New York Supreme Court

APPELLATE DIVISION – FIRST DEPARTMENT

Appellate Case Nos.
2021-02971
2021-04034

CONSOLIDATED RESTAURANT OPERATIONS, INC.

Plaintiff-Appellant,

against

WESTPORT INSURANCE CORPORATION,

Defendant-Respondent.

AMICUS CURIAE BRIEF OF THE CHEFS' WAREHOUSE INC. IN SUPPORT OF PLAINTIFF-APPELLANT CONSOLIDATED RESTAURANT OPERATIONS, INC.

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New York County Clerk's Index No. 450839/2021

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I. DISCLOSURE STATEMENT

The Chefs' Warehouse Inc. ("Chef's Warehouse") is a non-governmental, publicly-traded corporation on the New York Stock Exchange under the symbol CHEF. Chefs' Warehouse does not have a parent company nor does any publicly-owned company own more than 10% of Chefs' Warehouse stock.

II. STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

Many policyholders paid substantial premiums for "all risk" insurance policies with business interruption coverage and no express exclusion for losses due to viruses. Now, in a moment of need, their insurers claim there is no coverage for virus-related losses. Many insurers, like Westport Insurance Company ("Westport") in this case, do so despite declining, at the point of sale, to attach an express virus exclusion to their policies when such exclusion had been available since 2007 and used by more than 80% of other insurance policies.

If no coverage ever existed for loss related to viruses, there would be no need for such exclusions. The insurance industry has known for decades that courts have interpreted its standard language to provide coverage when losses arise from property becoming unsafe for its intended use. One of the most sophisticated property insurers in the United States has not only recognized, but advocated for coverage in such a situation. Insurers have paid claims for business interruption

based on the effects of a lethal virus. Property insurance policies without virus exclusions provide coverage for loss or damage caused by viruses.

Insurers should not now – in the face COVID-19 claims – be allowed to rewrite their policies, imposing additional restrictions that do not actually exist. If insurers wanted to exclude these losses, they should have done so clearly. The industry had the means to do so. Chefs' Warehouse has great interest in holding the insurance industry accountable for the policies it writes. If insurance companies know their policies without virus exclusions provide coverage for loss or damage from the presence of a virus, they should provide coverage. At a minimum, if their insurance policies are ambiguous as to whether they provide coverage in such situations, insurance companies have an obligation to use clear language.

For these reasons, Chefs' Warehouse supports the Consolidated Restaurant Operations Inc.'s ("CRO") request that the trial court's order be reversed.

III. SUMMARY OF THE ARGUMENT

Amicus submits this brief for a limited purpose: property and casualty insurers like Westport have long known that circumstances impacting the safe and intended use of property can cause direct "physical loss" or "physical damage" to that property as those terms are used in standard-form insurance policies, without any tangible "impact" or "alteration" to the property. This conclusion has been reached by policyholders making insurance claims, by courts evaluating those claims, and

by insurance companies themselves in contexts identical to those here. Where property is infused or threatened with dangerous substances like ammonia, smoke, bacteria, mold spores, poisonous spiders, and even the initial novel coronavirus, SARS-CoV-1, there is a "direct physical loss or damage" to that property.

As CRO persuasively explains, SARS-CoV-2 actually does alter property in a tangible way. However, the insurance industry's undefined terms "physical loss or damage" apply to situations where property cannot safely be used, even if is not tangibly altered. More important for present purposes, however, such language is *at least ambiguous* as to whether it is triggered by losses such as those in this case. This ambiguity is demonstrated by the rulings and other events described below. It has also been recognized by FM Global, one of the most sophisticated insurance companies in the United States. Critically, the insurance industry drafting organizations, including the Insurance Services Office ("ISO") – upon information an belief, an organization of which Westport was, and is, a member[1] – closely monitored these events on behalf of their members and concluded fifteen years ago that the language needed to be clarified (*i.e.*, was at least ambiguous) in relation to loss or damage caused by the presence of a virus.

[1] Westport is authorized in New York to use certain ISO forms. *See* https://www.dfs.ny.gov/consumers/small_businesses/livery_iso_approved. Further, Westport employed ISO copyrighted forms to the insurance policy it sold to CRO. (R-80, 151-157.)

Indeed, after insurers paid a number of SARS-CoV-1 claims, ISO and another insurer organization (the American Association of Insurance Services ("AAIS")) drafted language which they averred they intended to exclude losses arising from the loss and damage caused viruses and bacteria. In negotiating with regulators the right and conditions to use these exclusions, ISO and AAIS represented that, without them, the existing standard-form policy wording might become a "source of recovery" for losses arising from pandemics or transmission of infectious material. They told regulator the Virus or Bacteria Exclusion would "clarify" their policies and avoid that by result. While ISO's and AAIS's negotiations with regulators included incorrect and confusing statements, for present purposes, four things are indisputable:

1. ISO, acting on Westport's behalf, developed the exclusion and made representations to regulators that constitute admissions by Westport.

2. ISO acknowledged that, without a Virus or Bacteria Exclusion, courts might well find coverage for losses arising from virus, *i.e.*, that the standard-form language was at least ambiguous as to whether a virus causes physical loss or damage.

3. ISO drafted the Virus or Bacteria Exclusion to address that ambiguity.

4. Westport could have used ISO's Virus or Bacteria Exclusion in the CRO Policy, but it chose not to do so.

Westport was on notice for more than 60 years that losses arising from viruses, organisms, or other substances, even if they cause no tangible alteration of property,

have been found to cause a physical loss or damage that triggers property insurance coverage. Westport had more specific language readily available—ISO's Virus or Bacteria Exclusion—to potentially address the issue. Westport chose not to employ that language in the CRO Policy. Westport's election must have a consequence: this Court should reverse the court below and conclude that CRO's loss is covered.

IV. ARGUMENT

A. WESTPORT HAS BEEN ON NOTICE THAT ITS STANDARD-FORM POLICY LANGUAGE WAS AT LEAST AMBIGUOUS AS TO WHETHER IT APPLIED TO SITUATIONS WHERE PROPERTY IS AFFECTED BY SUBSTANCES MAKING ITS INTENDED USE DANGEROUS.

Westport cannot reasonably contest that it was aware that policyholders, courts, insurance companies, and insurance industry drafting organizations had – for decades – concluded that "physical loss or damage" included situations where property was rendered unfit or unsafe for its intended use, regardless of whether such property had suffered a physical "alteration." At a minimum, Westport knew that its standard-form policy language was ambiguous as applied in those situations.

1. From 1957 through 2000, Courts Across the United States Concluded that Policyholders Were Correct in Asserting that Events Rendering Property Unfit or Unsafe for Intended Use Caused "Direct Physical Loss or Damage."

For years, there have been issues as to whether unusual events – *i.e.*, events other than a fire, collapse or tornado – cause "direct physical loss or damage" to property. The parties will no doubt discuss these cases at length, and Chefs'

Warehouse will not duplicate that discussion. What is important for present purposes is that there were cases finding standard-form property insurance policies to have been triggered in such circumstances in the 1950s,[2] the 1960s,[3] the 1970s,[4] the 1980s,[5] and the 1990s.[6]

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

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

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

[5] *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986) (finding policyholder could claim Business Income coverage from "*direct physical loss*" where risk of collapse necessitated abandonment of grocery store) (emphasis added).

[6] In chronological order: *Hetrick v. Valley Mut. Ins Co.*, 15 Pa. D. & C. 4th 271, 1992 WL 524309, at *3 (Pa. Ct. Com. Pl. May 28, 1992) (finding that there would be coverage for "*direct loss*" of a house if an outside oil spill made the house uninhabitable) (emphasis added); *Largent v. State Farm Fire & Cas. Co.*, 842 P.2d 445, 446 (Or. Ct. App. 1992) (noting insurance company conceded methamphetamine fumes could cause "*accidental direct physical loss*") (emphasis added); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. Ct. App. 1993) (finding costs of methamphetamine odor covered as "*direct physical loss*" or damage) (emphasis added); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, No. 9400837, 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) (emphasis added); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (holding asbestos could cause "*direct physical loss*" to house) (emphasis added); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 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*") (emphasis added); *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

2. The Insurance Industry Made Payments for Claims of Loss from the Loss or Damage to Property Caused by SARS-CoV-1.

In the early 2000s, more courts found that unusual circumstances rendering property unsafe or unusable caused direct physical loss or damage to that property, triggering standard-form property policies.[7]

Consistent with this, the insurance industry paid claims for loss caused by the original novel coronavirus, SARS-CoV-1, which led to an epidemic in Asia from 2002-2004:

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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") (emphasis added); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. 98-434-HU, 1999 WL 619100, at *7-*8 (D. Or. Aug. 4, 1999) (finding that policyholder could bear its burden to demonstrate that clothes impregnated with mold or mildew suffered "*direct physical loss or damage*" if it established "at trial a class of garments which has increased microbial counts and that will, as a result, develop either an odor or mold or mildew") (emphasis added); *Board of Educ. v. International Ins. Co.*, 720 N.E.2d 622, 625-26 (Ill. App. Ct. 1999) (citing liability insurance coverage cases finding that incorporation of asbestos into buildings caused "property damage," defined under liability policies to be "*physical injury to or destruction of tangible property*," and finding that policyholder had established that the asbestos fiber contamination constituted Property Damage) (emphasis added).

[7] In chronological order: *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" resulting in a "*direct physical loss*") (emphasis added); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *8-*9 (D. Or. June 18, 2002) (concluding that mold damage to house could constitute "distinct and demonstrable" damage and that inability to inhabit a building may constitute "*direct, physical loss*") (emphasis added); *Graff v. Allstate Ins. Co.*, 54 P.3d 1266, 1269 (Wash. Ct. App. 2002) (finding methamphetamine vapors constituted "*physical loss*" to a house) (emphasis added); *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'") (emphasis added).

> The forced closure of businesses nationwide because of the novel coronavirus would seem to be the perfect scenario for filing a "business interruption" insurance claim.
>
> But most companies will probably find it difficult to get an insurance payout because of policy changes made after the 2002-2003 SARS outbreak, according to insurance experts and regulators.
>
> SARS, which infected 8,000 people mostly in Asia and is now seen as foreshadowing the current pandemic, led to millions of dollars in business-interruption insurance claims. Among the claims was a $16 million payout to one hotel chain, Mandarin Oriental International.[8]

Accordingly, by the mid-2000s, not only did the insurance industry know that courts had found that standard-form property insurance forms covered claims for loss or damage to property affected by substances rendering its intended use dangerous or unusable, the insurance industry specifically knew that its members had paid claims arising from a virus, the first novel coronavirus.

3. Insurance Industry Drafting Organizations Paid Close Attention to the Development of Case Law in this Area.

The loss-of-function cases continued to multiply in the mid-2000s after the industry paid claims from SARS-CoV-1.[9] The insurance industry, through its

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[8] Todd C. Frankel, "Insurers knew the damage a viral pandemic could wreak on businesses. So, they excluded coverage," Washington Post (April 2, 2020), https://www.washingtonpost.com/business/2020/04/02/insurers-knew-damage-viral-pandemic-could-wreak-businesses-so-they-excluded-coverage (attached hereto as Ex. 1).

[9] In chronological order: *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 824, 826–27, 824-26 (3d Cir. 2005) (finding there was a question of fact as to whether E. coli in house caused "*direct physical loss*") (emphasis added); *De Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 722-23 (Tex. App. Mar. 31, 2005) (finding mold damage constituted "*physical loss to property*") (emphasis added); *Schlamm Stone & Dolan LLP*. v. *Seneca Ins. Co.*, 800 N.Y.S.2d 356 (N.Y. Sup. 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")

ratings organizations (ISO and AAIS), its claims handlers, its coverage counsel, and its employees reading trade journals, was well aware of the decisions and took action.

To the extent there is any doubt of this, ISO admitted that it was part of its responsibility to its member companies (including Westport) to monitor the common law on standard-form property insurance policies, and that such review prompted ISO to draft changes to the standard forms to eliminate ambiguities. It was no secret in the insurance industry that many courts had found events that do not physically alter property can nonetheless cause physical loss or physical damage to that property; indeed, anyone reading one of these cases recounted above would quickly learn of the larger body of authority.[10]

(emphasis added); *Cook v. Allstate Ins. Co.*, No. 48D02-0611-PL-01156, slip op. at 6-8 (Ind. Super. Nov. 30, 2007) (finding that infestation of house with Brown Recluse Spiders constituted "*sudden and accidental 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") (emphasis added); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co.*, No. 05-1315, 2007 WL 464715, at *8 (D. Or. Feb. 7, 2007) (finding, where the policyholder's heat treater for medical implants was contaminated by lead when a lead hammer was mistakenly left in it, this was "*physical loss or damage*": "There is no question that the physical transformation of the furnace which rendered it useless for processing medical devices, the use for which it was specially certified, reduced both the value of the furnace and [the policyholder's] ability to derive business income from the furnace. This reduction of value was caused by an incident that is fairly characterized as 'direct physical damage'") (emphasis added).

[10] For instance, one of the first such decisions, *First Presbyterian Church* (gasoline vapors) was subsequently cited by a host of other similar decisions: *Lillard-Roberts*, 2002 WL 31495830, at *8-9 (mold); *Matzner*, 1998 WL 566658, at *4 (carbon monoxide); *Trutanich*, 858 P.2d at 1335 (methamphetamine fumes); *Hetrick*, 1992 WL 524309, at *3 (oil fumes).

4. As a Result of Their Close Review of the Common Law, and the Claims Paid for Losses from SARS-CoV-1, ISO Drafted the Virus or Bacteria Exclusion.

The trend in the common law, and insurance company payments in relation to SARS-CoV-1, motivated ISO and AAIS, on behalf of their members, to draft the Virus or Bacteria Exclusions.[11] On July 6, 2006, ISO submitted its ISO Circular announcing "the submission of form filings to address exclusion of loss due to disease-causing agents such as viruses and bacteria."[12] In relevant part, ISO's Circular states that property policies had not historically been a source of cover for loss from "disease-causing agents."[13] As shown above, this statement was false. Yet, at the same time, ISO recognized that a policyholder could reasonably claim coverage for these losses – including SARS, for which the insurance industry had already paid for loss or damage – under existing policies. This included a Business Interruption claim for the loss during the period of decontamination:

> 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.

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[11] Lucca de Paoli, *et al.*, "Insurance Unlikely to Cushion Coronavirus Losses – But There Are Exceptions," Insurance Journal (Mar. 4, 2020) https://www.insurancejournal.com/news/international/ 2020/03/04/560126.htm (attached hereto as Ex. 2).

[12] ISO Circular, July 6, 2006, Commercial Property LI-CF-2006-175 at 1 (attached hereto as Ex. 3).

[13] *Id. at* 6.

> 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*.
>
> 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.[14]

Given that is uses ISO forms, Chefs' Warehouse submits Westport must be a member of the ISO. This means ISO's statements to regulators are legally and factually the equivalent of statements by Westport to CRO and should be considered admissions by Westport.[15] That is why insurance trade organizations like ISO exist: to prepare, draft, and negotiate policy changes, *on behalf of their members*, with the

[14] *Id.* at 9-10 (emphasis added).

[15] *See Morton Int'l, Inc. v. General Acc. Ins. Co.*, 629 A.2d 831, 849-53 (N.J. 1993).

state regulators who represent consumers.[16] ISO's statements that, without a clarification through the Virus or Bacteria exclusion, the standard form language could be read to cover a Business Interruption loss from the presence of a virus are statements of Westport.

5. From 2007 through 2018, Courts Concluded that Policyholders Were Correct in Asserting that Events Rendering Property Unfit or Unsafe for Intended Use Caused Physical Loss or Damage.

After the insurance industry drafted the Virus or Bacteria Exclusion, courts continued to rule for policyholders in cases like this one under language like that at issue here.[17]

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[16] *Id.*

[17] In chronological order: *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.") (emphasis added); *Manpower Inc. v. Insurance Co. of the State of Pa.*, No. 08C0085, 2009 WL 3738099, at *1 (E.D. Wis. Nov. 3, 2009) (finding "*direct physical loss … or damage to*" a building adjacent to a building which collapsed despite the fact that the collapse did not cause any noticeable damage to the policyholder's occupied space) (emphasis added); *Travco Ins. Co. v. Ward*, No. 2:10cv14, 2010 WL 2222255, at *8-9 (E.D. Va. June 3, 2010) (finding that house built with Chinese drywall which emitted toxic gases, causing the policyholder to move out, had suffered *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, at least where the building in question has been rendered unusable by physical forces") (emphasis added); *In re Chinese Mfd. Drywall*, 759 F. Supp. 2d at 831 (finding that there "exists a covered *physical loss*" where "potentially injurious material" is "activated, for example by releases gases or fibers," and "that the presence of Chinese-manufactured drywall in a home constitutes a physical loss" because it "renders the [policyholders'] homes useless and/or uninhabitable") (emphasis added); *Association of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1068 (D. Haw. 2013) (applying Hawai'i law) (finding that intrusion of arsenic into roof caused "*direct physical loss or damage*" to the roof) (emphasis added); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, No. 2:12-cv-04418, 2014 WL 6675934, at *5-6 (D.N.J. Nov. 25, 2014) (concluding that "property can sustain *physical loss or damage* without experiencing structural

Decisions addressing claims for loss or damage from the pandemic have noted that courts, in wrestling with the issue since 1957, had essentially begged the insurance industry to make their language more specific. For instance, in *Cherokee Nation v. Lexington Insurance Co.*, No. CV-20-150, 2021 WL 506271 (Okl. Dist. Jan. 28, 2021), the policyholder, in response to the pandemic, temporarily closed its business operations to implement mitigation protocols and modifications, to allow its businesses to operate safely.[18] The policyholder sought coverage for its losses of income under a policy triggered by "all risk of direct physical loss or damage," which "important phrase" was not defined.[19] The insurance companies argued that "direct physical loss or damage" was a "phrase-of-art" which means "distinct, demonstrable, physical alteration to the property."[20]

The court disagreed. It first noted that the interpretation of this phrase "could have been preempted if [the insurance companies] would have simply defined the phrase within the [insurance] Policy," noting that "[c]arriers have utilized the phrase

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alteration," that "the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated," and therefore that the ammonia discharge caused direct physical loss or damage to the plant) (emphasis added); *Mellin*, 115 A.3d at 806 (holding that pervasive odor of cat urine was "*physical loss*" to condominium) (emphasis added); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-cv-01932-CL, 2016 WL 3267247, at *5-6 (D. Or. June 7, 2016), *vacated by joint stipulation*, 2017 WL 1034203 (Mar. 6, 2017) (finding smoke from wildfires caused "*physical loss or damage*" to outdoor theatre) (emphasis added).

[18] *Id.* at *1-2.

[19] *Id.* at *3.

[20] *Id.*

direct physical loss for over fifty (50) years and courts have begged carriers to define the phrase to avoid the precise issue before the Court now."[21] Later in the opinion, the court noted "[i]t is also notable that since at least 1968 [*i.e.*, since *First Presbyterian Church*], several courts have rejected [the insurance companies'] interpretation and instructed carriers to clearly limit *direct physical loss or damage* within their policies for it to have the meaning [the insurance companies] advance here," but the insurance companies "failed to do so."[22]

"Despite these pleas and the known confusion surrounding the phrase 'direct physical loss,' [the insurance companies] made no attempt to clarify or define that phrase within the [insurance] policy to avoid the [policyholder's belief or contention] that losses such as the closure of a business in response to the Pandemic would be covered – at least, not until it was too late."[23] Specifically, the insurance companies added a Communicable Disease exclusion the day after they were sued, which the court construed against them:

> The day after the [policyholders] filed this same action under this same policy, Defendant Insurers added a new Communicable Disease exclusion to the [insurance] Policy that preempted coverage due to the fear or threat of viruses. This action on the part of the Defendant Insurers can mean one of two things. Either the exclusion was added to provide clarity for [the insurance companies'] interpretation—i.e., that Pandemic-related closures like the one at issue here are not

[21] *Id.*

[22] *Id.* at *7 n.16.

[23] *Id.* at *3.

> covered—which underscores the confusion surrounding the existing policy language and the conclusion that the [insurance policy] is ambiguous. Or the exclusion was added because the [policyholders'] interpretation is correct—i.e., that Pandemic-related closures like the one at issue here are covered—and Defendant Insurers needed to create a truly new exclusion in order to avoid liability for such claims. In either event—even assuming the Defendant Insurer[s'] interpretation of the existing language is reasonable—Oklahoma law would require the Court to adopt the [policyholders'] interpretation.[24]

6. Insurance Companies Confirmed the Majority Rule that Events Rendering Property Dangerous or Unusable for Its Intended Use Cause Physical Loss.

Prior to the current run of pandemic-related claims, insurance companies had confirmed the status of the law discussed above. For instance, three months before the pandemic, Factory Mutual Insurance Company (part of FM Global, perhaps the most sophisticated property insurance company in the United States) admitted that "physical loss or damage" to property exists when the presence of a physical substance renders property unfit for its intended use, despite it causing **no** structural alteration to property.[25]

At issue in *Factory Mutual Insurance Co. v. Federal Insurance Co.* was a mold infestation in a "clean room" at a drug manufacturing plant.[26] Mold (and its spores), like SARS-CoV-2 virions, can exist on the surface of property and in the

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[24] *Id.* at *4.

[25] FM's Mot. *in Limine* No. 5 re Physical Loss or Damage, filed Nov. 19, 2019 as ECF#127 in *Factory Mut. Ins. Co. v. Fed. Ins. Co.*, No. 1:17-cv-00760-GJF-LF (D.N.M.) (attached hereto as Ex. 4).

[26] *Id.* at 3.

air. FM argued the mold infestation constituted "physical loss or damage" under a property insurance policy sold by Federal Insurance Company because the mold "destroyed the aseptic environment and rendered [the clean room] unfit for its intended use."[27] FM asserted case law "broadly interprets the term 'physical loss or damage' in property insurance policies."[28] Citing several of the cases cited above, FM asserted that loss of use is physical loss or damage:

> *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).[29]

FM reiterated that what was key was whether property could be used as it was used prior to the impacting event, and, essentially, that the Period of Restoration lasted until customers viewed the policyholder's location as safe:

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[27] *Id.*

[28] *Id.*

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

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

Moreover, FM conceded that, *at the very least*, it had put forward a reasonable interpretation of the undefined phrase "physical loss or damage" and even if Federal could propose a reasonable reading, this merely rendered the policy ambiguous.[31]

7. The Vast Majority of Property Insurance Policies in Effect in March 2020 Contained Express Virus Exclusions.

In the wake of the COVID-19 pandemic, the National Association of Insurance Commissioners called on insurance companies nationwide to report the percentage of commercial property policies they sold containing an exclusion "for Viral Contamination, Virus, Disease, Pandemic, or Similar Exclusion," which revealed that 82.83% of such policies sold in in 2020 had such an exclusion.[32]

8. Conclusion

The insurance industry (including Westport) has known for decades that "direct physical loss or damage" has covered claims where property has been

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

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

[32] *See* COVID-19 Property & Casualty Insurance Business Interruption Data Call (June 2020) (attached hereto as Ex. 5).

rendered unfit for use. They refused to clarify it. Instead, the industry developed a virus exclusion. Westport, however, refused to include the ISO virus exclusion here. That has dispositive consequences.

B. Where an Insurance Company Has Knowledge of an Ambiguity in Standard-Form Policy Language and Has the Ability To Resolve It but Fails To Do So, that Language Will Be Construed in Favor of Coverage.

Where an insurance company has knowledge that its standard-form policy language is ambiguous, and has the ability to resolve that ambiguity with more careful drafting, its failure to do so will be construed against it and in favor of coverage. As stated in one of the most influential insurance coverage cases, decided nearly fifty years ago and widely known in the insurance industry, when insurance companies fail to use clear and distinct language to exclude a cause of loss known in the market, especially in an all risk policy, they "act at their own peril."[33]

As demonstrated above, Westport was well aware that the "physical loss" or "physical damage" language in its Policy was at least ambiguous as to whether it was triggered by agents – such as virus, bacteria, ammonia, smoke, *etc.* – making ordinary use of the property dangerous. Further, Westport cannot dispute it could have tried to resolve that ambiguity in several ways:

[33] *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1001 (2d Cir. 1974).

First, Westport could have defined "physical loss," "physical damage," or even the word "physical," as it no doubt will in its brief to this Court, to make its restrictive view clear.

Second, like 83% of other insurance companies, Westport could have added an exclusion to its policy that specifically addressed loss or damage arising from a virus, like the ISO Virus or Bacteria Exclusion.

Westport's failure to resolve an ambiguity, about which it had abundant warning, must be construed against it. CRO, and *amicus curiae*, paid significant premiums for this sort of broad coverage. They paid those premiums to transfer the risk of a pandemic to their insurers. They transferred that risk so that, if the unthinkable happened, they would be protected. The Court should not permit insurers to escape their obligation, voluntarily assumed, because they want to be left unscathed by the COVID-19 disaster.

V. CONCLUSION

Insurers like Westport have known for decades that standard-form physical loss or physical damage language was at least ambiguous as to whether it covered events like the property rendered dangerous by a lethal virus. Westport sought neither to resolve that ambiguity by defining those terms to require alteration to property, nor to include ISO's Virus or Bacteria Exclusion. The still-remaining ambiguity must be construed against Westport and in favor of CRO.

Accordingly, the judgment below should be reversed.

Respectfully submitted,

Dated: November 15, 2021

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Dated: November 15, 2021

John N. Ellison

Counsel for Amicus Curiae The Chefs' Warehouse Inc.

EXHIBIT 1

The Washington Post
Democracy Dies in Darkness

Insurers knew the damage a viral pandemic could wreak on businesses. So they excluded coverage.

Some industry watchers predict 'a tidal wave of litigation' over whether policies should cover losses due to coronavirus closures

By Todd C. Frankel

April 2, 2020

  119

The forced closure of businesses nationwide because of the novel coronavirus would seem to be the perfect scenario for filing a "business interruption" insurance claim.

But most companies will probably find it difficult to get an insurance payout because of policy changes made after the 2002-2003 SARS outbreak, according to insurance experts and regulators.

SARS, which infected 8,000 people mostly in Asia and is now seen as foreshadowing the current pandemic, led to millions of dollars in business-interruption insurance claims. Among the claims was a $16 million payout to one hotel chain, Mandarin Oriental International.

As a result, many insurers added exclusions to standard commercial policies for losses caused by viruses or bacteria. Now, the added policy language will potentially allow insurance companies to avoid hundreds of billions of dollars in business-interruption claims because of the covid-19 pandemic.

"Insurers realized they would not be able to cover such a broad-scale event," said Robert Gordon, a senior vice president at the American Property Casualty Insurance Association.

Other types of insurance policies may still have to pay out. Personal travel and event cancellation policies are expected to face huge claims from the coronavirus pandemic, according to industry reports. But few successful claims are expected to come from traditional business insurance lines because of the exclusion of virus-related damages.

The insurance industry said that its policies are tightly regulated by state authorities and that the exclusions were necessary given the overwhelming number of claims that can come from a single disease outbreak.

"This is a scale that only the federal government can bridge," said David Sampson, president of the insurance trade group.

A global pandemic presents unique problems for insurers because, Sampson said, "by its very definition, you

can't diversify the risk."

But property and casualty insurance companies are facing growing pressure to tap the industry's $822 billion in cash reserves.

Lawmakers in New Jersey, Massachusetts and Ohio are considering forcing retroactive policy changes to cover coronavirus business-interruption claims. Insurers said they object to this move because the additional cost of such claims were not included in policy premiums.

Attorneys said they expect disputes over the precise wording of business insurance policies to generate court fights — similar to the battles with insurers after Hurricane Katrina in 2005, when homeowners and insurance companies fought over whether damages were caused by flooding or wind.

Making the current insurance situation even more complicated are the many different kinds of business insurance policies, some with boilerplate language and others filled with personalized exclusions and endorsements.

"We're going to see a tidal wave of litigation over the business interruption," said Ross Angus Williams, an attorney with the Bell Nunnally & Martin firm in Dallas. "It's really a Wild West situation for a lot of businesses as to whether they'll have coverage."

About one-third of U.S. businesses have "business interruption" insurance, which is intended to cover losses from an event that forces companies to suspend or stop operations. Many policies also have "civil authority" clauses that cover losses when a governmental agency stops a business from operating. A common example would be a fire that damages a restaurant and leads the fire marshal to close it down.

But most insurance policies require a physical loss to trigger coverage. A fire. A tornado.

"You can expect to hear, does contamination from a virus cause physical damage?" said Stephen Avila, professor of insurance at Ball State University.

That's the argument being made by Oceana Grill, a restaurant in New Orleans's French Quarter that, like every other restaurant in the city, has been ordered to stop offering sit-down service by an emergency declaration from the mayor.

Oceana Grill filed a lawsuit in a local court last month claiming the insurer should be required to pay a business-interruption claim because coronavirus had caused property damage by contaminating surfaces. An attorney for the restaurant did not respond to a request for comment.

A Native American tribe in Oklahoma, the Chickasaw Nation, also has sued insurers claiming that its losses from shuttering its casinos should be covered by its business-interruption insurance.

A well-known restaurant in California's Napa Valley, the French Laundry, also filed a lawsuit recently making similar claims.

State insurance commissioners are looking into the potential limitations of business insurance coverage for

coronavirus-related claims — with differing viewpoints.

“We understand the desire to have coverage in this space,” said North Dakota Insurance Commissioner Jon Godfread, “but many existing policies have specific exclusions to ‘viral pandemics,’ and business disruption coverage is generally triggered by actual physical damage. At this point, a pandemic is not considered physical damage.”

“This is really a contract issue and will ultimately be settled in the courts,” said Mississippi’s insurance commissioner, Mike Chaney.

Christina Haas, a spokeswoman for Delaware’s insurance office, recommended that business owners discuss their policies with insurers.

Avila, the Ball State professor, said the insurance disputes caused by coronavirus shows the need for a government-supported solution, such as a national pandemic insurance program, similar to the National Flood Insurance Program.

Pandemic business insurance — complete with virus coverage — is offered by the broker Marsh.

Interest in its PathogenRx insurance product has exploded in recent weeks — “it’s exponential,” said Chad Wright, the company’s head of risk analytics and alternative risk transfer.

The company began thinking about the problem several years ago and modeled the risks of different diseases. It launched its outbreak insurance in 2018.

A few companies in the hospitality and gaming industries showed interest.

But not a single policy was sold.

With reporting from Michael Majchrowicz in Fort Lauderdale, Kate Harrison Belz in Chattanooga and Sheila Eldred in Minneapolis.

EXHIBIT 2

INSURANCE JOURNAL

View this article online: https://www.insurancejournal.com/news/international/2020/03/04/560126.htm

Insurance Unlikely to Cushion Coronavirus Losses – But There Are Exceptions

Don't look for much relief from insurers to cushion losses from canceled events, travel disruptions and potential medical claims from the deadly Covid-19 virus that's sweeping across the globe.

The world's largest insurers have learned lessons from previous health crises, including the 2003 SARS outbreak. 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 90,000 people and left more than 3,000 people dead.

"While there is a significant risk of disruption, coronavirus-related claims will be low," analysts at Moody's Investors Service wrote in a note on Monday. "Business interruption claims will be limited as these policies commonly exclude outbreaks of infectious disease, and pay out only if physical damage occurs."

Claims from the SARS outbreak ended up spurring some property-casualty insurers to revisit policy language, particularly with "loss of attraction" clauses, according to Gigi Norris, co-leader of Aon Plc's infectious disease task force.

"SARS comes along and the insurers ended up paying some large losses," Norris said. "Since then, there's been a pullback from insurers for providing this kind of coverage."

Below are some of the areas where insurers stand to be affected by the virus.

Health Insurance

While most of the industry nervously leafs through policies and counts its exposure, firms offering health insurance policies may get more business.

Companies such as Prudential Plc stand to benefit from the virus's spread as more people seek cover. That was certainly the case back in 2003, when Asia represented a far smaller part of its business.

"Prudential generates almost half its operating profit in Asia and health and protection products are a significant part of its offering," Kevin Ryan, an analyst at Bloomberg Intelligence, wrote in a note. In the first nine months of 2003, when SARS struck, "Prudential reported a 17% rise in new business sales in local currency."

Health insurers in China are also expected to get a helping hand from the government.

"We expect coronavirus-related critical illness claims to be limited because the Chinese government has undertaken to cover the cost of care and treatment for those affected," Moody's said in a note on Monday.

Events Insurance

Events are particularly susceptible to an epidemic, and a number of large corporate fairs and conferences have been scrapped or postponed.

"Event cancellation is one area of insurance that may have losses," analysts at Fitch Ratings said in a note on Monday. "The largest event taking place is the Tokyo Olympics in July 2020. Industry experts anticipate coverage of approximately $2 billion for this event."

Informa Plc, which derived more than half of its 2018 revenues from events, has postponed several March and April exhibitions as a result of the virus. The London-based firm has fallen almost 23% so far in 2020, greater than the drop in the benchmark FTSE 100 index.

Mipim, the world's largest property fair, was postponed to later in the year, while the Mobile World Conference in Barcelona was canceled.

"With other companies, like logistics companies if shipments don't come through in the next few weeks, there will probably be some catch-up effect later down the line," said Michael Field, an analyst at Morningstar Inc. "With conferences and sporting events, generally, you've got tight windows and, if you miss them, that could be the end of it for a year or two."

Travel Insurance

The cost to insurers from payouts on travel insurance is likely to be minimal. Many travel policies exclude losses caused by epidemics, so unless consumers took out additional disruption cover they won't be able to claim for canceling travel plans, according to a statement on Allianz SE's travel insurance website.

Some insurers, including Allianz and AXA SA, have temporarily waived that condition for certain claims related to coronavirus.

Credit Insurance

A slowing economy and lagging consumer spending could lead to higher claims for credit insurance, and the longer the outbreak continues, the bigger the impact could be for firms like Coface SA and Allianz's Euler Hermes.

Allianz, Europe's largest insurer, says the biggest potential risk would be from any bankruptcies in Europe spurred by the virus's spread. Credit insurance protects companies when firm they do business with fail.

“The issue that may affect us is if you have massive bankruptcies in small- and medium-size companies, because we have the world market leader in credit insurance,” Chief Executive Officer Oliver Baete said in an interview with Bloomberg last week, referring to Euler Hermes, which it acquired in 2018.

While Allianz’s credit insurance business isn’t large in Asia, the firm has still been cutting such exposure in China for the past two months, he said.

Reinsurance

Reinsurers, firms that provide insurance for insurers, would need the death toll to rise into the hundreds of thousands before they took a big hit, but the effect of a full-scale pandemic would be sizable.

“It’s one of the biggest potential risks they face on a par with a 1-in-200-year hurricane or quake,” said Charles Graham, an analyst at Bloomberg Intelligence.

For instance, about 15% of SCOR SE’s regulatory capital is at risk in the event of a pandemic, but only in an extreme event that would see more than 10 million people die from the virus, according to company filings.

Munich Re has exposure of more than 500 million euros ($556 million) to contingency losses, should all events covered for pandemic be canceled, said Torsten Jeworrek, chief of the firm’s reinsurance unit.

For now, Munich Re’s “risk overall is pretty limited” because few clients include pandemic risks in their reinsurance coverage, Chief Financial Officer Christoph Jurecka said in an interview on Bloomberg Television on Friday. The risks are “easily digestible for us as we speak; if things go south substantially then the situation might change,” he said.

Financial Markets

Last month, the S&P 500 Index dropped and U.S. Treasury yields fell amid fears about the coronavirus’ impact. The upheaval in financial markets is likely to have a more material impact on the industry, according to Moody’s analysts.

Insurers such as MetLife Inc. and American International Group Inc. control billions of dollars in investments, pooling the money it takes in from policyholders. These funds come under pressure during bouts of market volatility.

“Significant deterioration in equity markets and widening credit spreads, along with even lower interest rates, will weigh on insurers’ profitability and capitalization,” analysts at Moody’s said in a report. “The expected economic slowdown will also have a negative impact on insurers’ business volumes.”

–With assistance from Dan Reichl.

Photograph: A Chinese worker checks the temperature of a customer as he wears a protective suit and mask at a supermarket in Beijing on Feb. 11, 2020. Photographer: Kevin Frayer/Getty Images.

Related:

- Parametric Insurance Could Offer Hotels Relief from Coronavirus Cancellations
- Handshakes, Buffets Out. Otherwise It’s Insurance Conferences-as-Usual Amid Coronavirus.
- Fitch Sees Only ‘Modest Impact’ on U.S. P/C Insurance from Coronavirus
- Re/Insurers to Feel Coronavirus Impact From Financial Market Volatility: Moody’s
- Global Insurers Face Hefty Claims If Coronavirus Forces Olympics Cancellation
- Coronavirus Raises Insurance Questions But Catastrophe-Tested Insurers Are Prepared
- Insurers Rush to Exclude Coronavirus Epidemic from Event-Cancellation Protection
- Coronavirus Leads Companies with Supply Chain Disruptions to Invoke ‘Force Majeure’
- Coronvirus Led to Cancellation of Telecoms Meeting, but Insurance Cover Is Excluded
- Thai Insurer Offers First Coronavirus Insurance Policy
- Many Global Firms Face High Coronavirus Costs Due to Insurance Exclusions

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EXHIBIT 3

ISO Circular

FORMS - FILED
FROM: LARRY PODOSHEN, SENIOR ANALYST

JULY 6, 2006

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

Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

About This Filing

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

New Form

We are introducing:

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

Related Filing(s)

Rules Filing CF-2006- OVBER

Introduction

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

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

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

Current Concerns

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

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

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

Features Of New Amendatory Endorsement

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

Copyright Explanation

Important Note

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

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

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

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

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

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

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

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

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

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Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

About This Filing

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

New Form

We are introducing:

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

Related Filing(s)

Rules Filing CF-2006-OVBER

Introduction

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

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

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

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

Current Concerns

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

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

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

Features Of New Amendatory Endorsement

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

Copyright Explanation

Important Note

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

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

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

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other 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 supersedes any exclusion relating to "pollutants".

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

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EXHIBIT 4

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

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

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

I. INTRODUCTION

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

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

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

II. ARGUMENT

A. Legal Standard.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/*Maureen A. Sanders*
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EXHIBIT 5

National Association of Insurance Commissioners

COVID-19 PROPERTY & CASUALTY INSURANCE BUSINESS INTERRUPTION DATA CALL

PART 1 | PREMIUMS AND POLICY INFORMATION

JUNE 2020

Notes and Disclaimers Regarding Data Received

The purpose of the data call is to determine the relative size of the market and potential exposure for losses due to business interruption (BI) related to COVID-19.

The data call sought total premium written for all policies with BI coverage from all U.S. insurance groups and legal entities not part of a group (hereafter "insurer") that wrote BI coverage in 2019. The policy types were separated into two categories, "businessowners policy" (BOP) and "other than BOP." Other than BOP includes commercial multiple peril as well as any other BI coverage filed under inland marine or other NAIC annual financial statement lines of business.

Industry provided feedback prior to the data call that they could not separate the BI portion of the premium in all instances. For example, in a BOP where BI coverage is part of the base policy. An accommodation was made to allow the total policy premium (Total Premium Written) to be reported in addition to the BI portion of the premium (BI Premium Written) where it could be separately determined.

Additionally, the data call sought policy counts, the percentage of policies with virus exclusion and the percentage of policies with physical loss requirements by size of business (small, medium, and large). The definition of size of business was based on the number of employees although alternatives were offered if the number of employees was not retained by the reporting insurer. Small means insured businesses with 100 or fewer employees. Medium means insured businesses with 101-500 employees. Large means insured businesses with 501 or more employees.

Insurers were also asked to provide their percentage of policies with virus exclusion as well as the percentage of policies with physical loss requirements. These figures represent the percentage of policies with exclusion and the percentage of policies with physical loss requirements for in force policies as of 12/31/2020 with BI coverage.

Additional information regarding the data call can be found here:
https://content.naic.org/industry_property_casualty_data_call.htm.

Due to limitations in state law and given the nature of this inquiry, the group/company-specific data for the state of Texas is not available to regulators of other participating states. Regulators from the state of Texas are similarly limited in access to Texas data alone.

Please note the following: New Mexico and New York are not participating states. Although some data may be reported based on the extent of a participating state's authority, the data for these states should not be considered comprehensive or fully representative.

Group and company level data collected by and on behalf of Participating States (the "Confidential Information") shall be deemed to be confidential and exempt from public disclosure in accordance with state law.

COVID-19 Property & Casualty Business Interruption Data Call Aggregate National Data

Total Premium Written for Policies with Business Interruption Coverage	$48,734,265,949
Premium Written for Business Interruption Coverage (BI Premium Written)	$2,431,742,896
Small Business Policies In Force	6,918,024
Medium Business Policies In Force	629,344
Large Business Policies In Force	151,219
Percent of Small Business Policies with Exclusion	83%
Percent of Medium Business Policies with Exclusion	82%
Percent of Large Business Policies with Exclusion	78%
Percent of Small Business Policies with Physical Loss Requirement	98%
Percent of Medium Business Policies with Physical Loss Requirement	97%
Percent of Large Business Policies with Physical Loss Requirement	85%

COVID-19 Property Casualty Business Interruption Data Call Summary

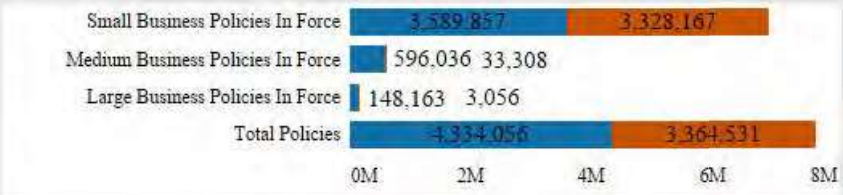
Policy Type
Other than BOP Businessowners Policy (BOP)

239 National Groups with Premiums

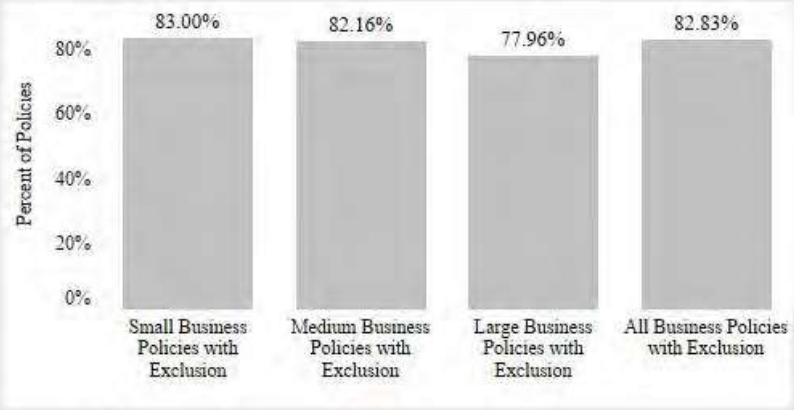
Premium by Business Type National

Policy Type	Total Premium Written	BI Premium Written
Businessowners Policy (BOP)	$9,919,595,690	$132,350,763
Other than BOP	$38,814,670,259	$2,299,392,133
Grand Total	$48,734,265,949	$2,431,742,896

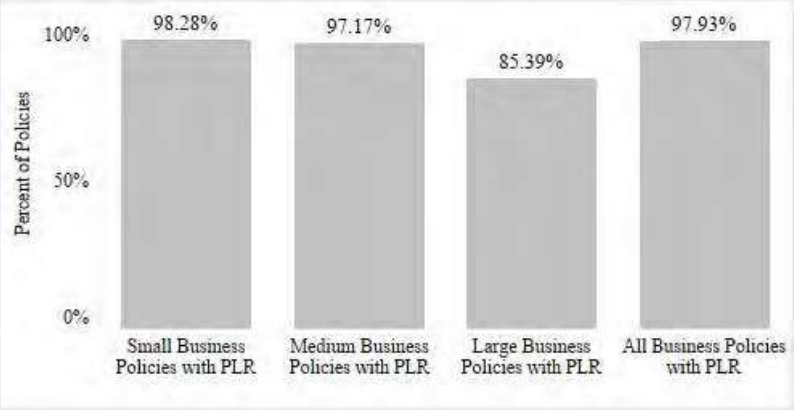
Number of Policies by Business Type National



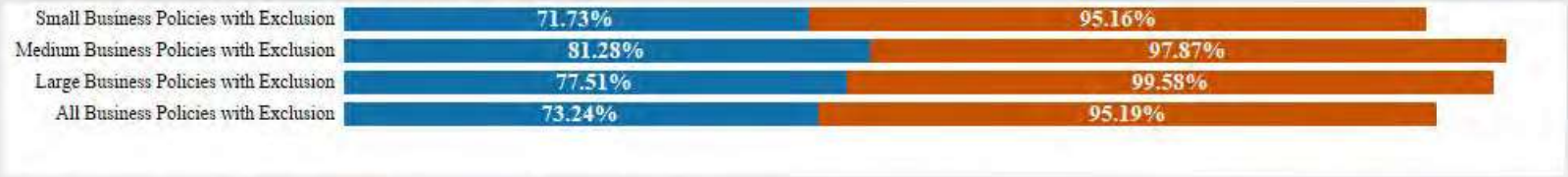
Percent of Policies with Exclusion
All Policy Types & Business Sizes



Percent of Policies with Physical Loss Requirement
All Policy Types & Business Sizes



Percent of Policies with Exclusion by Business Size National



Percent of Policies with Physical Loss Requirement by Business Size National