orders to quell the virus spread. Three dental clinics completely closed and one remained open only for essential and emergency dental cases. The policyholder pled that its property was damaged because of the presence of COVID-19 on and around its property such that it had to either end or reduce its operations due to actual contamination. It also alleged that employees, customers, and other visitors likely were infected with the coronavirus and thus operations were suspended to prevent physical damage to property and to the people on it. The 'stay at home' orders and general fear of infection or spreading COVID-19 on the property itself meant that customers could not access the property.

The insurer in this case argued that the fact that the one clinic was offering some services meant that its operations were not suspended within the meaning of coverage under the policy. The insurer also argued that the policyholder's clinics suffered no "direct physical loss of or damage to" property. As was the case in *Studio 417*, there was no exclusion for pandemics or communicable diseases in the applicable policy.¹⁸⁹

The court found that COVID caused the policyholder's alleged physical loss in that the virus physically occupied and contaminated the dental clinics. This deprived the policyholder of use of the clinics, making them unsafe. The court also held that the policyholder necessarily suspended its operations to prevent physical damage from COVID. The COVID virus was the cause of the suspension and implicated business interruption coverage.

The court also held that the policyholder would be entitled to civil authority coverage because the orders by the state and counties do not need to be directed specifically at insured property or property adjacent to it in order to trigger coverage. The court cited *Studio 417* with approval, reiterating that policyholders do not need to completely lose all access to property—coverage could be had for partial impeded access. In this case, although three of the clinics closed entirely and the other had only limited dental services for emergency patients, access was prohibited to such a

¹⁸⁸ 2020 U.S. Dist. LEXIS 172639.

¹⁸⁹ Nor was there a virus exclusion in the policies at issue in *K.C. Hopps v. Cincinnati Ins. Co.*, 2020 U.S. Dist. LEXIS 144285 (W.D. Mo. 2020). It thus appears that Cincinnati sold a significant number of policies without a virus exclusion and may face significant coverage responsibility in cases where courts take a similar view of the "direct physical loss or damage" requirement and where government orders mandated closure.

degree as to trigger coverage. The court left open the question as to the effect of the order that targeted essential versus non-essential businesses.

The important factor in the *Studio 417* and *Blue Springs Dental Care* cases is that the policyholders alleged specific physical damage through the presence of COVID-19 virus on the insured property in question. That allowed the court to find a direct physical loss, and thus the potential for coverage. The fact that contamination was not permanent was not an issue restricting the coverage analysis. The court also held that direct physical loss could be had through loss of use of the property. The court also had little issue with connecting the causal chain of the presence of COVID-19 virus on property, its prevalence in the community, and the inability of the policyholders to use their property as a result of governmental orders arising directly from the presence of COVID-19.

The court in *Elegant Massage* granted coverage to a massage spa when the spa was forced to close due to governmental orders. The spa's business model required the touching and close proximity to customers which was the very risk the orders were trying to quell in prevention of the virus. After the mandatory closure order ended, the spa still voluntarily closed as it was exceedingly difficult to comply with the mandated physical distancing requirements and still provide massage services. As mentioned above, the court found the coverage clause "direct physical loss of or damage to property" ambiguous because the clause does not specifically require distinct, structural damage for coverage to attach. If the insurer wished such a requirement, it could have added that language. Therefore, by interpreting the clause in a fashion most favorable to the policyholder, the court held that the loss of use of the policyholder's property qualified as a "direct physical loss." The court, however, denied civil authority coverage to the policyholder as it would not show a causal link between any damaged surrounding properties and its own. Simply put, there was no structural damage to the policyholder's premises—only loss of use and access.

V. CASELAW AND THE VIRUS EXCLUSION

As is by now clear, we are concerned, perhaps to the point of being dismayed, that so many courts have so credulously embraced the view that as an absolute matter of law viral infection of premises cannot be physical loss or damage to insured premises and that there is no coverage even where government authorities have deprived policyholders of use of their property. This reading of policy language—especially its cocksure construction that refuses to recognize alternative reasonable reading of the words—poses significant potential problems not only for COVID coverage cases but for property insurance disputes generally.

That said, this first wave of cases may be an example of erroneous judicial reasoning that nonetheless arguably reaches a correct result, at least in many instances. Of the COVID coverage decisions made as this article was written, all but a handful had favored insurers. In nearly all of these cases granting insurer dismissal motions on the basis of what we regard as incorrect application of the physical-loss-or-injury trigger, the policies at issue also contained a virus exclusion. As discussed below, the standard ISO virus exclusion is broadly drafted and was intended by insurers to preclude coverage for certain virus-related losses. In some cases, drafting, communication, or claims-handling errors of an insurer may make a virus exclusion ineffective. Or there may be particular facts of a claim that negate the virus exclusion, like issues of causation.¹⁹⁰

As discussed below, despite the apparent clarity of the virus exclusion, it may well be ineffective in some loss situations. In addition, the prevalence of virus exclusions in policies is unclear. As noted above, in the decisions to date, a fourth of the policies at issue lacked a virus exclusion. A preliminary study of liability insurance policies suggests that the majority of these policies lack a virus exclusion.¹⁹¹ Regarding property insurance, however, insurers contend that eighty percent or more of the policies contain virus exclusions. Although that figure that accords with the policies in court decisions to date,¹⁹² it is a sufficiently high percentage that we harbor concerns that may be overstated. For example, the policies of Cincinnati Insurance Company, involved in nearly 200 cases filed, tend not to have a virus exclusion.¹⁹³

Prior to the SARS tragedy of the early Twenty-first Century, insurance policies did not contain virus exclusions, although many did have bacteria, fungus, or mold exclusions. And there is, of course, the pollution exclusion that we think has no application to infection-related loss but that insurers continue to occasionally push as a defense to coverage. Insurers effectively accepted that their policies of the pre-SARS era did not exclude—at least not with sufficient clarity—viral infection losses and responded by drafting a rather comprehensive virus exclusion.

The exclusion and its rationale were presented to regulators in a 2006 ISO circular.¹⁹⁴ The key operative phrase of the exclusion reads: “We will not pay for

¹⁹⁰ See, e.g., *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-cv-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020) (applying Virginia law) (finding no direct connection between exclusion and loss; governmental order, not virus, direct cause of loss; and exclusion inapplicable).

¹⁹¹ See Baker, *supra*, note 10.

¹⁹² See *id.* (identifying 174 cases filed against Cincinnati as of Oct. 21, 2020).

¹⁹³ *Id.*

¹⁹⁴ ISO VIRUS EXCLUSION, *supra* note 25.

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.”¹⁹⁵ Some virus exclusions also contain an anti-concurrent cause clause, which attempts to exclude coverage regardless as to whether the damaged complained of is concurrently caused with another non-virus-related cause or not.¹⁹⁶ In particular, the circular stated:

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.¹⁹⁷

Case law to date has supported application of the ISO virus exclusion to exclude coverage for COVID-related losses in a near-automatic fashion, without subjecting the exclusion to any meaningful analysis.¹⁹⁸ The virus exclusion has been

¹⁹⁵ *Id.*

¹⁹⁶ *See, e.g.*, the policy at issue in *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-cv-461-DAE, 2020 WL 4724305 F.Supp.3d (W.D. Tex. 2020) (applying Texas law).

1. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these: . . .

j. Fungi, Virus Or Bacteria

. . . (2) Virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease.

Id.

¹⁹⁷ ISO VIRUS EXCLUSION, *supra* note 25.

¹⁹⁸ *See, e.g.*, *Seifert v. IMT Ins. Co.*, No. 20-1102 (JRT/DTS), 2020 WL 6120002 (D. Minn. Oct. 16, 2020) (applying Minnesota law) (holding that losses resulted from order, not virus, but anti-concurrent loss provision in virus exclusion ousts coverage because virus is part of causal chain of loss); *Founder Inst. Inc. v. Hartford Fire Ins. Co.*, No. 20-cv-04466-VC, 2020 WL 6268539 (N.D. Cal. Oct. 22, 2020) (applying California law) (rejecting

policyholder argument that governmental orders were about spread of saliva and respiration droplets, not virus; virus exclusion applies); *Border Chicken AZ LLC v. Nationwide Mut. Ins. Co.*, No. CV-20-00785-PHX-JJT, 2020 WL 6827742 (D. Ariz. Nov. 20, 2020) (applying Arizona law); *Chattanooga Prof. Baseball LLC v. Nat'l Cas. Co.*, No. CV-20-01312-PHX-DLR, 2020 WL 6699480 (D. Ariz. Nov. 13, 2020) (applying Arizona law); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, No. 20-cv-04434 JSC, 2020 WL 5642483 (N.D. Cal. Sept. 22, 2020) (applying California law); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, No. 2:20-cv-04423-AB-SK, 2020 WL 5938689 (C.D. Cal. Oct. 2, 2020) (applying California law); *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-cv-22833-BLOOM/Louis, 2020 WL 6392841 (S.D. Fla. Nov. 2, 2020) (applying Florida law); *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Co.*, No. 2:20-cv-05663-VAP-DFMx, 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020) (applying California law); *Palmer Holdings & Invs., Inc. v. Integrity Ins. Co.*, No. 4:20-cv-154-JAJ, 2020 WL 7258857 (S.D. Iowa) (applying Iowa law); *Whiskey River on Vintage, Inc., v. Ill. Cas. Co.*, No. 4:20-cv-185-JAJ, 2020 WL 7258575 (S.D. Iowa Nov. 30, 2020) (applying Iowa law); *Natty Greene's Brewing Co. v. Travelers Cas. Ins. Co. of Am.*, No. 1:20-CV-437, 2020 WL 7024882 (M.D.N.C. Nov. 30, 2020) (applying North Carolina law); *Wilson v. Hartford Cas. Co.*, No. 20-3384, 2020 WL 5820800 (E.D. Pa. Sept. 30, 2020) (applying Pennsylvania law); *N&S Rest., LLC v. Cumberland Mut. Fire Ins. Co.*, No. 20-05289 (RBK/KMW), 2020 WL 6501722 (D.N.J. Nov. 5, 2020) (applying New Jersey law); *Long Affair Carpet & Rug, Inc. v. Liberty Mut. Ins. Co.*, No.: SACV 20-01713-CJC(JDEx), 2020 WL 6865774 (C.D. Cal. Nov. 12, 2020) (applying California law); *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, No. 2:20-cv-00087-KS-MTP, 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020) (applying Mississippi law); *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, No. CV 20-1869, 2020 WL 7395153 (E.D. Pa. Dec. 17, 2020) (applying Pennsylvania law); *Brian Handel DMD, PC v. Allstate Ins. Co.*, No. 20-3198, 2020 WL 6545893 (E.D. Pa. Nov. 6, 2020) (applying Pennsylvania law); *Hajer v. Ohio Security Ins. Co.*, No. 6:20-cv-00283, 2020 WL 7211636 (E.D. Texas Dec. 7, 2020) (applying Texas law); *Vizza Wash, LP v. Nationwide Mut. Ins. Co.*, No. 5:20-cv-00680-OLG, 2020 WL 6578417 (W.D. Tex. Oct. 26, 2020) (applying Texas law); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, No. 1:20-CV-665-RP, 2020 WL 7351246 (W.D. Tex. Dec. 14, 2020) (applying Texas law); *AFM Mattress Co. v. Motorists Com. Mut. Ins. Co.*, 2020 WL 6940984 (N.D. Ill. Nov. 25, 2020) (applying Illinois law); *Boulevard Carroll Ent. Grp. v. Fireman's Fund Ins. Co.*, No. 20-11771 (SDW)(LDW), 2020 WL 7338081 (D.N.J. Dec. 14, 2020) (applying New Jersey law); *Santo's Italian Café LLC v. Acuity Ins. Co.*, No. 1:20-cv-01192, 2020 WL 7490095 (N.D. Ohio) (applying Ohio law); *1210 McGavock St. Hosp. Partners, LLC v. Admiral Indem. Co.*, No. 3:20-cv-694, 2020 WL 7641184 (M.D. Tenn. Dec. 23, 2020) (applying Tennessee law); *Boxed Foods Company, LLC v. Cal. Capital Ins. Co.*, No. 20-cv-04571-CRB, 2020 WL 6271021 (N.D. Cal. Oct. 27, 2020) (applying California law); *LJ New Haven LLC v. AmGUARD Ins. Co.*, No. 3:20-cv-00751 (MPS), 2020 WL 7495622 (D. Conn. Dec. 21, 2020) (applying Connecticut law); *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, No. 20-cv-03461-MMC, 2020 WL 7495180 (N.D. Cal. Dec. 21, 2020) (applying California law).

held to oust coverage because courts have found that, even though some policyholders lost business income due to governmental orders closing or limiting access to their buildings, that access was lost because the governmental orders were issued due to a virus. In short, the courts link the causal chain back to the virus, an excluded cause. Courts summarily find no coverage in those cases where the virus exclusion has an anti-concurrent cause clause (and such a clause is permissible in that particular state).

We are not so certain the application of the virus exclusion to COVID-19-related cases is as straightforward as these court decisions suggest, especially those involving losses caused by governmental orders.¹⁹⁹ We are reminded of the similar path taken by courts first interpreting another seemingly impenetrable exclusion: the absolute pollution exclusion.²⁰⁰ We might suggest that a more nuanced, contextual approach to the ISO virus exclusion is at least warranted, paying attention to drafting and underwriting history and what was meant in that 2006 ISO circular sent to insurance regulators. No court to date has examined what insurers actually meant to exclude in 2006 and how that plays out—or not—in the property insurance context of the 2019–2020 COVID pandemic. Keep in mind—the 2006 ISO virus exclusion was drafted in response to the SARS crisis, a very different disease scenario without the marked and intermittent governmental closures of the COVID-19 pandemic. It may be that, after such an analysis, the exclusion does exclude most if not all COVID-19-related business interruption losses. But we think it is at least intellectually honest to run the gauntlet with it, as was done with the absolute

But see *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-cv-265, 2020 WL 72496234 (E.D. Va. Dec. 9, 2020) (applying Virginia law) (holding virus exclusion not applicable because cause of loss for massage spa is government closure order, not virus); *Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London*, No. 20093025, 2020 WL 6380449 (Pa. Com. Pl. Oct. 26, 2020) (Trial Order) (refusing to dismiss case at pleadings stage, even though virus exclusion at issue).

¹⁹⁹ At least one court appears to have had the same concerns, although in a context where the complete insurance policy was not supplied to the court. In *Urogynecology Specialist of Fla., LLC v. Sentinel Ins. Co.*, No. 6:20-cv-1174-Orl-22EJK, 2020 WL 5939172 (M.D. Fla. Sept. 24, 2020) (applying Florida law), the court allowed the policyholder's case to proceed, despite the presence of a virus exclusion, because the court surmised that COVID-19 may be different than other "virus"-type claims and perhaps it may be inappropriate to lump it in with other environmental pollutants like fungi, bacteria, or dry rot.

²⁰⁰ See Jeffrey W. Stempel, *Reason and Pollution: Correctly Construing the "Absolute" Pollution Exclusion in Context and in Accord with Its Purpose and Party Expectations*, 34 TORT & INS. L.J. 1 (1998); Jeffrey W. Stempel, *Unreason in Action: A Case Study of the Wrong Approach to Construing the Liability Insurance Pollution Exclusion*, 50 FLA. L. REV. 463 (1998).

pollution exclusion before it (recall that exclusion was eventually found wanting, and certainly did not merit as broad an application as insurers enjoyed in the early years of the exclusion).

However, incredibly, a number of courts have dismissed cases at the pleadings stage because of a cursory read of the virus exclusion and, in so doing, also denied specific policyholder requests for discovery about the ISO virus exclusion and its genesis.²⁰¹ After raising what appear to be reasonable queries about what the ISO circular was meant to do, policyholders are apparently faced with a door slammed shut about further factual discovery on the issue. Still other courts have preferred instead to offer—without the assistance of any evidence or context beyond pleadings—their own guesses as to what the boundaries of the exclusion surely must be.²⁰²

Most noteworthy perhaps is this question: if a policy does not include a virus exclusion, must that then be taken to mean that it covers virus-related losses?²⁰³ Such virus exclusion language has been available since 2006, in direct response to the SARS pandemic. If an insurer has not specifically excluded viruses as a cause of loss, then pandemic-related losses resulting from virus contamination or civil authority orders attempting to quell virus spread would appear to be within the concept of covered losses (as long as the policyholder can prove there was a “direct physical loss of or damage to” covered property).

A. CASES WITHOUT A VIRUS EXCLUSION

In those cases without a virus exclusion, courts did not outright dismiss the policyholder’s claim and instead at least inquired about the potential for “physical loss or damage.” Unlike the policyholders in *Studio 417*, the policyholder in *Mudpie, Inc. v. Travelers Casualty Insurance Company of America*²⁰⁴ did not allege the virus

²⁰¹ See, e.g., *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, No. 20-cv-03461-MMC, 2020 WL 7495180 (N.D. Cal. Dec. 21, 2020) (applying California law) (denying restaurant policyholder leave to discover genesis of ISO form and circular); *Boxed Foods Co. v. Cal. Capital Ins. Co.*, No. 20-cv-04571-CRB, 2020 WL 6271021 (US Dist. Ct., N.D. Cal.) (applying California law) (denying discovery request about ISO circular and virus exclusion genesis on dismissal).

²⁰² See, e.g., *LJ New Haven LLC v. AmGUARD Ins. Co.*, No. 3:20-cv-00751 (MPS), 2020 WL 7495622 (D. Conn. Dec. 21, 2020) (applying Connecticut law) (citing ISO circular policyholder submits that exclusion likely limited to “on contact” or “on surface” contamination only; court disagrees and chastises policyholder for importing what is not in the policy (despite clause being an exclusion!)).

²⁰³ See French, *supra* note 4.

²⁰⁴ 2020 WL 5525171 (applying California law).

entered the property. Its business interruption claim rested solely on the governmental “stay at home” order in effect. Thus, the policyholder’s putative class action was dismissed. The court held that the lead plaintiff policyholder, a children’s clothing store, did not lose its property nor did it have that property damaged by the virus.

The court took a broad view of “direct physical loss of or damage to” property, in that it would consider loss of functionality as triggering coverage without requiring physical alteration of the property. However, to qualify for coverage, a policyholder would have to prove some intervening physical force made the premises uninhabitable or unusable (as was the case in *Gregory Packaging* with the ammonia).

The court did not accept that loss of property functionality or access due to governmental orders equated to “direct physical loss;” the policyholder could go back to its property after the “stay at home” order ended. Loss of use was thus held to be not a direct physical loss in this instance. The court distinguished this claim, based solely on the governmental order causing a loss of use, from that in *Studio 417* where the claimants had alleged actual physical virus microbes damaged the inside of their premises, rendering it unusable.

The court also denied coverage under the civil authority provisions of the store’s policy because it found no causal link between any damage to adjacent property and the subsequent denial of access to the store. Because the “stay at home” orders were preventative, and did not involve actual physical damage, there was no causation between the policyholder’s business losses and the government closure order.

The policyholder restaurant in *Malaube, LLC v. Greenwich Insurance Company*²⁰⁵ alleged that Miami’s order to close all restaurants to indoor dining (and thus permit only takeout and delivery) as a result of COVID-19, plus the Florida governor’s statewide executive order closing all dining on-site restaurants, both resulted in prohibited access to its restaurants and thereby interrupted its business income. The policyholder argued that the full use of its property was limited by the government orders. The case did not survive a motion to dismiss.

The court cited *Mama Jo’s, Inc.* and *Source Foods* and held that, under Florida law, an actual, tangible change in insured property must accompany a claim for coverage for “direct physical loss of or damage to” insured property. It distinguished the *Studio 417* case because, in that case, the policyholders alleged the actual presence of virus microbes on the property. The only allegations of loss in *Malaube* involve losses arising from the two Florida emergency orders. Because

²⁰⁵ No. 20-22615-CIV, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020) (applying Florida law).

there was no physical intrusion of the property that resulted in an actual physical change to the property, under the *Mama Jo's/Source Foods* line of authority, the court held there was no potential for coverage and the claim was dismissed.

A similar result was reached in *Rose's 1 LLC v. Erie Insurance Exchange*,²⁰⁶ on a motion for summary judgment in the Superior Court of the District of Columbia. Some DC restaurants were seeking business interruption coverage based on the DC mayor's order that closed all non-essential businesses (which included the restaurants) and told residents to stay inside except for essential reasons. The court held that there were no cases in this jurisdiction where a government edict, standing alone, is considered a direct physical loss, thereby triggering coverage, unless there was some physical damage to property. The court relied on *Brothers., Inc. v. Liberty Mutual Fire Insurance Company*,²⁰⁷ a case where coverage was denied after a curfew was imposed in DC following riots after Martin Luther King's assassination. The curfew was held to be preventative in nature, and not a result of any physical damage to property. In fact, the point of the curfew was to prevent physical damage to property, so coverage could not possibly be triggered, according to the court.

The San Diego barbershop policyholder in *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.*²⁰⁸ had its claims for business interruption and civil authority coverage dismissed. The policyholder alleged that the local order banning non-essential gatherings plus then the state-wide "stay at home" order resulted in direct physical loss of or damage to their insured property. The policyholder argued that the precautionary measures taken by the government were the cause of the loss, not the actual presence of virus on any physical surface. The court held that the governmental orders did not prohibit access to the policyholder's place of business and the orders were not issued due to direct physical loss of or damage to either the policyholder's property or other property. Because there were no allegations of what the court considered were direct physical loss or damage, the claim was dismissed.

The overarching pattern is that cases without a virus exclusion at least prompt the courts to grapple with whether or not coverage is to be had for "direct physical loss of or damage to property." Nearly all cases which did not feature a virus exclusion have denied coverage if the policyholder did not allege actual physical loss on the premises.²⁰⁹ And of course most right-thinking policyholders

²⁰⁶ 2020 WL 4589206 (D.C. Super. Ct. Aug. 6, 2020).

²⁰⁷ 268 A.2d 611 (D.C. 1970).

²⁰⁸ No. 20-CV-907-CAB-BLM, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020) (applying California law).

²⁰⁹ See, e.g., *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London*, No. 8:20-cv-1605-T-30AEP, 2020 WL 5791583 (M.D. Fla. Sept. 28, 2020) (applying Florida law) (relying on *Mama Jo's* court requires actual physical damage for coverage; case dismissed).

could not allege such loss because to do otherwise would bring the claim squarely within the virus exclusion. So, the common route taken by policyholders—if unsuccessful to date—has been to argue that the governmental orders closing or limiting property access are the cause of the business interruption loss, and not the virus.

B. CASES WITH A VIRUS EXCLUSION

As stated, insurers have been successful in having those cases that featured a virus exclusion dismissed by courts. In probably the earliest claim focusing on pandemic-related losses, a Michigan state court granted the insurer's motion to dismiss the policyholder's claim for business interruption losses in *Gavrilides Management Company v. Michigan Insurance Company*²¹⁰ The policyholder in that case owned two restaurants and alleged that it lost revenue due to COVID-19 related closure orders and restrictions. The court held that, because the restaurants only alleged loss of use of their facilities, and not physical loss or damage, the restaurants did not suffer any covered loss. The virus exclusion in the policy operated to oust coverage regardless of whether there had been direct physical loss or damage to property.

as no facts plead to show physical property damage); *Uncork & Create LLC v. Cincinnati Ins. Co.*, No. 2:20-cv-00401, 2020 WL 6436948 (S.D.W. Va. Nov. 2, 2020) (applying West Virginia law) (distinguishing *Studio 417* as there was alleged virus contamination in that case; however, court goes on to state that even if virus was present, coverage would likely not attach as premises can be cleaned); *Oral Surgeons, PC v. The Cincinnati Ins. Co.*, No. 2-20-CV-222-CRW-SBJ, 2020 WL 5820552 (S.D. Iowa Sept. 29, 2020) (applying Iowa law) (finding no allegations of direct physical loss); *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, No. 20-cv-2211-JAR-GEB, 2020 WL 7078735 (D. Kan. Dec. 3, 2020) (applying Kansas law) (declining to accept allegations that virus contaminated property court cites to *Source Food* and *Mama Jo's* to require physical alteration); *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.*, No. 20-cv-03750-WHO, 2020 WL 6562332 (N.D. Cal Nov. 9, 2020) (applying Hawai'i law) (distinguishing *Studio 417* and *Mudpie*, where actual threats of contamination were alleged, court finds no actual exposure at stores in this case); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, No. 1:20-CV-665-RP, 2020 WL 7351246 (W.D. Tex. Dec. 14, 2020) (applying Texas law) (finding no allegations of virus on property; assuming virus there, it does not cause physical loss and can be cleaned); *S. Fla. ENT Assocs, Inc. v. Hartford Fire Ins. Co.*, No. 20-23677-Civ-WILLIAMS/TORRES, 2020 WL 6864560 (S.D. Fla. Nov. 13, 2020) (applying Florida law) (finding no allegations of virus presence); *Kirsch v. Aspen Am. Ins. Co.*, No. 20-11930, 2020 WL 7338570 (E.D. Mich. Dec. 14, 2020) (applying Michigan law) (finding no allegations of virus on property).

²¹⁰ No. 20-000258-CB (Mich. Cir. Ct., Ingham Cty. July 1, 2020).

In *Diesel Barbershop LLC v. State Farm Lloyds*,²¹¹ a U.S. District Court in the Western District of Texas dismissed the policyholder barbershop's claims for pandemic-related losses. The policy featured a fungi, virus or bacteria exclusion, which had an anti-concurrent cause clause:

1. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of:
 - (a) the cause of the excluded event; or
 - (b) other causes of the loss; or
 - (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or
 - (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:

j. Fungi, Virus Or Bacteria

- ...
- (2) Virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease.

The policyholder sought business interruption coverage for COVID-related losses due to the state and county orders restricting access to, or closing altogether of, non-essential businesses. The court preferred the line of cases requiring a direct tangible injury in order to trigger property coverage for a “direct physical loss.” It held that Texas law would mandate there be a tangible injury for coverage to be triggered. The policyholder did not allege that the virus was physically on its property and caused tangible harm. Rather, it alleged that the cause of its loss was the governmental orders restricting access to its properties. This was not sufficient to create the potential for coverage as no direct physical loss or damage was alleged, according to the court.

Regardless as to the issue of direct physical loss, the court found that the virus exclusion and its anti-concurrent cause clause would prohibit both business interruption and civil authority coverage for the policyholder. The underlying root cause of the alleged losses was the virus—an excluded cause—according to the court because the virus was the reason for the orders to be issued by the state and county in the first instance.

²¹¹ No. 5:20-CV-461-DAE, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020) (applying Texas law).

The key to the court’s reasoning in *Diesel Barbershop* was the view that the virus exclusion negated any possibility for coverage for COVID-19 related losses. The court also preferred to interpret “direct physical loss” as requiring not only a tangible injury to the property in question but a physical injury of sufficient magnitude that the property had been permanently structurally altered—an injury not alleged by the policyholder in that case.

A similar result to *Diesel Barbershop* was reached in *Turek Enterprises, Inc. v. State Farm Mutual Automobile Insurance Company*²¹² in a motion to dismiss heard in the U.S. District Court for the Eastern District of Michigan. In that case, a chiropractic clinic’s claim for business interruption coverage was dismissed. The clinic claimed for losses due to its inability to access its property as a result of governmental “stay at home” orders. Like *Diesel Barbershop*, the property policy in *Turek* had a similar virus exclusion with an anti-concurrent cause clause. The policyholder clinic specifically argued that COVID-19 virus particles did not attach to or damage any property (presumably to get around the virus exclusion). The court found that this case was similar to the *Source Food* case, in that there was no contamination of the insured property and therefore no possibility of coverage.

The court in *Turek* distinguished *Studio 417* and preferred the reasoning of *Diesel Barbershop* and *Gavrilides Management Company LLC v. Michigan Insurance Company*²¹³ in holding that Michigan law required a tangible injury to property to trigger the “direct physical loss or damage” coverage clause. The court did not accept the policyholder’s argument that COVID-19 was not the proximate cause of the loss and the virus exclusion was only limited in its applicability to the costs of decontamination. Instead, the court held that the governmental orders preventing property access were not the sole cause of the policyholder’s loss—the virus was also a cause, thus triggering the anti-concurrent cause portion of the virus exclusion. The court made this holding despite the policyholder raising the fact that the 2006 ISO virus exclusion circular submitted to insurance regulators indicated that the exclusion was meant to preclude losses due to contamination by disease-causing agents.

²¹² No. 20-11655, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020) (applying Michigan law).

²¹³ No. 20-000258-CB (Mich. Cir. Ct., Ingham Cty. July 1, 2020) (holding that, when a city order prevented customers from dining in the restaurant, it did not suffer a direct physical loss because there was no physical alteration or tangible damage to the integrity of the building).

Similarly, in *10E, LLC v. Travelers Indemnity Company of Connecticut*,²¹⁴ a restaurant in downtown Los Angeles had its claim for business interruption and civil authority-related losses dismissed on motion after it alleged that the Los Angeles Mayor's public health restrictions prohibiting in-person dining at restaurants resulted in lost income. The insurance policy in this case had an exclusion for losses due to virus and bacteria.²¹⁵

The court held that there was no direct physical loss or damage triggering coverage as nothing physically changed in the property. Under California law, the court held that losses from inability to use property do not amount to "direct physical loss of or damage to property." A distinct, demonstrable physical alteration to the property is required for coverage to attach. Furthermore, the court held that temporary impairment to property does not equate to direct physical loss. The policyholder's civil authority claim was dismissed because the virus exclusion ousted coverage for COVID-19 related losses. The government-ordered dining restrictions were entirely attributable to the virus, an excluded cause. Additionally, the court found that no particular adjacent property was damaged so the civil authority coverage could not be triggered in the first place.

The court in *Martinez v. Allied Insurance Company of America*²¹⁶ dismissed a dental office's claim for business interruption insurance because the policy contained a virus exclusion.²¹⁷ The policyholder claimed that the COVID-19 virus and Florida's emergency shutdown orders, including orders limiting non-essential dental procedures, caused the interruption of its income stream. It also alleged damages due to decontamination of its office. The court dismissed the claim solely on the language of the virus exclusion by holding that all of the office's losses were related to the virus, an excluded cause of loss. This is, in fact, the predominant pattern of courts faced with the virus exclusion when deciding pandemic-related coverage issues: a knee-jerk dismissal.

In perhaps the most shocking example of all, the United States District Court for the Western District of Missouri in *Zwillo v. Corporation. v. Lexington Insurance*

²¹⁴ No. 2:20-cv-04418-SVW-AS, 2020 WL 5359653 (C.D. Cal. Sept 2, 2020) (applying California law).

²¹⁵ *Id.* at *1 (noting that the policy reads, "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.").

²¹⁶ No. 2:20-cv-00401-FtM-66NPM, 2020 WL 5240218 (M.D. Fla. Sept. 2, 2020) (applying Florida law).

²¹⁷ *Id.* at *3 (noting that the exclusion was for loss or damage caused "directly or indirectly," by "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.").

*Company*²¹⁸ dismissed a policyholder's claim based on an extremely broadly worded pollution exclusion which included the word "virus" in a long list of possible pollutant contaminants. The court distinguished the *Studio 417*, *KC Hopps*, and *Blue Springs Dental* cases—cases in its own district!—on the basis that the word "virus" was here in an all-encompassing pollution exclusion and not a stand-alone "virus" exclusion. The court did not accept the policyholder's arguments that this pollution exclusion was obviously aimed at environmental or industrial pollution, not pandemic-related losses.

Where cases to date have ruled in favor of an insurer based on knee-jerk embrace of a faulty concept of direct physical loss or injury, the courts may nonetheless have blundered toward the right result in some situations involving the virus exclusion—if insurers win the causation battle. We think that is a big "if" but realize courts may decide to the contrary. If that becomes the majority rule, observers will tend to minimize the significance of judicial decisions construing the physical loss or injury trigger, at least where there is a virus exclusion. Notwithstanding this, we remain critical of the "no direct physical loss or damage" decisions even if they can be defended on the "no harm, no foul" grounds of a more persuasive basis such as the virus exclusion.

But it is far from clear how many policies at issue actually contain a virus exclusion or how that exclusion operates in all loss scenarios. Insurers have promoted the view that nearly all policies contain the exclusion but a quarter of the case law to date involves policies with no such exclusion. Consequently, better juridical reasoning regarding loss and damage may make thousands of policies and millions of dollars in coverage available to policyholders.

VI. CONCLUSION

Insurers have won the bulk of the early COVID coverage battles, with analysis in too many of these early decisions that mangles fundamental insurance policy interpretation doctrine. Fortunately, there is a cluster of better reasoned cases that one hopes will be persuasive to the appellate courts that will ultimately determine the outcome of the COVID coverage war.

The insurance industry's media thrust at the early stages of the COVID pandemic which pushed the no-coverage-for-COVID message appeared to set the stage for the early salvo of claim dismissals from courts across the country. Whether due to media influence or simple subpar analysis, many court decisions fall short in that they have, in varying degrees:

²¹⁸ No. 4:20-00339-CV-RK, 2020 WL 7137110 (W.D. Mo. Dec. 2, 2020) (applying Missouri law).

- a) ignored or wrongfully rejected state law precedents regarding the “direct physical loss or damage” coverage trigger;
- b) read pro-insurer precedents too broadly, failing to distinguish the ubiquity, reach, and impact of COVID as compared to the more distant and non-physical loss of these precedents;
- c) ignored or summarily distinguished similarly analogous cases of insurance coverage for contaminating substances, precedents which would have provided helpful guidance on the insurance coverage issue for COVID-related losses;
- d) artificially distinguished insurance policy wording from the wording in past precedents when, in fact, the relevant policy wording is identical to the cases at hand;
- e) provided no reasoning as to why one line of coverage cases is preferred over another;
- f) fallen into a hyper-literalist dictionary-based argument which cherry-picks only certain dictionary definitions and ignores others which run counter to the conclusions reached;
- g) refused to even consider insurance policy term ambiguity in the wake of conflicting dictionary definitions and case precedents, thereby failing to invoke the policyholder-friendly tools of insurance policy interpretation: *contra proferentem* and reasonable expectations;
- h) refused to read pleading allegations at face value and as presumptively true, as required at the motion to dismiss stage of litigation; and,
- i) dispensed with policyholder claims without any further factual findings or discovery, at the pleadings stage, in a context where factual knowledge of the COVID-19 virus is evolving on a near-daily basis, and where allegations should be enough to get the policyholder in the door of the litigation system.

In response to this list, insurers would certainly argue that the presence of a virus exclusion in the cases on which they have prevailed validates dismissal²¹⁹ even

²¹⁹ And, as reflected in the tally of decisions to date, courts are receptive to this insurer argument. See Baker, *supra* note 10; Erin Ayers, *Insurers Prevail in Two More COVID-19-related BI Lawsuits*, ADVISEN, (last visited Jan. 25, 2020) https://www.advisen.com/tools/fpnproc/fpns/articles_new_1/P/376369872.html?rid=376369872&list_id=1 (discussing Tracker findings); Mike Curley, *Travelers Ducks Counterclaims*

if judicial analysis of the loss or damage questions has been unduly abrupt and reductionist. We reject a “no harm, no foul” justification because there is harm when courts warp prevailing contract and insurance law in a rush to judgment.²²⁰ In particular, the collapsing and narrowing of the concepts of directness, physicality, loss and damage sets unwise precedent sure to wrongfully deprive policyholders of coverage in future non-COVID cases. If the virus exclusion is conclusive, bully for insurers—but if that is the case, decisions should be made on the basis of this express exclusion rather than tortured reasoning about loss and damage.

The judiciary’s excessively textual focus-cum-myopia also unnecessarily raises doubts about the correctness of the decisions. If it is fact correct that there cannot be loss or damage without structural change in tangible property or that the concept of damage requires a particularized showing of viral contamination of specific surfaces, one would expect supporting evidence in the drafting history of property policies or similar materials providing context and illuminating the policy purpose and coverage intent. But overconfident hermeneutics-lite decisions in favor of insurers deprive policyholders, the judicial system, and society of access to materials that can determine whether a court’s reading of policy verbiage is correct.

Ironically, this type of background information might support the insurer position. The drafting history of the standard ISO virus exclusion, for example, does strongly suggest that insurers were seeking to avoid contamination liability, although the case against civil authority shutdown is less clear.²²¹ We understand that insurers, who think they can consistently win drafting wars, are reluctant to concede the usefulness of contextual materials and undermine future arguments seeking to restrict court consideration to only policy text. But the insurers’ long term

in *Geragos COVID-19 Suit*, LAW360, (last visited Jan. 25, 2020) <https://www.law360.com/articles/1321151/travelers-ducks-counterclaims-in-geragos-covid-19-suit> (California federal district court finds “a virus exclusion in [law firm] policy bars coverage.”).

²²⁰ In addition, it appears that many insurance policies lack a virus exclusion. See Baker, *supra* note 10 (last visited Oct. 21, 2020) (noting that in cases with decisions, one-fifth of policies lack virus exclusions); Josh Czaczes, et. al., *Why We Don’t Need COVID-19 Immunity Legislation*, BALKINIZATION (Sept. 26, 2020), <https://balkin.blogspot.com/2020/09/why-we-dont-need-covid-19-immunity.html> (noting that the majority of general liability insurance policies lack virus exclusion). In the rush to enact limitations on liability for COVID claims, state legislatures appear not to have investigated the prospect that such limitations on liability inure to the benefit of insurers rather than policyholders, at least in the short term. Insurers would presumably argue that in the absence of such legislation, they will be forced to raise premiums or restrict coverage.

²²¹ See ISO VIRUS EXCLUSION, *supra* note 25.

agenda should not strangle immediate judicial decision-making. Courts interested in correctly deciding COVID coverage cases would presumably be interested in seeing this material rather than making it moot through a Rule 12 dismissal.

Apart from its possible (we think probable) infection of the judiciary, the insurance industry's public relations narrative is troubling. The insurance industry claims that COVID coverage is a death knell even though it also claims that nearly all policies provide only four weeks of civil authority coverage while all policies of course have policy limits and perhaps even other sub-limits on business interruption coverage or applicable exclusions as well as conditions that policyholders may fail to meet. In light of the liability limiting tools at their disposal, the insurer claims of imminent poverty if COVID is covered seems melodramatic.

The insurer claim of disaster rings particularly hollow in light of the European experience more receptive to coverage. While insurer profitability may have declined for the moment, the insurance industry remains alive and well in both the E.U.²²² and the U.K., where a key test case went well for policyholders.²²³ And in the U.S., insurers appear to be doing just fine in spite of—or in some cases because of—the pandemic.²²⁴

²²² See *Munich Re Reports €800M of COVID-19-Related Losses During Q3*, INS. J. (Oct. 21, 2020), <https://www.insurancejournal.com/news/international/2020/10/21/587446.htm>. Although 800 million euros is of course a good deal of money, it is not the hundreds of billions of dollars American insurers claim they will lose (allegedly each month) if COVID business interruption claims must be paid. The Munich Re experience thus suggests that policy limits, sub-limits, and specific exclusions give carriers substantial economic protection even if their defenses of no-direct-physical-loss-or-damage are rejected by courts.

²²³ See Carolyn Cohn & Kirstin Ridley, *London Court Rules Some Insurers Should Not Have Denied Business Interruption Claims*, INS. J. (Sept. 15, 2020), <https://www.insurancejournal.com/news/international/2020/09/15/582641.htm> (describing *Financial Conduct Authority v. Arch Insurance (UK) Ltd*, [2021] UKSC 1).

²²⁴ See Leslie Scism & Allison Prang, *Travelers More Than Doubles Quarterly Income*, WALL ST. J. (Oct. 20, 2020), <https://www.wsj.com/articles/travelers-profit-rose-in-third-quarter-11603192181> (noting Traveler's \$827 million third quarter profit compared to \$396 million in 2019, which included \$400 million in subrogation revenue from claims against Pacific Gas & Electric in connection with California fires; and how Travelers stock rose by \$3.12 per share). Travelers was also aided in that its auto insurance business did better than usual because of pandemic-stimulated reductions in driving and hence in collisions. We realize that property insurance is expected to have a less successful 2020 than auto or liability insurance but note that insurers have multiple means of enduring difficult times and profiting over the proverbial long-haul, where their longevity records is considerably better than that of their small business policyholders.

Meanwhile, business policyholders appear to be experiencing the type of debacle insurers claim they face if coverage claims succeed. Insurers seem to sing this tune with ease when threatened. We have heard it before regarding asbestos, pollution, product liability, bad faith, and punitive damages claims. But even the massive asbestos mega-tort, Superfund, and other pollution claims—not to mention the credit swap defaults of the Great Recession—did minimal long-lasting damage to insurers and their ability to accumulate capital and regain profitability. In times of such stress, many more policyholders than insurers fail.

Although insurer claims of industry-wide doom tend to ring hollow, their means of survival is not without collateral consequence. The asbestos, pollution, and Superfund coverage wars produced broad exclusions in standard policies and made coverage more expensive and difficult (but not impossible) to obtain. COVID-19 will surely spur restrictions of coverage and increases in premiums—but this is likely even if insurers prevail in today's coverage battles.

The immediately relevant question is whether today's policyholders seeking coverage under policies issued prior to the pandemic—particularly those lacking a virus exclusion—are entitled to coverage. Too many initial decisions on the issue have implicitly embraced a flawed insurer narrative in abruptly turning policyholders away.

ADDENDUM 7



Consumer Federation of America

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**THE INSURANCE INDUSTRY'S INCREDIBLE
DISAPPEARING WEATHER CATASTROPHE RISK:**

**HOW INSURERS HAVE SHIFTED RISK AND COSTS
ASSOCIATED WITH WEATHER CATASTROPHES
TO CONSUMERS AND TAXPAYERS**

**J. Robert Hunter, Director of Insurance
Consumer Federation of America**

February 17, 2012

Insured losses from catastrophes around the globe totaled an estimated \$108 billion in 2011, the second highest year in history. More than \$30 billion of those losses occurred in the United States, likely the fifth or sixth most expensive year on record. Since 2004, storms like Katrina, Rita, Wilma and Ike, combined with other events have resulted in nearly \$200 billion in catastrophe claims paid to millions of home, business and vehicle owners.

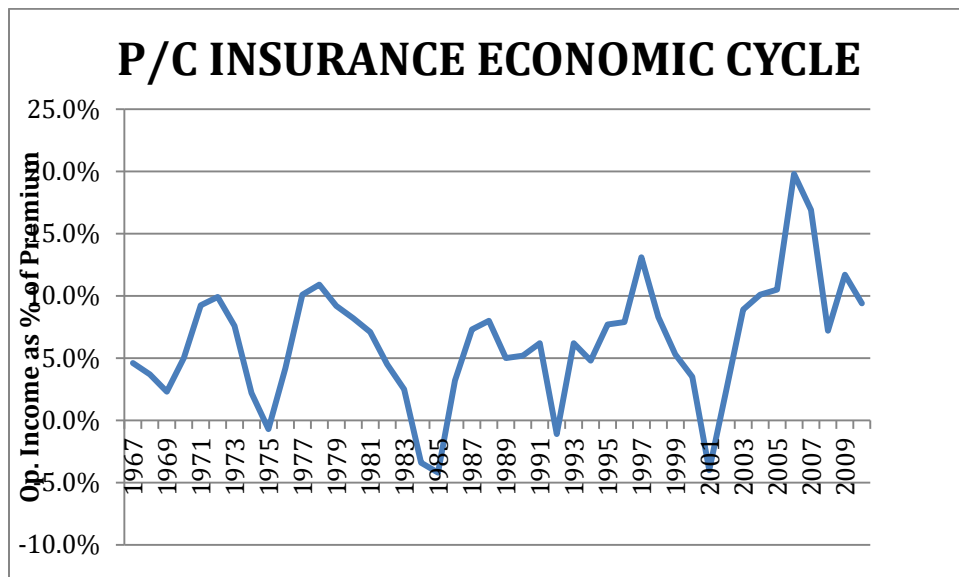
Robert Hartwig, President of the Insurance Information Institute¹

The question of how insurers deal with weather catastrophes, especially in years in which multiple events occur, has serious policy implications for Americans. In short, how can insurers handle all this risk, and is it legitimate to shift these costs to consumers and taxpayers?

While insurance executives frequently remind the public and regulators of the frequency and severity of catastrophic events, industry data demonstrates that insurers have significantly and methodically decreased their financial responsibility for these events in recent years and shifted much of this risk to consumers and taxpayers. Some of the savings they have achieved is the result of the use of reinsurance and wise risk diversification strategies. However, most these savings have been achieved by hollowing out the coverage in homeowners insurance policies and raising rates. Insurers have also exposed taxpayers to more disaster assistance payouts and shifted high risk homes to state pools. This study investigates and analyzes the significant weather catastrophe risk-shift that has occurred in the last twenty years and offers recommendations to stop insurers from continuing to illegitimately shift costs and risks to taxpayers and consumers.

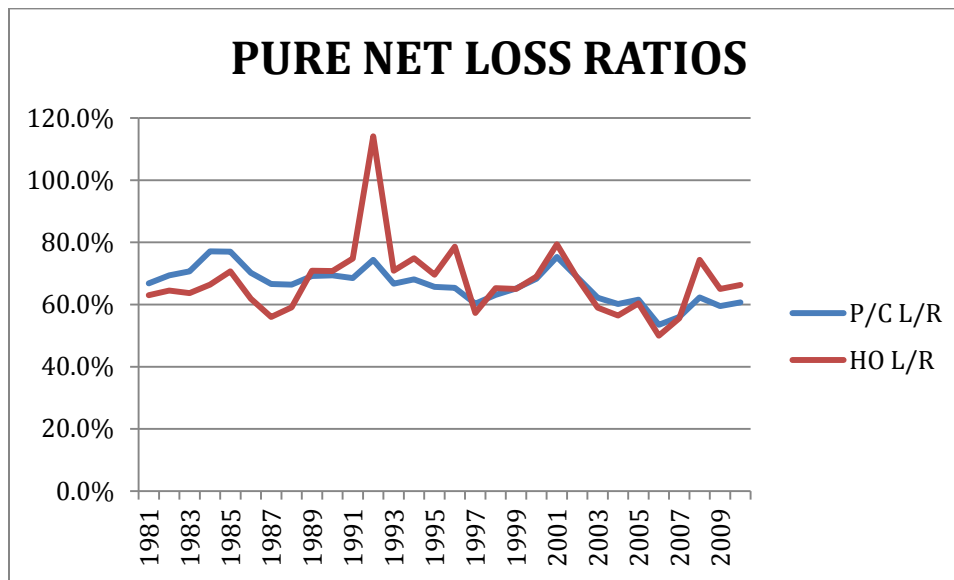
CATASTROPHES: ONCE A SERIOUS PROBLEM FOR INSURERS

The fact is that catastrophic weather events were once a serious problem for insurers. Consider the following charts:²



¹ "III Response to Americans for Insurance Reform Report," December 15, 2011.

² The data underlying these charts can be viewed at Addendum A.



“P/C L/R” is total property/casualty insurance losses divided by premium, called the “loss ratio.” “HO L/R” is the loss ratio for the homeowners’ insurance line of insurance.

The first chart illustrates the insurance industry economic cycle, showing operating income as a percentage of premium for the entire property-casualty insurance business over the last thirty years. There is a strong cyclical pattern to the industry’s results. Periodically, insurers’ profits decline to the break-even point. This is followed by what is known as a “hard market,” in which coverage is hard to get and prices rise sharply. For example, a hard market began in 1975. Profits rose quickly thereafter and then, slowly, declined during the soft market until 1985, when another hard market started as profits dropped to zero and even a bit below that. A soft market began in 1987 and stayed in place until profits bottomed out again in 2001. The market is still soft as 2012 begins, but declining profits indicate that a hard market might be on the way. In fact, insurers are hoping for a hard market soon.³

One noteworthy aspect to the first chart is the sharp drop in overall property-casualty profits in 1992. What caused that one-year deviation from the normal cycle? The answer is that Hurricane Andrew adversely affected the insurance industry. Overall property-casualty profits fell that year by seven points as a direct result of Andrew. This is exactly what one would expect when a huge catastrophe occurs, because this is why Americans buy insurance, to cushion such occasional blows.

The impact of Hurricane Andrew can also be clearly seen in the second chart. Net loss ratios of the property-casualty industry increased by about seven points because homeowner’s insurance profits were reduced by a whopping 40 points by Andrew.

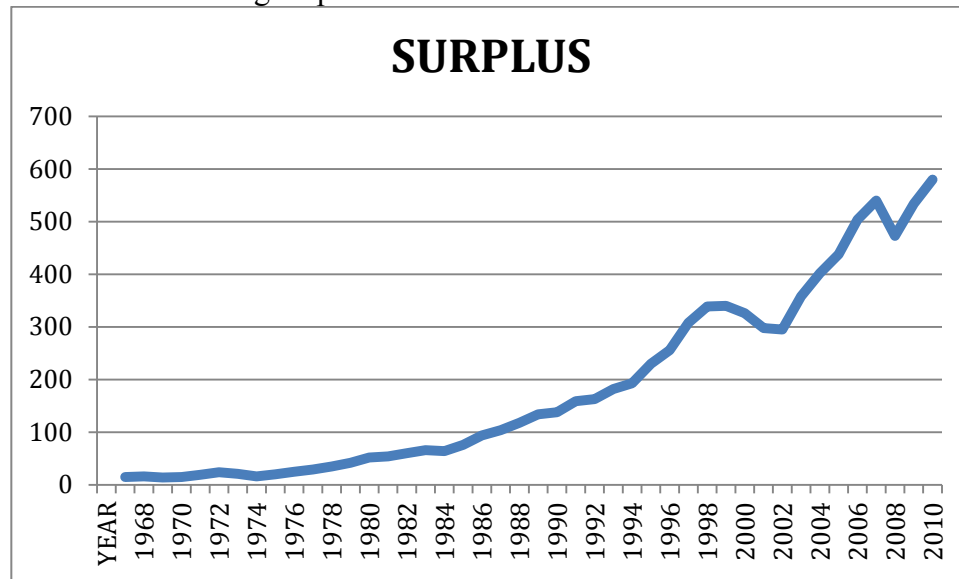
These charts demonstrate that at one time -- when hurricane Andrew hit in 1992 -- insurers bore much of the financial risk of hurricanes. This trend clearly changed in the last decade, in which seven of the most destructive ten disasters in American history occurred, according to the Insurance Information Institute.⁴ The huge hurricane damages of 2004 (four

³ “Repeat Offenders: How the Insurance Industry Manufactures Crises and Harms America,” Americans for Insurance Reform, December 2011.

⁴ See http://www.iii.org/facts_statistics/catastrophes-us.html.

Florida hurricanes) and 2005 (Katrina and other hurricanes) had almost no impact on the overall property-casualty loss ratio or even the homeowners insurance loss ratio, as shown by the above chart.

One factor that illustrates the trend of large events having minimal impact on insurers is the increasing surplus that property casualty insurers have accumulated in recent years. One would expect that, in years when large hurricane events occurred, insurers losses would increase, leveling out or even decreasing surplus over time. This has not occurred.



INSURERS HAVE NOW “MASTERED” CATASTROPHIC EVENTS

When four hurricanes hit Florida in 2004 and Hurricane Katrina pummeled the Gulf Coast in 2005, there was no noticeable impact on the overall profits or loss-ratios of property-casualty insurers in either year. An examination of just the loss ratios for homeowners’ insurance in those two years shows an impact from the storms that is not noticeable. According to the Insurance Information Institute,⁵ Hurricane Andrew resulted in overall losses of \$28 billion, of which \$17 billion (64 percent) were paid out in insured losses. Hurricane Katrina resulted in overall losses of \$125 billion, of which insurers paid out \$62 billion (just under 50 percent). Had the payout ratio for Katrina been the same as for Andrew, insurers would have paid out \$80 billion, or \$18 billion more than they did. The bottom line in these comparisons is that, if insurers had not reduced policyholder coverage and increased rates after Hurricane Andrew, they would have paid out almost 30 percent more to them

How is it possible that the property-casualty industry’s surplus would sharply increase as the number and severity of catastrophic weather events also increases? The primary reason is that the insurers have “mastered” hurricanes by shifting the lion’s share of the risk and costs to consumers and taxpayers. In other words, property-casualty insurers have paradoxically emerged as masters of risk avoidance, rather than continuing their historic role of risk taking.

⁵ See http://www.iii.org/facts_statistics/catastrophes-global.html.

HOW INSURERS REDUCED THEIR HURRICANE LOSSES AND SHIFTED RISK TO CONSUMERS AND TAXPAYERS

First, insurers have made intelligent use of reinsurance, securitization and other risk spreading techniques.⁶ Some insurers now spread risk by issuing securities that couple the threat of a catastrophic event with the purchase of construction stocks that would likely increase in value if a catastrophic event occurs and the demand for construction increases. The use of this kind of creative approach to diversify risk is wise.

Second, after Hurricane Andrew, insurers changed ratemaking techniques by using computer models to project either 1,000 or 10,000 years of weather experience. While this caused huge price increases to consumers at the time, consumer leaders supported this change because insurers appeared to be genuinely surprised by the level of damage caused by Hurricane Andrew and promised that the models would bring long-term stability to prices. The model contained projections of periods of intense activity and very large hurricanes, as well as periods of little or no activity, and based rates on these estimates.

However, Risk Management Solutions (RMS) and the other risk modeling companies have recently stopped using this scientific method to project storms over a 1,000 or 10,000-year period and are now using one to five-year projections. This has caused at least a 40 percent jump in loss projections in Florida and the Gulf Coast and a 25 percent jump in the Northeast. This move reneges on promises of pricing stability made by insurers in the mid-1990s and has led to rates that are excessive. Insurance rates on the coasts have soared for property risks, homes and businesses in the last few years.

Third, insurers have sharply hollowed out the catastrophe coverage offered to consumers in recent years by placing a number of new requirements on policyholders and limits on coverage in policies:

- Deductibles of 2 to 5 percent have been imposed with little fanfare or notice. This reduction in coverage was accompanied in many cases by large rate increases.
- Caps on replacement costs and other limits on needed coverage. State Farm, for instance, caps payments for increased rebuilding costs at 20 percent. Other insurers allow no increased payments at all. A consumer who buys a \$100,000 policy would receive only \$100,000 to rebuild from some insurers, and \$120,000 from State Farm, even if the cost of repairs skyrockets after a storm due to increased demand for materials and labor. Costs can also increase when homeowners are required to make special repairs to comply with building codes that were enacted after a home was first constructed. For example, many municipalities require such code upgrades to comply with the National Flood Insurance Program if a home is more than 50 percent damaged by a flood.

⁶ This report is focused on the primary insurance market, not the reinsurance market. The worldwide reinsurance market has had rather stable catastrophe prices since 2002, with “rates on line” – defined by the reinsurer Guy Carpenter as “Premium divided by indemnity (claims paid). A British term for the rate which, when multiplied by the indemnity, would produce the premium.” in a tight range since 2002. The highest rate on line observed in the data was in 1993 as Andrew severely impacted pricing. Today prices are stable because the catastrophe reinsurance sector “was overcapitalized by more than US \$20 billion, or 12 percent at the beginning of 2010.” This led to share buy-backs by many reinsurers. (Material in this footnote based on “World Catastrophe Reinsurance Market,” Guy Carpenter, September 2010.)

Reimbursement for costs incurred to comply with building codes is now excluded from many homeowners' insurance policies. Coverage for mold mitigation is also now excluded from most policies. Given the surge in demand for home building and repair that occurs in the wake of a hurricane, and corresponding increases in prices, and new coverage exclusions, these changes significantly shift risk and costs to consumers.

- “Anti-concurrent-causation” clauses. This is the most draconian reduction in coverage that insurers have attempted to impose in recent years. It removes all coverage for wind damage if another, non-covered event (usually a flood) also occurs, regardless of the timing of the events. Under this anti-consumer measure, if a hurricane of 125-miles-per-hour rips a house apart but hours later a storm surge floods the property, the consumer would receive no reimbursement for wind losses incurred.

Given the cutbacks in coverage that have occurred in coastal areas, there is a serious question as to whether this diminished coverage is worth the higher rates that many consumers must pay. However, most consumers have no option but to purchase such coverage as it is required by lenders or the law or both. Demand for insurance is relatively inelastic.

Insurers have claimed that they are facing higher risks because of a sharp increase in the number of people and amount of construction in areas of the country vulnerable to earthquake and hurricane disasters. This claim was investigated in 2006 by the Los Angeles Times investigative reporter Peter Gosselin, who wrote that:

...Key statistics don't support the argument....Census figures...show that the population of coastal and earthquake counties grew at an annual average rate of 1.56 percent between 1980 and last year. But they show that the U.S population grew at a reasonably close pace of 1.24 percent.

Gosselin interviewed Judith T. Kildow, director of the government-funded National Ocean Economics Program at California State University at Monterey, who said, “You simply cannot make the case from the numbers that America's coastal counties have grown at a disproportionately faster rate than the country as a whole over the last 25 years.”⁷

Fourth, insurers have also shifted risk, sometimes onto taxpayers. Taxpayers are exposed by the high deductibles, anti-concurrent causation and other limits on coverage as disaster relief will fill in what insurers used to cover.

Taxpayers might also be called upon to subsidize state-run insurers-of-last resort, which were sharply populated by insurers non-renewing tens of thousands of homeowner and business properties. Allstate, the leading exemplar after Hurricane Andrew, emerged once again as the company that was most aggressive in refusing to renew homeowner's policies in the wake of Hurricane Katrina. After Hurricane Andrew, Allstate threatened to non-renew 300,000 South Floridians, leading the state of Florida to place a moratorium on such precipitous actions. After Hurricane Katrina, Allstate non-renewed thousands of homeowners, even many on Long Island, New York and Cape Cod, Massachusetts. Allstate has also announced that it will no longer offer new homeowner's policies in many states, from Connecticut to Delaware, and has refused to

⁷ “The New Deal – Insurers Learn to Pinpoint Risks – and Avoid Them,” Peter Gosselin, Los Angeles Times, November 28, 2006.

write new business in large portions of other states, such as Maryland and Virginia. Other insurers have also cut back coverage on the nation's coasts (See Addendum B, for more information).

Insurers have become quite adept at convincing government to use tax dollars to help them avoid risk. Consider the federal Terrorism Risk Insurance Act (TRIA), the California Earthquake Authority, Citizen's Insurance in Florida, and wind "pools" in a number of other states. The state pools have become the largest writers of insurance in some states⁸. Such an arrangement allows insurers to "cherry-pick" these states, keeping the safest risks for themselves and shifting the highest risks onto the taxpayers of the state, thereby socializing high-risk, potentially unprofitable policies and privatizing the low-risk, profitable business. This adverse result for policyholders and taxpayers is hardly surprising. It is akin to "solving" the health insurance crisis by requiring states to cover sick or terminally ill patients, while the private sector writes coverage for young and healthy consumers. Allstate has also led efforts at the federal level that failed to create a taxpayer-backed program modeled on TRIA to reinsure the private market against the perils of wind and other weather damage.

INSURERS COULD EASILY HANDLE CATASTROPHE RISK THEY ARE AVOIDING BECAUSE THEY ARE SIGNIFICANTLY OVERCAPITALIZED

In determining whether the property-casualty insurance industry is adequately capitalized, one must first examine the losses incurred for major catastrophe or terrorism events. According to the Insurance Information Institute, the top ten insured loss disasters for property were:

<u>EVENT</u> ⁹	<u>PRE-TAX POST TAX 2010 DOLLAR LOSS</u>	
1. Hurricane Katrina, August 2005	\$45.5 billion	\$29.6
2. World Trade Center, Pentagon terrorist attacks, September 2001	22.9	14.9
3. Hurricane Andrew, August 1992	22.4	14.6
4. Northridge, California earthquake, January 1994	17.3	11.2
5. Hurricane Ike, September 2008	12.7	8.3
6. Hurricane Wilma, October 2005	11.4	7.4
7. Hurricane Charley, August 2004	8.5	5.5
8. Hurricane Ivan, September 2004	8.1	5.3
9. Hurricane Hugo, September 1989	6.7	4.4
10. Hurricane Rita, September 2005	6.2	4.0

Source: Insurance Services Office (ISO); Insurance Information Institute (See http://www.iii.org/facts_statistics/catastrophes-us.html). (Ranked on constant dollar cost to insurers)

⁸ According to PIPSO – The Property Insurance Plans Service Office, the Florida FAIR Plan had 1.5 million policies, of which over 285,000 were high-risk coastal properties on May 2011. The Texas wind pool had 247,972 residential and 17,998 commercial policies in 2010. In 2010, Alabama's pool had 18,800 policies (more than double the 7,800 of 2007z), Mississippi's Beach/Windstorm Plan had 46,546 policies and Georgia had 26,340 policies in its Pool.

⁹ The catastrophes were ranked by III based on size of loss in 2005 dollars, which we do not display here. What is displayed is the actual dollars in the year of the event. We calculate the post-tax figure by deducting the corporate tax rate of 35 percent.

Considering that property-casualty insurers now have surplus in excess of \$580 billion,¹⁰ catastrophes of this size are very easy to manage.

Terrorism risk is an interesting case study. While insurers are rightly concerned about a huge event, such as a nuclear, chemical or biological attack, the actual terrorism events that have occurred so far have been easily managed by private industry. There were hundreds of terrorism events in America in the 20 years leading up to the September 11th attacks. In spite of this fact, insurers did not even bother to charge a separate price for terrorism coverage in their rating structures. September 11th changed this practice, but even that attack was a “small” insured event compared to the industry’s mammoth capital and surplus, which has grown significantly since 2001. Yet, insurers convinced the federal government to provide free reinsurance that CFA estimates has represented about a ten billion taxpayer subsidy to date.

Historically, the prime test for the solidity of the property-casualty insurance industry has been the ratio of net premiums written (NPW) to surplus, discussed above. Regulators became concerned about the financial soundness of an insurer if its ratio exceeded 3 to 1. The so-called “Kenney Rule,” named after financial writer Roger Kenney, held that a safe insurer should not exceed about a 2 to 1 ratio. This guideline was introduced in the 1960s and served as the standard that insurers and regulators followed for many decades. More recently, analysts have recommended lowering the acceptable ratio to about 1.5 to 1, in recognition of some more extreme risks that insurers now face, such as catastrophic hurricanes and terrorist attacks. Net premium written to surplus ratios for almost thirty years are as follows:

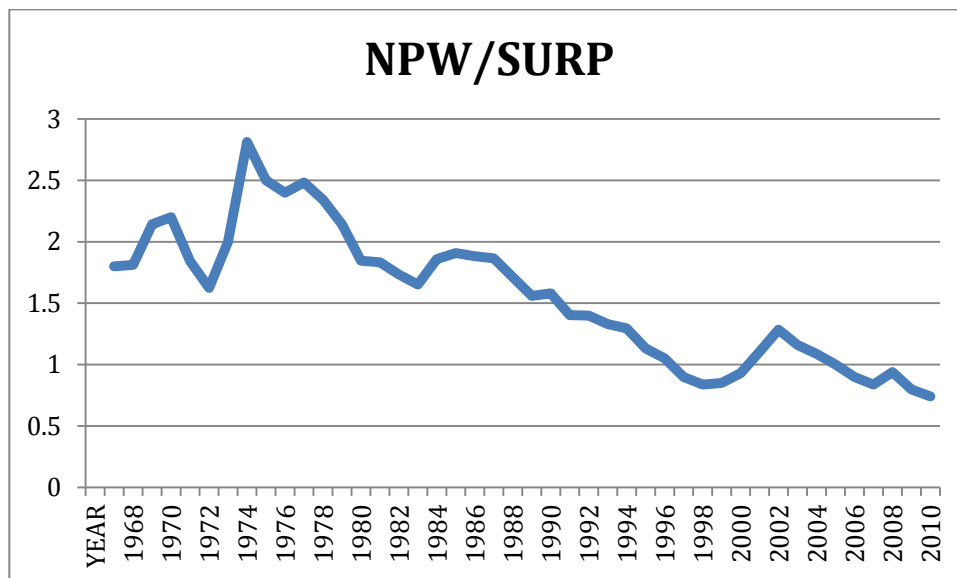
YEAR	NPW/SURP
1967	1.80
1968	1.81
1969	2.14
1970	2.20
1971	1.84
1972	1.63
1973	2.00
1974	2.81
1975	2.50
1976	2.40
1977	2.48
1978	2.34
1979	2.14
1980	1.85
1981	1.83
1982	1.73
1983	1.65
1984	1.86
1985	1.91
1986	1.88
1987	1.87
1988	1.71

¹⁰ As of December 31, 2010, Bests Aggregates and Averages, 2011 Edition, page 366.

1989	1.56
1990	1.58
1991	1.40
1992	1.40
1993	1.33
1994	1.30
1995	1.13
1996	1.05
1997	0.90
1998	0.84
1999	0.85
2000	0.93
2001	1.10
2002	1.28
2003	1.16
2004	1.09
2005	1.00
2006	0.90
2007	0.84
2008	0.94
2009	0.80
2010	0.74

Source: Best's Aggregates
and Averages, 1988-2011

Property-casualty insurers have not exceeded the recommended 1.5 to 1 ratio of NPW to surplus in almost twenty-five years. The sharp downward trend in this key leverage ratio is very clear, demonstrating that the industry is now significantly overcapitalized. Here is a graphic display of these data:



Consider this startling fact: Even if all of the top ten catastrophic events, including the September 11, 2001 attack, the Northridge Earthquake, and the top eight hurricanes, had

occurred in the last year and had been paid for last week (a total of \$162 billion in 2010 dollars after tax¹¹), the property-casualty industry surplus would still be at \$418 billion and the leverage ratio would still be at an ultra safe ratio 1.0.¹²

WHO PAYS WHEN INSURERS DO NOT?

Consumers

Data indicates that Hurricane Katrina cost \$125.0 billion, of which \$62.2 billion (just under 50 percent) was paid by insurance. Hurricane Andrew cost \$26.5 billion, of which \$17.0 billion (64 percent) was paid by insurance.¹³

To show the difference in coverage now that the policies have been hollowed out, consider a hypothetical \$100,000 home that incurred different levels of wind damage under the Hurricane Andrew compared to Hurricane Katrina. Assume the home had a \$500 deductible under Andrew and a 5 percent deductible under Katrina.

Damage	<u>Benefit after Deductible</u>		<u>Katrina as a % of Andrew</u>
	Andrew	Katrina	
\$10,000 (Consumer pays \$500 in Andrew; \$5,000 in Katrina)	\$ 9,500	\$ 5,000	53.6%
\$50,000 (Consumer pays \$500 in Andrew; \$5,000 in Katrina)	\$49,500	\$45,000	90.9%

Assume further that additional work must be done when it is reconstructed to bring it up to code. If, for instance, the home required \$1,000 of electrical work, the policyholder would be paid an additional \$1,000 for Hurricane Andrew in both circumstances. However, under Katrina, there would be no additional payment under the policy for mandated code work.

Damage	<u>Benefit after Deductible</u>		<u>Katrina as a % of Andrew</u>
	Andrew	Katrina	
\$10,000 (Consumer pays \$500 in Andrew; \$6,000 in Katrina)	\$ 9,500 + \$1,000	\$ 5,000	47.6%
\$50,000 (Consumer pays \$500 in Andrew; \$6,000 in Katrina)	\$49,500 + \$1,000	\$45,000	89.1%

If the home was in a flood plain and not elevated, damages that totaled 50 percent of the home's value would trigger a "non-conforming use" under the National Flood Insurance

¹¹ From Insurance Information Institute at http://www.iii.org/facts_statistics/catastrophes-us.html.

¹² \$430 million in premium divided by (\$580 million in surplus less \$162 million in assumed after-tax loss) Data on Net Premiums Written and Surplus for all insurers is from A. M. Best Aggregates and Averages, 2011 Edition, Page 369.

¹³ See http://www.iii.org/facts_statistics/hurricanes.html.

Program and the home would have to be upgraded to withstand a “100-year” flood. If such an improvement costs \$10,000, the damage situation with \$50,000 in losses would be:

Damage	<u>Benefit after Deductible</u> Andrew	Katrina	<u>Katrina as a % of Andrew</u>
\$10,000 (Consumer pays \$500 in Andrew; \$6,000 in Katrina))	\$ 9,500 + \$1,000 + \$10,000	\$ 5,000	24.4%
\$50,000 (Consumer pays \$500 in Andrew; \$16,000 in Katrina)	\$49,500 + \$1,000 + \$10,000	\$45,000	74.4%

It could get even worse if the home is destroyed and a demand surge of 50 percent raised the rebuilding cost for the \$100,000 home to \$150,000. If there was any additional flood damage to the home, even minor damage, (such as \$5,000) the insurer might invoke the anti-concurrent causation clause of the policy and pay nothing. If the damage is caused only by wind, but the severe damage in the area causes rebuilding costs to rise by 50 percent, the benefit situation would be:

ANDREW: \$150,000¹⁴ less \$5,000 for flood damage plus \$10,000 flood elevation less \$500 deductible = \$154,500. Consumer pays \$5,500.

KATRINA: Insurance pays nothing. Consumer pays \$160,000.

It is very clear that much of the cost that used to be paid by private insurers has been shifted to consumers, ranging from a small amount to 100 percent of what used to be paid. Much of this will be shifted again, to taxpayers, in the form of increased disaster relief payouts as discussed now.

Taxpayers

Taxpayers are also bearing more risk. The National Flood Insurance Program is almost \$20 billion in debt because the program is poorly administered by the Federal Emergency Management Agency (FEMA) and is poorly designed. FEMA has allowed flood risk maps to become antiquated, which has resulted in inadequate premiums that encourage unwise construction. The “Write Your Own” program which requires taxpayers to shoulder all financial risk, but allows insurers to service the NFIP, has also allowed insurers to collect excessive fees. The program will surely go deeper in debt in coming years due to these among other hidden subsidies, such as “grandfathering” in low, inadequate rates when new maps are issued. Congress should require the private sector to take a small, but growing, percentage of the risk over time. This will reduce taxpayer exposure in two ways: (1) The private sector will pay for flood losses incurred on their own accounts and (2) once the private sector has financial responsibility for some flood losses, it will police against hidden subsidies, such as FEMA’s unauthorized (by Congress) grandfathering of low rates on supposedly actuarially-rated homes when a new map raises flood elevations.

¹⁴ Some companies, such as State Farm, would pay an additional 20% or \$30,000 more in this example.

The subsidy to taxpayers under TRIA has amounted to roughly \$10 billion. Although there is no need for the federal government to back terrorism risk (except for exotic risks like nuclear and biological attacks), insurers are enjoying what amounts to free reinsurance, making TRIA another example of a wasteful corporate subsidy.

When private insurance payouts decline during catastrophic weather events, it stands to reason that government disaster relief costs will increase. Hurricane Andrew generated public disaster relief payments of \$7 billion in 2009 dollars, whereas Hurricane Katrina generated \$51 billion.¹⁵ Insurance payments were twice as high for Katrina as for Andrew but disaster relief payments were over seven times higher. In 2008, with Hurricanes Gustav and Ike, among others, federal disaster relief was \$13 billion (2009 dollars). When storms like these eclipse Andrew in the amount of government disaster relief that is paid out, it is hard not to conclude that a major cause of this increased taxpayer burden is the reduction in risk carried by insurers. The total cost of disaster relief from 1990 to 1999 was \$40 billion; from 2000 to 2010 it was more than double, at \$94 billion (all in 2009 dollars).

Because private insurers have fled America's coasts, many homes are insured through state pools. In Florida, Florida Citizens' Property Insurance Corporation (CPIC), the state pool, covers 1.5 million homes. If a storm or series of storms depletes Citizens' rather healthy reserves, assessments may be placed on other property-casualty companies in the state to address the shortfall. The state has the authority, since assessments are limited, to finance loss payments via tax-exempt bonds. State taxpayers could be at some risk if Citizens' or the CAT Fund (also backed by the state) ever ran out of money, even though this possibility has become less likely as the state has built up reserves. In California, earthquake risk is mostly written through the California Earthquake Authority, an entity similar to Florida Citizens, where state taxpayers may be exposed in extreme events.

RECOMMENDATIONS

There are many conclusions to be drawn from the reduced losses that insurers have experienced in recent years. The prime conclusion is that the insurance industry has moved from its historic role as a calculated risk-taker to one of a risk-avoider, exposing consumers and taxpayers to much higher costs. Not only have insurers insulated themselves from their historic share of hurricane risk, they have made no serious effort to write flood risk and terrorism risk, which are entirely backed by federal taxpayers.

Although insurers have become adept at shifting the cost of catastrophe losses to others, they still use catastrophic weather events to advocate for measures that would shift risk even more, such as higher rates, or putting more policyholders in pools or created taxpayer-supported entities. Thus, many consumers exposed to catastrophe weather risk are also vulnerable to insurer attempts to unjustifiably increase rates or hollow out coverage.

Recommendations for the States

CFA recommends that the states carefully examine national data on limited catastrophe losses and excessive surplus before approving any insurer requested rate increases. State

¹⁵ Database maintained by Congressional Research Service based upon US Budget documents and appropriation statutes, Table 1 of "Disaster Relief Funding and Emergency Supplemental Appropriations, CRS, May 24, 2010.

insurance commissioners should be on guard against unwarranted attempts by insurers to use catastrophe losses as part of their rationale for jacking up rates.

We recommend that states carefully review the reasons why insurers are dumping risks into state pools and to take action to stop insurers from unjustifiably refusing to cover qualified homeowners. It is unnecessary for any more dumping to occur since insurers have now twice purged their portfolios of risk, once after Hurricane Andrew and again after Hurricane Katrina. States should also look at the high prices being charged to homeowners in their states in light of the fact that, in the aftermath of Andrew, insurers made major adjustments to pricing, dumped risk, reduced coverages and significantly reduced their hurricane risk exposure. Repeating these adjustments in the wake of 2004/5 storms was really more about gouging than correction. Rates requested by insurers in non-competitive markets after hurricanes can easily be excessive, violating sound actuarial principles. The coastal states must revisit hurricane pricing in recognition of the fact that the industry has mastered hurricanes on a national basis as evidenced by the almost negligible impact of Hurricane Katrina on their national results, a vast change compared to results during Hurricane Andrew, a smaller event. States should ban the use of non-scientific pricing models, such as short-term catastrophe models.

States should ban use of anti-concurrent causation clauses and any other attempt by insurers to build a “trap-door” hidden in the policy, through which coverage can unexpectedly fall when policyholders most need help.

States should not allow hurricane deductibles to apply unless a storm is classified as a hurricane throughout its journey through the state, from entry to exit. It is impossible to tell where a hurricane exactly becomes a tropical storm within a state so this ambiguity must be decided to the benefit of the consumers who have bought the coverage, not insurers who are compensated for being risk-takers.

States should adopt the California approach to consumer participation in regulatory proceedings, where consumers can receive reimbursement from the filing insurer to hire experts (like actuaries, lawyers and economists) if they make a “substantial contribution” to a case. They receive no compensation if they do not make a substantial contribution, so consumer groups in California study filings prior to risking an intervention very carefully. Costs paid by the insurers for such intervention would be allowed to be included as part of the rate filing.

States should make sure that they have all the data they need to monitor the home insurance market, including data by census track on who is writing and where, non-renewal patterns, etc. This will allow regulators to make informed decisions about whether markets in their states are truly competitive.

Coastal states should join together to form an interstate compact to deal with common issues stemming from their shared hurricane risk. A pool of states with common policies could allow states to spread risk and lower costs by developing common pools and provide consumers and insurers with consistent requirements. A common approach would also better position states – especially small ones – to resist coercive efforts by insurers to weaken regulatory protections for consumers. For example, after the hurricanes of 2004/5, several smaller states (AL, MS and LA) were pressured by insurers with threats of withdrawal to take actions that would harm consumers in those states.

One action a consortium of coastal states could take is to create a regulatory model for calculating hurricane risk to test the reliability of insurer-proposed catastrophe premiums in rates.

Using the model, states could create a stand-by reinsurance mechanism that would sell reinsurance to insurers at 50 percent more than actuarial rates developed by the model, which would keep premiums in check during the non-competitive phase of the insurer cycle or after hurricane events when reinsurers often gouge. When private reinsurance is reasonably priced at or near the actuarial level, the state back-up would not kick in. Florida successfully did sell reinsurance to the industry after the 2004/5 storms and now has, through premium accumulation and bonding, no real risk for its reinsurance. At the same time, policyholders saved about 15 percent of premiums because Florida requires insurers to use their reinsurance (or at least adopt the cost of that state reinsurance or less in home insurance ratemaking). This system temporarily replaced private reinsurance in Florida, which was priced at four to five times the actuarial rate in the non-competitive reinsurance market after 2004 and 2005 storms.

States should also develop model language that would be required in every minimum insurance policy sold in the region. Among other things, this language should remove the anti-concurrent causation clauses from use and clarify exceptions and exclusions in coverage. Coverage above the minimum would be allowed to be sold to consumers with pricing for such enhancements made clear to the policyholder.

Recommendations for the Federal Government

The fact that insurers do not take financial risk for either flood or terrorism insurance is a huge policy error. With the NFIP, it tempts unscrupulous insurers to illegitimately shift wind risk to the flood program. With both programs, taxpayers are required to pick up huge risks that private insurers are more than capable of identifying and backing. Taxpayers deserve to have at least some of this risk removed from them, particularly at this time of economic stress, and a search for ways to cut federal spending. We recommend that Congress limit the exposure of taxpayers to terrorism risk to only extreme events such as nuclear, chemical or biological events exceeding a 100 billion threshold. TRIA should be amended to only cover losses caused by nuclear, biological or chemical attacks that exceed \$100 billion.

We recommend that the National Flood Insurance Program bills currently under consideration be amended to require a study on how to involve the private sector in sharing the risk from the first dollar of loss, perhaps starting with a low, but increasing, percentage of the risk for insurers wishing to participate in the NFIP as “Write Your Own” companies.¹⁶ FEMA should also lower the excessive WYO servicing fees that create a windfall for the WYO companies at taxpayer expense. Recommendations for private reinsurers to cover losses only above the federal insurance coverage that is offered should be rejected, as they will only add the cost of reinsurers’ overhead and profit to the program over time. It does not make sense to have the relatively tiny reinsurance industry backing up the federal government, at the same time as insurers are pushing for a federal backstop for their wind exposure. Logically, a smaller entity should not be backing up a bigger one, which argues for a private NFIP role at the low end of flood loss spectrum, not at the high end. If the program were privately reinsured, it would most

¹⁶ See June 23, 2011 Testimony given by Travis Plunkett to the US Senate Banking Committee on the “Authorization of the National Flood Insurance Program” for detailed comments on CFA’s recommendations.

likely add the unnecessary cost of the overhead and profit the reinsurers receive to the cost of the program, requiring more taxpayer expenditures over time. Further, if significant events occur, reinsurers are likely to either retrench or severely raise prices, just when reinsurance is most needed, as they do with wind coverage.

Data on home insurance in a format similar to what is required of banks under the Home Mortgage Disclosure Act (HMDA) should be collected by the Federal Insurance Office (FIO) and made available to the states and to the public. This would allow detailed analysis of why certain markets are stressed, which insurers are doing their best to serve markets in stressed areas and which are causing problems. This would enable policyholders to craft solutions based on solid statistical evidence. It would also allow analysis of markets to see if low- and moderate-income areas are being properly served.

We recommend that the federal government assist the states in forming an interstate compact to regulate hurricane insurance by authorizing such a combined effort and by taking action to assist the states in several ways, including:

- Offering the expertise of the federal government (entities like FEMA, NOAA, etc.) to the group of coastal states. These experts could help develop the regulatory hurricane model for states to use in regulating insurance and in developing stand-by reinsurance pricing.
- Offering bridge loans at low-interest when stand-by reinsurance is used, if such use suffers losses due to timing risk (such as a large storm in the early years of the development of reserves.) These loans would be required to be fully repaid over reasonable time periods.

ADDENDUM A

DATA UNDERLYING THE CHARTS FOUND IN THE BODY OF THIS REPORT

COLUMN 1 YEAR	COLUMN 2 Total P/C Op Inc/Prem	COL 3 YEAR	COLUMN 4 P/C L/R	COL 5 HO L/R	
1967	4.6%				
1968	3.7%				
1969	2.3%				
1970	5.0%				
1971	9.3%				
1972	9.9%				
1973	7.6%				
1974	2.2%				
1975	-0.7%				
1976	4.2%				
1977	10.1%				
1978	10.9%				
1979	9.2%				
1980	8.2%				
1981	7.1%	1981	66.8%	63.0%	
1982	4.5%	1982	69.4%	64.5%	
1983	2.5%	1983	70.7%	63.7%	
1984	-3.4%	1984	77.1%	66.4%	
1985	-4.2%	1985	77.0%	70.7%	
1986	3.2%	1986	70.2%	61.9%	
1987	7.3%	1987	66.6%	56.0%	
1988	8.0%	1988	66.4%	59.1%	
1989	5.0%	1989	69.2%	70.9%	
1990	5.2%	1990	69.4%	70.8%	
1991	6.2%	1991	68.5%	74.8%	
1992	-1.1%	1992	74.4%	114.1%	HURRICANE ANDREW
1993	6.2%	1993	66.7%	70.9%	
1994	4.8%	1994	68.1%	74.9%	
1995	7.7%	1995	65.7%	69.6%	
1996	7.9%	1996	65.4%	78.6%	
1997	13.1%	1997	60.3%	57.3%	
1998	8.3%	1998	63.1%	65.3%	
1999	5.3%	1999	65.2%	65.0%	
2000	3.5%	2000	68.3%	69.0%	
2001	-4.0%	2001	75.3%	79.4%	
2002	2.4%	2002	68.8%	68.5%	
2003	8.9%	2003	62.2%	59.0%	
2004	10.1%	2004	60.2%	56.5%	4 FLORIDA HURRICANES
2005	10.5%	2005	61.6%	60.4%	HURRICANE KATRINA
2006	19.8%	2006	53.5%	50.0%	
2007	16.9%	2007	56.0%	55.6%	
2008	7.2%	2008	62.3%	74.4%	

2009	11.7%	2009	59.5%	65.0%
2010	9.4%	2010	60.7%	66.3%

Source: All data from Best's Aggregates and Averages, various years.

Columns 1 and 2 were used to create the chart showing the Property-casualty Insurance Industry's Economic Cycle over more than four decades.

Columns 3, 4 and 5 were used to create the chart showing the loss ratios for both the overall Property-casualty Insurance Industry and for homeowners insurance over a thirty-year period.

Addendum B: Reprinted from The Los Angeles Times, November 28, 2006

Insurance company cutbacks have left more than 1 million coastal residents scrambling to land new insurers or learning to live with weakened policies. As insurers retreat, states and homeowners are left to bear the biggest risks.

Massachusetts

During the last two years, six insurers have stopped selling or renewing policies along the coast, especially on Cape Cod, leaving 45,000 homeowners to look for coverage elsewhere. Most have turned to the state-created insurer of last resort. The Massachusetts FAIR Plan, now the state's largest homeowners insurer, recently received permission to raise rates 12.4 percent.

Connecticut

Atty. Gen. Richard Blumenthal has subpoenaed nine insurance companies to explain why they are requiring thousands of policyholders whose houses are near any water —coast, river or lake—to install storm shutters within 45 days or have their coverage cut or canceled.

New York

Allstate has refused to renew 30,000 policies in New York City and Long Island, and suggested it may make further cuts. Other insurers, including Nationwide and MetLife, have raised to as much as 5 percent of a home's value the amount policyholders must pay before insurance kicks in, or say they will write no new policies in coastal areas.

South Carolina

Agents say most insurers have stopped selling hurricane coverage along the coast. Those that still do have raised their rates by as much as 100 percent. The state-created fallback insurer is expected to more than double its business from 21,000 policies last year to more than 50,000.

Florida

Allstate has offloaded 120,000 homeowners to a start-up insurer and has said it will drop more as policies come up for renewal. State-created Citizens Property, now the state's largest homeowners insurer with 1.2 million policies, was forced to use tax dollars and issue bonds to plug a \$1.6- billion financial hole due to hurricane claims. The second-largest, Poe Financial Group, went bankrupt this summer, leaving 300,000 to find coverage elsewhere. The state also has separate funds to sell insurers below-market reinsurance and cover businesses. Controversy over insurance was a major issue in this fall's election campaign, causing fissures in the dominant GOP.

Louisiana

The state's largest residential insurer, State Farm, will no longer offer wind and hail coverage as part of homeowners policies in southern Louisiana. In areas where it still covers these dangers, it

will require homeowners to pay up to 5 percent of losses themselves before insurance kicks in. In a move state regulators call illegal and are fighting, Allstate is seeking to transfer wind and hail coverage for 30,000 of its existing customers to the state created Citizens Insurance.

Texas

Allstate and five smaller insurers have canceled hurricane coverage for about 100,000 homeowners and have said they will write no new policies in coastal areas. Texas' largest insurer, State Farm, is seeking to raise its rates by more than 50 percent along the coast and 20 percent statewide.

California

The state has bucked the trend toward higher homeowners insurance rates with three major insurers, State Farm, Hartford and USAA, seeking rate reductions of 11 percent to 22 percent. Regulators have begun to question whether insurers are making excessive profits after finding that major companies spent only 41 cents of every premium dollar paying claims and related expenses. Alone among major firms, Allstate is seeking a 12.2 percent rate hike.

Washington

Allstate has dropped earthquake coverage for about 40,000 customers and will have its agents offer the quake insurance of another company when selling homeowners policies in the state. Nationally, the company has canceled quake coverage for more than 400,000.

Sources: Risk Management Solutions (map); interviews with state insurance regulators