

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

|                                     |   |                          |
|-------------------------------------|---|--------------------------|
| WINDBER HOSPITAL d/b/a CHAN         | : | No: 3:20-cv-00080-KRG    |
| SOON SHIONG MEDICAL CENTER,         | : |                          |
| on behalf of himself and all others | : |                          |
| similarly situated                  | : |                          |
|                                     | : |                          |
|                                     | : |                          |
| Plaintiff,                          | : | COMPLAINT – CLASS ACTION |
|                                     | : |                          |
|                                     | : |                          |
| vs.                                 | : |                          |
|                                     | : |                          |
| TRAVELERS PROPERTY CASUALTY         | : |                          |
| COMPANY OF AMERICA                  | : | JURY TRIAL DEMANDED      |
|                                     | : |                          |
| Defendant.                          | : |                          |

**MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR JUDGMENT ON PLEADINGS**

**Overview**

The Windber Hospital d/b/a Chan Soon Shiong Medical Center (“Windber”) is the named insured under a policy issued by the Travelers Property Casualty Company of America (“Travelers”). A copy of the Policy is attached to the Complaint as Exhibit “A”. On March 19, 2020, on March 23, 2020, April 1, 2020 and April 20, 2020, Governor Tom Wolfe issued various Orders necessitating the partial suspension of operations of the medical facility of Windber. See Complaint, ¶¶ 11-24. Accordingly, Windber made claim upon Travelers seeking coverage under the terms of the policy when there is a necessary suspension of operations. Travelers denied coverage. A copy of the letter from Travelers is attached as Exhibit “B” to the Complaint.

Windber then instituted this lawsuit. Travelers has filed a Motion for Judgment on the Pleadings which Windber opposes. In turn, Windber has filed a separate Motion for Summary Judgment.<sup>1</sup>

### **Summary of Argument**

In order for an insured to be entitled to coverage, two things must be true. First, the insured's claim must be encompassed by one or more of the insuring agreements in the policy. Second, none of the exclusions in the policy can be applicable. Based upon the undisputed facts in this matter, Windber is entitled to coverage both under the "Business Income" insuring agreement in the policy,<sup>2</sup> and under the "Civil Authority" insuring agreement in the policy.<sup>3</sup> Moreover, no exclusion eliminates the coverage that Windber is seeking, namely, the coverage for "continuing normal operating expenses".<sup>4</sup>

### **Argument**

#### **(a) If the Insured's Interpretation of the Policy Language is Reasonable, the Insured's Interpretation Must Be Adopted**

The methodology to be employed in resolving the legal coverage dispute is of prime importance. When interpreting an insurance policy, any ambiguity must be construed in favor of the insured. Ambiguity exists where more than one reasonable interpretation of policy language is present. Here, there are two interpretations of the policy language, namely that of Travelers and

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<sup>1</sup> Windber asserts that it is entitled to Judgment as a matter of law and, as such, Windber has filed for Summary Judgment on the legal coverage issues in addition to opposing the Motion for Judgment on the Pleadings of Travelers.

<sup>2</sup>See part (b) of this memorandum.

<sup>3</sup>See part (c) of this memorandum.

<sup>4</sup>See part (e) this memorandum. Windber is not seeking coverage for any other benefit, such as lost profits.

that of Windber. If Windber's interpretation of the policy is reasonable, i.e. interpretation of the words used in the policy reasonably supports the insured's position, then the policy is ambiguous. That ambiguity is to be resolved in favor of the insured, i.e. Windber. As such, Windber must be afforded coverage. The position of the insurer must be rejected. In fact, it is irrelevant whether the insurer's interpretation may be considered to be more reasonable than the insured's interpretation. In fact, adopting Travelers' position in that context, would be resolving the ambiguity in favor of the insurer, in direct contravention of Pennsylvania law. As discussed in the leading treatise on insurance coverage issue, Windt, Insurance Claims & Disputes (Thomson/West 2013 6<sup>th</sup> Edition) (2020 Supplement), Section 6.2, pages 6-60 to 6-62, a policy is ambiguous if "it can be given two alternate reasonable interpretations," and if an ambiguity exists, "the interpretation that is most favorable to the insured will be adopted". In fact, as discussed in Windt, Section 6.2, page 6-65:

It is not enough for the insurer's interpretation to be adopted that its interpretation is more reasonable than the insured's interpretation. Otherwise, one would be resolving the ambiguity in favor of the insurer, in contravention of the foregoing rules.

Among the cases cited in Windt and the 2020 Supplement are Medical Protective Co. v. Watkins, 198 F.3d 100, 104 (3d Cir. 1999) (Pennsylvania law) (Insurer argued that an exclusion applied, and the court did not dispute that the insurer's interpretation was reasonable. The court nevertheless held in favor of the insured because "the interpretation offered by the insured was also reasonable." The court also reiterated the principle that "if a court should err in determining the meaning of an insurance policy provision, its error should be in favor of coverage for the insured"); Weisman v. Green Tree Ins. Co., 447 Pa. Super. 549, 670 A.2d 160, 162 (1996) (Although the insured's suggested definition of the word "explosion" in the policy

was not “commonly used,” court held in favor of the insured because the word “explosion” was “susceptible to more than one meaning”); General Refractories Co v. First State Ins. Co., 94 F. Supp.3d 649, 658, 660 (E.D. Pa. 2015) (“Where more than one reasonable construction exists, the construction that favors coverage must be applied.” “As between Travelers and (the insured), which proffers the more reasonable interpretation... is not decided here.” It is enough that the insured’s interpretation “is objectively reasonable. Travelers has not met its burden of showing that (the insured’s) interpretation is not reasonable”). See also, e.g., Perry v. Allstate Indem Co., 953 F.3d 417, 421 (6th Cir. 2020) (Ohio law) (“It will not suffice for the insurer to demonstrate that its interpretation is more reasonable than the policyholder’s. Instead, in order to defeat coverage, the insurer must establish not merely that the policy is capable of the construction that it favors, but rather that such an interpretation is the only one that can fairly be placed on the language in question. If the policy is ambiguous, and the insured’s interpretation is reasonable, the insured prevails”)(emphasis in original); Mitchell v. State Farm Fire & Cas. Co., 954 F.3d 700,706 (5<sup>th</sup> Cir. 2020) (Mississippi law) (“Since (insured’s) interpretation... must prevail if the term is ambiguous, we need only determine whether (the insured’s) interpretation is a reasonable one - - not necessarily the most reasonable”). Using this methodology, which it must, the Court is compelled to find in favor of Windber.

As discussed more fully in this Memorandum, both Travelers and Windber posit reasonable interpretations of the “Business Income” portion and the “Civil Authority” portion of the policy that lead to the conclusion that the insured is entitled to coverage under both of those coverage parts by reason of the government’s virus related directives. Travelers need not argue that its interpretation of the policy is reasonable. This is certainly so. The only issue is whether Windber’s policy interpretation is also reasonable. If it is, the policy is ambiguous; that ambiguity

can only be resolved one way. This Court is bound to conclude that Windber is entitled to coverage under both of those coverage parts. Any argument of Travelers that its interpretation of the policy language is more reasonable is of no consequence. Travelers cannot prevail by arguing that its reasonable interpretation of policy language leads to the conclusion that coverage does not exist. While Travelers' interpretation is arguably reasonable, the only way that Travelers can prevail is if the policy interpretation set forth by Windber is absurd. If Windber's interpretation is reasonable, which is manifestly the case, an ambiguity exists which *must* be resolved in favor of Windber.<sup>5</sup> Judgment should be entered in favor of Windber in this case.

**(b) Coverage Exists Under the Insuring Agreement  
in the Business Income Portion of the Policy**

**(1) Generally**

The prerequisite to coverage under the insuring agreement for "Business Income"<sup>6</sup> is that the suspension of the insured's operations have been caused by "direct physical loss of or damage to property" at the insured premises (Windber's medical center). Coverage exists, therefore, either: (a) if Windber suspended operations because of a direct physical loss *of* property; or (b) if Windber suspended operations because of direct physical damage *to* property.<sup>7</sup> For the reasons discussed below, the policy language can reasonably be interpreted to lead to the conclusion that Windber's

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<sup>5</sup> It is for the Court to interpret the insurance policy. See Republic Franklin Insurance Co. v. Brothern Mutual Insurance Co., 436 F. Supp. 3d 817-820 (E.D. Pa. 2020). That interpretation should be in favor of Windber.

<sup>6</sup>See the first page of the Business Income Coverage form.

<sup>7</sup>The loss must also have been caused by a Covered Cause of Loss. That issue is discussed later in this memorandum.

suspension of operations was caused both by a direct physical loss *of* and by direct physical damage *to* property. For two independent reasons, therefore, the prerequisites to coverage under the “Business Income” coverage part have been satisfied.

(2) **Direct Physical Loss**

The insuring agreement for Business Income, set forth on the first page of the Business Income policy form, uses the phrase “physical loss of or damage to” property. The word “loss,” as defined in the dictionary, can mean either of two things: (1) detriment/disadvantage, or (2) something that is lost (cannot be found).<sup>8</sup> By predicating coverage upon either “loss of” property or “damage to” property, the term loss of can only mean “loss of use” of the property. The term “of” following loss is important. The policy does not reference “loss to” property. Travelers will argue that under the specific words of the Business Income insuring agreement, “loss of” property can only mean “unable to find”. The word “loss” is used in conjunction with the word “of”, i.e. the policy references “loss. . . of” property. Travelers’ argument is without merit. As explained below, the only thing that the words “loss of...property” can refer to is a “loss of” use of the property. In short, Travelers has used, in its policy, words that do have a clear meaning, which create an ambiguity; that ambiguity must be resolved in favor of the insured, Windber.

Focus, therefore, must be directed to the language of the Business Income insuring agreement. After stating that coverage can exist for “physical loss of ...property” or for “physical... damage to property,” the insuring agreement then goes on to say that the “loss or damage” must be caused by or result from a Covered Cause of Loss. A Covered Cause of Loss means “direct

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<sup>8</sup>Dictionary.com.

physical loss.”<sup>9</sup> As discussed above, a “loss” can mean a detriment/disadvantage or something that is lost. Putting that all together, the insuring agreement provides as follows:

- A. Coverage exists if the suspension of the insured’s operations was caused by “direct physical loss of ...property” if the loss of property was caused by direct physical detriment to property.

AND

- B. Coverage exists if the suspension of the insured’s operations was caused by “direct physical... damage to property” if the damage to the property was caused by direct physical detriment to property.

If, as Travelers contends, the words “loss of ... property” mean lost (cannot be found), the first of the foregoing coverages would not make sense. Replacing the words “loss of property” with property that has been “lost,” the insurance agreement would read as follows:

- A. Coverage exists if the suspension of the insured’s operations was caused by property that has been lost if being unable to find the property was caused by or resulted from direct physical detriment to the property (or from being unable to find the property).

That makes no sense. One thing, therefore, is irrefutable. When the words “loss of” property are used in the Business Income insuring agreement, they mean something other than property that has been lost. What, then, do the words mean? The only other possible definition of the words “loss of” property is a loss of use of the property. (At minimum, that is a reasonable interpretation.) That is true because it is only if the words “loss of ...property” mean loss of use that the insuring agreement makes sense. The insuring agreement would reasonably read as follows:

- A. Coverage exists if the suspension of the insured’s operations was caused by property that could not be used if the property could not

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<sup>9</sup>Page two of the Business Income Coverage Form states, in relevant part, that Covered Causes of Loss means “direct physical loss....”

be used because of, or as a result of, direct physical detriment to property.

At a minimum, that is a reasonable policy interpretation. As such, Judgment must be entered in favor of Windber.

What's more, the insurance policy uses the phrase "physical loss of or (physical) damage to" property elsewhere in the policy, and (consistent with the use of that phrase in the Business Income insuring agreement) when the phrase is used, it cannot mean property that has been lost. For example, paragraph g(2), on page 7 of the basic Property Coverage Form, states that coverage exists for "direct physical loss of or damage to" property caused by "fungus, wet rot or dry rot." If the words "loss of" property meant "lost (cannot be found), that provision would be nonsensical, since adding fungus or rot to a product would not cause the product to be "lost" (unable to be found). Necessarily, therefore, for the additional reason, when the same words - - "loss of" property - - are used in the Business Income insuring agreement in the policy, the words mean something other than property that has been lost (cannot be found).<sup>10</sup>

Similarly, paragraph 4(b)(1), on page 2 of the Business Income Coverage form, states that coverage exists if there is "physical loss of or damage to property" caused by a suspension of

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<sup>10</sup>The same words used in different insuring provisions of an insurance policy must be given the same meaning. See, e.g., ML Direct, Inc. v. BIG Specialty Insurance Co., 79 Cal. App. 4th 137, 93 Cal. Rptr. 2d 846, 850 (2d Dist. 2000) ("words used in a certain sense in one part of a contract are deemed to have been used in the same sense elsewhere"); Solvent Underwriters Subscribing to Energy Ins. Intern., Inc. Cover Note No. ECI-3824 v. Furmanite America, Inc., 282 S.W.3d 661, 670 (Tex. App. Houston 14<sup>th</sup> Dist. 2009), review denied, (Aug. 21, 2009) (applying Texas Supreme Court's rule that "words used in one sense in one part of a contract are, as a general rule, deemed to have been used in the same sense in another part of the instrument, where there is nothing in the context to indicate otherwise"); Atlantic Permanent Federal Sav. and Loan Ass'n v. American Cas. Co. of Reading, Pa., 839 F.2d 212, 219-20 (4th Cir. 1988) ("We think it highly unlikely that the parties intended the term 'loss' . . . to have a different meaning in calculating the applicable deductible than it has in determining the insurer's maximum coverage" under the insuring clause).



operations at a dependent property. Once again, if the words “loss of” meant “lost” (cannot be found), that provision would be nonsensical, since a suspension of operations would not cause property to be “lost” (unable to be found). In the same vein, the first paragraph of the Utility Services endorsement states that coverage exists “for loss of or damage to” property caused by an “interruption of utility service.” Once again, if the words “loss of” meant “lost (cannot be found), that provision would be nonsensical, since an interruption of utility services would not cause property to be “lost” (unable to be found).

Briefly summarizing, the words “loss of ... property” in the Business Income insuring agreement should be interpreted to mean loss of use of the property. As discussed above, because of the “Covered Cause of Loss” requirement the policy affords coverage if there has been “direct physical loss of or damage to property.” The words “loss of...property” mean something other than “damage to property,”<sup>11</sup>. As discussed above, they cannot mean property that has been lost. It is reasonable, therefore, to interpret the “loss of” property language to be applicable when there has been a loss of use of the property. That gives the word “loss” meaning and takes into account the existence of the word “of” in the policy language. As a result, it is reasonable to conclude that coverage exists in the matter at hand because, by reason of the government directive, Windber has

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<sup>11</sup>When one speaks of a “loss of property,” one is obviously saying something different than a “loss to property.” By the same token, when one speaks of a “loss of property,” one is obviously saying something different than “damage to property.” Moreover, the insuring agreement already states that it applies to “damage to property.” In order to give the words “loss of property” meaning, therefore, the words have to mean something other than “damage to property.” It is a fundamental rule of insurance contract construction that the words used in a policy should not be given an interpretation that would render the words superfluous. E.g., Lower Paxton Tp. v. U.S. Fidelity and Guar. Co., 383 Pa. Super. 558, 557 A.2d 393, 402 (1989) (policy should not be interpreted so as to render a word in the policy “surplusage”); Continental Ins. Co. v. McKain, 820 F. Supp. 890, 897 (E.D. Pa. 1993), judgment aff’d, 19 F.3d 642 (3d Cir. 1994) (“when there are alternative readings of a clause in a contract, the rule of construction is that the one that avoids surplusage should be chosen”).

been unable to use its medical center (the insured premises). That is, it is reasonable to say that there has been a “physical loss of property” because there has been a loss of use of the (physical) building.

Unsurprisingly, the case law is consistent with the foregoing analysis. Courts interpreting the same policy language that is at issue in the matter at hand have held that there can be a physical loss of a building without there having been a physical alteration of the building. It is enough that there has been a loss of use of the building. Illustrative cases include Murray v. State Farm and Cas. Co., 203 W.Va. 477, 509 SE.2d 1, 17 (1998) (“Direct physical loss’... may exist in the absence of structural damage to the insured property.... Losses... rendering the insured property unusable or uninhabitable” can be covered “in the absence of structural damage to the insured property”) (emphasis added); Sentinel Management Co v. New Hampshire Ins. Co., 563 NW.2d 296, 300 (Minn. App. 1997) (“Direct physical loss may exist in the absence of structural damage to the insured property....Although asbestos contamination does not result in tangible injury to the physical structure of a building, a building’s function may be seriously impaired or destroyed and the property rendered useless by the presence of contaminants”)(emphasis added); Matzner v. Seaco Ins. Co., 9 Mass L. Rptr. 41, 1998 WL566658 (Sup.Ct. August 12, 1998) (“(T)he phrase ‘direct physical loss or damage’ is ambiguous in that it is susceptible of at least two different interpretations. One includes only tangible damage to the structure of insured property. The second includes a wider array of losses”) (collecting cases); Motorist Mut. Ins Co. v. Hardinger, 131 Fed. Appx. 823, 826 (3d Cir. 2005) (“direct physical loss or damage” requirement satisfied by e-coli, which had “reduced the use of the property to a substantial degree”) (emphasis added); Port Authority of New York and New Jersey v. Affiliated FM Ins. Co., 311 F.3d 226, 236 (3d Cir.

2002) (New York and New Jersey law). (T)he policies cover “physical loss,” as well as damage. When the presence of large quantities of asbestos in the air in a building is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner. (Emphasis added)). To sum up, the interpretation given the words “physical loss of property” by the foregoing courts is, at a minimum, reasonable. As made clear by the above discussion, it is reasonable to say that there is a “physical loss of” use of a building when the building cannot be used. Windber’s building could not be fully used because of a government directive. As a result, subject to one proviso, Windber is entitled to coverage because its suspension of operations at the building was caused by the fact that the building could not be used. The proviso is that, as discussed above, the government directive (the cause of the loss of use) must itself have been caused, at least in part, to direct “physical loss”:<sup>12</sup> that is, tied to a physical detriment.<sup>13</sup> That connection exists because (1)

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<sup>12</sup>The immediate cause of the business suspension was the government directive. The indirect (proximate) cause of the business suspension was the physical loss. The policy language does not (unambiguously) require that the immediate cause of the business suspension have been physical loss. To the contrary, any cause will suffice. The policy requires only that the suspension of the insured’s operations have been “caused by” physical loss. A “cause” can be direct, indirect, proximate, etc. At a minimum, therefore, the policy is ambiguous with regard to whether an indirect proximate cause is sufficient. That is, since the policy uses the word “caused” (instead of “directly caused”), the policy can reasonably be read to allow an indirect (proximate) cause to suffice. E.g., SW Energy Corp v. Continental Ins. Co., 1999 UT 23, 974 P.2d 1239, 1243 (1999) (Exclusion eliminated coverage for damage “caused by” corrosion. Court held that “caused by” unambiguously included damage even indirectly caused by corrosion, since “the language of the policy does not distinguish between direct and indirect losses”).

When Travelers wanted to limit its coverage to “direct” causes, it did so. See, for example, paragraph 4(a), on the second page of the Crime Coverage form. The paragraph states that in order to be entitled to coverage for money orders, the loss/damage had to have “result(ed) directly” from certain actions. Accordingly, in that coverage part, Travelers elected to limit the risk that it assumed to direct causes. Travelers was unwilling to cover loss that had indirectly been caused. By comparison, in the Business Income portion of the policy, Travelers did not elect to limit its coverage to direct causes

<sup>13</sup>As discussed above, the dictionary definition of the word “loss” is “detriment.”

the loss of use of the insured's premises was caused by the government's stay-at-home directive, and (2) consistent with the discussion in the next section of this memorandum, the government's stay-at-home directive was caused, in part, by a physical detriment to property - - virus on building surfaces in the city.<sup>14</sup> The connection would exist, however, even if there had not actually been a virus on building surfaces in the city. The policy's definition of "covered cause of loss" is satisfied merely by the "risk of direct physical loss."<sup>15</sup> The word "risk" must be given effect. That is, the policy provision cannot be given the meaning that it would have had if the word "risk" had not been included in the provision.<sup>16</sup> Accordingly, the "covered cause of loss" requirement was satisfied merely by the fact that the government's stay-at-home directive was caused, in part, by the risk of a physical detriment to property.

### (3) **Direct Physical Damage**

The virus is on surfaces, including building surfaces, from which the virus can come into contact with people. The question, therefore, insofar as coverage is concerned, is whether the virus, when it is on building surfaces, constitutes damage to the building. The answer is yes it does. As

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<sup>14</sup>The next section of this memorandum discusses the fact that, consistent with analogous case law, the presence of the virus on building surfaces constitutes "damage" to the building. Even if, however, the virus on a building's surface does not constitute "damage" to the building, it is certainly reasonable to say that the virus on a building's surface constitutes a "detriment" to the building.

<sup>15</sup>Enclosed as Exhibit "A" are copies of industry-standard Insurance Services Office policy forms in which the term "covered cause of loss" is defined as a "direct physical loss" and does not include the word "risk." Paragraph 3, on the second page of the Business Income Coverage Form, states that the definition of "Covered Cause of Loss" is set forth in the "Causes of Loss" form, and the first paragraph of the Causes of Loss form defines a Covered Cause of Loss as a "direct physical loss," not as a "risk of direct physical loss."

<sup>16</sup>See, e.g., Lower Paxton Tp v. U.S. Fidelity and Guar Co., 383 Pa. Super. 558, 557 A.2d 393, 402 (1989) (policy should not be interpreted also as to render a word in the policy "surplusage").

a result, coverage exists not only because of the “loss of” language in the policy (discussed above), but also because of the “damage to” language in the policy.

By way of background, the courts around the country are split with regard to whether the words “physical damage” require a physical alteration of an object,<sup>17</sup> or whether it is enough that there has been a physical change of condition. A well-reasoned case adopting the latter rule is Oregon Shakespeare Festival Assn. v. Great American Ins. Co., 2016 WL 3267247 (D. Or. March 16, 2017), vacated by stipulation of the parties, 2017 WL 1034203. In that case, smoke, soot and ash from wildfires “accumulated on the surface of the hard plastic seats and concrete ground of (the insured’s) open air theater.” The insured sought business income loss coverage for the performances that were cancelled “due to poor air quality and the related health concerns,” even though the soot and ash “had been cleaned up... well before any scheduled performances....”

The policy in the Great American case conditioned coverage on the suspension of the insured’s operations having been “caused by direct physical loss of or damage to property at the (insured) premises....”. The insurance company denied coverage because there had not been “any permanent or structural damage to (the insured’s) property.” The court held in favor of the insured, stating:

In this case, the parties disagree over the term “direct physical loss of or damage to covered property.”

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(The insured) defines the term in question by relying on Webster’s dictionary, defining “physical” as “of or belonging to all created existence; relating to or in accordance with the laws of

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<sup>17</sup>See the Port Authority case, discussed in section (b)(2) of this memorandum .

nature; of or relating to natural or material things as opposed to things mental, moral or spiritual.... (The insured) distills this definition down to mean a “natural or material thing.” “Loss” is defined as the “state or act of being destroyed or placed beyond recovery” or the amount of an insured’s financial detriment due to occurrence of a stipulated event...” Id. “Damage” means “loss due to injury;” injury or harm to person, property, or reputation.” Id. (The insured) asserts that these definitions, taken together, create a plain meaning of “physical loss or damage” as “any injury or harm to a natural or material thing.” Based on this interpretation, (the insured) claims that the wildfire smoke caused injury or harm to the interior of the theater, which include the air within the theater.

\* \* \*

In Farmers Ins. Co. of Oregon v. Trutanich, 123 Or. App. 6, 858 P.2d 1332 (1993), the Oregon Court of Appeals was asked to determine whether or not a “pervasive odor” in a residential home caused by a subtenant's illegal methamphetamine operation was considered a “direct physical loss”.... (The court held that it was a direct physical loss.)

Trutanich was cited favorably along with Largent v. State Farm Fire & Cas. Co., 116 Or.App. 595, 842 P.2d 445(1992), by District of Oregon Judge Hubel to stand for the proposition that “physical damage can occur at the molecular level and can be undetectable in a cursory inspection.” Columbiaknit, Inc. v. Affiliated FM Ins. Co., 1999 WL 619100, at \*6 (D. Or. Aug. 4, 1999).

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Additionally, this Court finds a District of New Jersey case to be extremely persuasive based on the similarities of the facts and the insurance policy terms at issue. In Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am., 2014 WL 6675934, at \*3 (D.N.J. Nov. 25, 2014), an accidental release of ammonia into a packaging facility caused the facility to be shut down for one week while the ammonia dissipated. The evidence in the record showed that in order to remedy the problem, the facility had to “air the property” and hire an outside company “to do the cleanup... Wash down anything with water ... [They] brought in dry ice, trying to neutralize the [ammonia] inside the plant. Set up fans and all that.” Id. at \*4. The

defendant insurance company asserted that the incident was not covered because “physical loss or damage” necessarily involves a “physical change or alteration to insured property requiring its repair.” *Id.* at \*2. The court disagreed, noting that “while structural alteration provides the most obvious sign of physical damage,” various courts have found “that property can sustain physical loss or damage without experiencing structural alteration.” *Id.* at \*5. See also Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co., 406 N.J. Super. 524, 543, 968 A.2d 724, 736 (App. Div. 2009) (holding that property can be physically damaged, without undergoing structural alteration, when it loses its essential functionality). The court concluded that the packaging facility incurred “physical loss or damage” when ammonia gas was discharged into the facility’s air... and rendered the facility temporarily unfit for occupancy.” *Id.* at \*8.

Other courts around the country have held that damage does not have to be “structural” to be “physical,” as long as it renders the property unusable for its intended purpose. See, e.g., Western Fire Ins. Co. v. First Presbyterian Church, 165 Colo. 34, 437 P.2d 52 (1968) (where gasoline vapors penetrated the foundation of the insured church and accumulated, rendering building uninhabitable, the property was held to have suffered a “direct, physical loss”); Matzner v. Seaco Ins. Co., 1998 WL 566658 (Mass. Super. 1998) (holding that carbon monoxide levels in an apartment building sufficient to render building uninhabitable were a “direct, physical loss”).

\* \* \*

In this case, wildfire smoke infiltrated the interior of the theater, making it uninhabitable and unusable for holding performances. Like the home infiltrated by methamphetamine odor, or the furnace contaminated by lead particles, or the facility filled with ammonia, the theater filled with smoke was unusable for its intended purpose. Even though the loss or damage was not structural or permanent, the property experienced a loss of “essential functionality.” ... Based on the case law, as discussed above, the Elizabethan Theatre sustained “physical loss or damage to property” when the wildfire smoke infiltrated the theater and rendered it unusable for its intended purpose.

Accord, e.g., Travco Ins. Co. v. Ward, 715 F. Supp.2d 699, 703, 707–708 (ED Va 2010), wherein the Court reasoned:

The Ward Residence contains walls that were constructed using sheets of Chinese Drywall (“the Chinese Drywall”). Over time, the Chinese Drywall in the Ward Residence has released sulfuric gas into the residence.

\* \* \*

With regard to the claim for the cost of removing the Chinese Drywall, (the insurer) argues that “the Drywall has not sustained a ‘direct physical loss,’ and therefore does not fall within the grant of coverage in the Policy....

\* \* \*

The parties disagree as to whether the Ward Residence has suffered a “direct physical loss”.... (The insurer) argues that there has been no direct physical loss because the Drywall is “physically intact, functional and has no visible damage.”...

The court find that the Ward Residence has suffered a direct physical loss, based on a review of the relevant precedent.

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The majority of cases appear to support (the insured’s) position that physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces. For example, in Hughes v. Potomac Insurance Co., 199 Cal. App.2d 239, 18 Cal. Rptr. 650 (1962), the land around the insured's home fell away in a landslide, leaving the home perched on a cliff. The court held that this constituted a physical loss to the dwelling, stating as follows:

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, appellant 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.

Id. at 248–249, 18 Cal. Rptr. 650; see also Essex v. BloomSouth Flooring Corp., 562 F.3d 399, 406 (1st Cir. 2009) (applying Massachusetts law and finding that unpleasant odor was physical injury to property); Motorists Mutual Ins. Co. v. Hardinger, 131 Fed.Appx. 823, 825–27 (3d Cir.2005) (applying Pennsylvania law and finding that bacteria contamination of well water would constitute direct physical loss to house if it rendered it unusable); Western Fire Ins. Co. v. First Presbyterian Church, 165 Colo. 34, 437 P.2d 52, 55 (1968) (en banc ) (gasoline fumes which rendered church building unusable constitute physical loss); Farmers Ins. Co. of Oregon v. Trutanich, 123 Or.App. 6, 858 P.2d 1332, 1336 (1993) (cost of removing odor from methamphetamine lab constituted a direct physical loss); Murray v. State Farm Fire & Cas. Co., 203 W.Va. 477, 509 S.E.2d 1, 17 (1998) (home rendered unusable by increased risk of rockslide suffered direct physical loss even in the absence of structural damage).

In support of its argument that physical damage requires some physical alteration or injury to the property's structure, (the insurer) cites a number of cases from other jurisdictions. The cases (the insurer) cites are all readily distinguishable, however, in that they do not involve situations in which the property in question was rendered unusable. (Citations omitted.)

See also, Pepsico, Inc. v. Winterthur Intern. American Ins. Co., 24 AD.3d 743, 896 NYS.2d 709, 711 (2d Dep't 2005) (“We reject Winterthur’s contention that the plaintiffs’ products were not ‘physically damaged’ under the ... policy issued by Winterthur. While ‘physical damages’ are not defined in the policy, we disagree with Winterthur that to prove ‘physical damages’ the plaintiffs must prove that ‘there has been a distinct demonstrable alteration of the physical structure (of the

plaintiffs' products) by an external force,' in other words, that the product has gone from good to bad. It is sufficient under the circumstances of this case involving the unmerchantability of beverage products that the product's function and value have been seriously impaired, such that the product cannot be sold").

To briefly reiterate, although it would be reasonable to interpret the "physical damage" language more narrowly than the foregoing courts have interpreted that language, the interpretation given those words by those courts is reasonable. Necessarily, therefore, at a minimum, the policy language is ambiguous, and the ambiguity must be resolved in favor of the insured. Accordingly, coverage exists because (a) due to the virus<sup>18</sup> (which either was already in the building, or would inevitably have entered the building), the government required that the business operations in the building cease, and (b) the existence of the virus constituted physical damage because virus on the building's surfaces physically changed the condition of the surfaces. Coverage must be extended to Windber.

**(c) Coverage Exists Under the Insuring Agreement in the "Civil Authority" Portion of the Policy**

Paragraph 4 (c), on pages 2-3 of the Business Income Coverage form, titled "Civil Authority," affords coverage for Business Income if: (1) the operations were suspended because of the "action of civil authority that prohibits access to the" insured premises; (2) the civil authority's denial of access constituted a "response to dangerous physical conditions resulting

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<sup>18</sup>As discussed in footnote 12 above, the immediate cause of the business suspension was the government directive, and the indirect (proximate) cause of the business suspension was the physical damage. As discussed in footnote 12, the policy language does not (unambiguously) require that the immediate cause of the business suspension have been physical damage. To the contrary, any cause will suffice.

from the damage or continuation of the Covered Cause of Loss<sup>19</sup> that caused the damage”; (3) there has been damage to property “other than property” at the insured premises (but within one hundred miles of the insured premises); and (4) access was also prohibited near the damaged property. A review of these four situations reveals that Windber is entitled to coverage.

The first requirement has been satisfied. It is reasonable to interpret the words “denial of access” to a building to encompass a government order to stay-at-home. The government directed Windber’s employees to not leave their houses. The governmental orders suspended nonessential services leaving certain employees with nothing to do. These employees were further ordered by the government not to leave their houses. As a practical matter, therefore, they were prohibited access to Windber’s medical center. In Friends of Danny DeVito v. Tom Wolf, 68 MM 2020 (Pa. April 13, 2020) the Supreme Court of Pennsylvania recognized that the government’s stay at home order amounted to prohibiting an insured for access to its building. In fact, the government’s order was the equivalent of compelling the evacuation of business buildings. The Supreme Court has recognized that the first requirement has been satisfied.

The second, third and fourth requirements have also been satisfied. The government acted as it did, in part, because the virus was on surfaces throughout the city (a dangerous condition), necessarily including surfaces within one mile of Windber’s medical center. Moreover, as discussed in section (b)(3) of this memorandum, the presence of the virus on those surfaces constituted physical damage to property. In fact, the government also prohibited access at those locations. Necessarily, therefore, coverage exists under Civil Authority portion of the policy.

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<sup>19</sup>As discussed above, a Covered Cause of Loss is defined, in relevant part, as “direct physical loss.”

**(d) Windber Does Not Have to Prove That the Virus Was Present in its Building on the Day That Windber Suspended Operations**

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As discussed in section (b)(2) of this memorandum, (a) because of the government directive, Windber's medical center could not be used on the day that Windber suspended operations, (b) since the medical center could not fully be used, the policy's "loss" coverage was triggered, and (c) the medical center could not be fully used whether or not the virus was present in the center.<sup>20</sup> Necessarily, therefore, Travelers could not deny coverage under the "loss of property" portion of the policy even if Windber cannot prove that there was a virus in its building. As discussed above, it is enough that one of the reasons for the government's stay-at-home directive was property damage (the virus on surfaces in the city).

Similarly, as discussed in section (c) of this memorandum, Windber is entitled to coverage because the virus was within one hundred miles of Windber's medical center. It is not necessary, in order for coverage to exist under the "Civil Authority" portion of the policy, that the virus have been in Windber's medical center. The only question is whether the third, independent, reason for the existence of coverage - - the coverage based upon "damage" (section (b)(3) of this memorandum) - - also exists whether or not there was virus in Windber's medical center on the date that Windber suspended its operations. For the reasons discussed below, the answer is yes; Windber is entitled to "damage" coverage regardless of whether there had been a virus in Windber's medical center.

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<sup>20</sup>All that is necessary is that there have been a loss of use of Windber's medical center.

The policy requires that the business suspension have been caused by physical “damage” to property. The policy is ambiguous because the policy does not state whether the suspension had to have been necessary because of existing damage, or whether it would be enough that the suspension was necessary because of inevitable future damage. The policy language states as follows:

The suspension must be “caused by... damage....”

The ambiguity arises out of the fact that that language can reasonably mean two different things.

The suspension must be “caused by ... damage” that already exists

Or

The loss must be “caused by...damage” that already exists or that will exist.

The point is that something has to be added to the language of the policy as written. It will be the insurer’s position that the “already exists” requirement is implicit from the language. It is the insured’s position that, since something has to be added, why not the “already exists or that will exist” language?

To put it in other words, while it is certainly reasonable to interpret the policy language to require that the damage have already existed, it is also reasonable - - not nonsensical - - to interpret the policy language to require only that the suspension be the result of property damage regardless of when the damage takes place. Normally, of course, one would not suspend one’s operations because of damage that did not exist; as a result, when reading the policy language, one would not initially think of future damage as being something that can cause a suspension. But future inevitable property damage can cause a suspension, as it did in the matter at hand. And there is

nothing in the policy language that unambiguously excludes coverage when a business' operations are, in fact, suspended because of inevitable property damage. To put it in still other words, just as existing property damage is known, inevitable future property damage is known. Under either scenario, therefore, one would be suspending operations because of known property damage. It is reasonable to say, therefore, under either scenario, that "the suspension was caused by damage." This conclusion is supported by the Pennsylvania Supreme Court Decision in Friends of Danny DeVito v. Wolf, supra., wherein the Supreme Court noted that the virus can live on surfaces for up to four days.

Another way to reach the same conclusion - - that when one uses the word "damage," one might possibly be speaking of inevitable damage - - is to consider common parlance. Consider a hypothetical. Suppose that Mr. Smith suspends his business on January 1 because a hurricane is on its way. Mr. Smith is later asked whether he suspended his business on January 1 because the business had been losing money. Mr. Smith responds that the suspension of his business on January 1 had been "caused by a hurricane." Mr. Smith's words are ambiguous. The suspension might have been caused by a hurricane that had already hit his building, or the suspension might have been caused by a hurricane that had not yet hit his building. The word "hurricane" can refer to a hurricane that had already taken place, or the word "hurricane" can refer to a hurricane that was inevitable. For the same reasons, the word "damage" can refer to damage that already taken place, or the word "damage" can refer to damage that was inevitable.

As was true of Mr. Smith in the hurricane hypothetical, the government could have caused Windber to suspend its business because of damage that had already taken place, or the government could have caused Windber to suspend its business because of the inevitability that

damage was otherwise going to take place. In either event, it would be possible to say that the government order and, therefore, Windber's suspension of operations was "caused by damage." This is reasonable.

Begin with the fact that it is reasonable to say: (a) that the government directive was caused, in part, by the government's concern that, absent a closing of the building to business, the building would inevitably become infested with virus; and (b) that as a result, the government directive can be said to have been caused by property damage (as that term is defined by the court decisions discussed above). It is reasonable to say, therefore, that one cause of Windber's suspension of operations was property damage because one cause of the government's directive was property damage. Necessarily, therefore, particularly as applied to the facts at hand, the words "caused by damage" in the insurance policy are ambiguous. Although it is certainly very reasonable to add the words "that already exists" to the policy language, it is also reasonable not to add those words.

Finally, it should also be recognized that the policy interpretation being proffered by Travelers is nonsensical, as illustrated by the following hypothetical. Suppose that an insured owns a factory, and the insured notices that one of the machine parts will break in 5 minutes unless the machine is shut down. As a result, the insured immediately shuts down the machine and suspends his operations for a week until the replacement machine part is obtained. In that scenario, there was no property damage prior to the suspension of operations. Now suppose that the insured had continued to run the machine for 5 minutes until the part broke. Under the latter scenario, the insured would be entitled to coverage for the week that he suspended his operations because the suspension would have been caused by damage that had already existed. Under the former

scenario, is the insured not entitled to coverage for the week that he suspended his operations because he did not wait the 5 minutes for the part to break before suspending his operations?

Similarly, in the matter at hand, Travelers's position is that Windber would have been entitled to coverage if the government had acted irresponsibly and issued a stay-at-home order a couple of weeks later, after the virus was everywhere. But, since the government acted responsibly, moving up the date of Windber's suspension of operations by a couple of weeks, Windber is not entitled to coverage. It would be a strange kind of argument and an equivocal type of justice that would hold that Travelers would have been obligated to pay for Windber's suspension of operations if the suspension had commenced later than it should have commenced, but Travelers is not obligated to pay for Windber's suspension of operations because the suspension commenced at the correct time.

The Pennsylvania Supreme Court's decision in Leebov v. United States Fidelity & Guaranty Co., 401 Pa. 477, 165 A.2d 82, 84-85 (1960), is consistent with the foregoing common sense analysis. The policy afforded coverage solely for the costs of remedying property damage that had already taken place. Property damage (a landslide) had taken place, but the insured sought reimbursement for the money spent to prevent additional (future) landslide damage - - that is, coverage was sought for property damage that had not yet taken place. The court, applying a fairness test, held that the insured was entitled to coverage:

If the plaintiff [insured] had not taken immediate and substantial measures to remedy the perilous situation, disastrous consequences might have befallen the adjoining and nearby properties. If that had happened, the defendant [insurer] would have been required to pay considerably more than is involved in the present lawsuit. It would be a strange kind of argument and an equivocal type of justice which would hold that the defendant would be compelled to pay out, let us say, the sum of \$100,000 if the



plaintiff had not prevented what would have been inevitable, and yet not be called upon to pay the smaller sum which the plaintiff actually expended to avoid a foreseeable disaster. That the danger to the neighborhood was one of considerable substance is evidenced by the fact that the City authorities required the nearby owners to vacate their premises for a period of two months.

It is folly to argue that if a policy owner does nothing and thereby permits the piling up of mountainous claims at the eventual expense of the insurance carrier, he will be held harmless of all liability, but if he makes a reasonable expenditure and prevents a catastrophe he must do so at his own cost and expense.<sup>21</sup>

For that additional reason, therefore, it is not necessary, even under the “damage” portion of the policy, that Windber prove that there had been a virus on surfaces in its medical center prior to the suspension of its business.

**(e) The Virus Exclusion Does Not Eliminate Coverage for the Insured’s “Continuing Operating Expenses”**

Since, as discussed above, coverage exists under two of the insuring agreements in the insurance policy, the next question that has to be addressed is whether an exclusion is applicable. The answer is no. The virus exclusion does not exclude coverage for “continuing normal operating expenses”. Judgment should be entered in favor of Windber for these claims.

The insurance policy contains an endorsement that states that “we will not pay for loss or damage caused by ...any virus....” Coverage under the policy, however, is not limited to “loss or

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<sup>21</sup>Accord Aronson Associates, Inc v. Pennsylvania Nat. Mut. Cas Ins. Co., 14 Pa. D&C.3d 1, 1977 WL 181 (C.P. 1977), aff’d, 272 Pa. Super. 606, 422 A.2d 689 (1979) (“preventive measures can be recovered where they are required to protect against a third person being harmed”).

damage.” Coverage also exists for “continuing normal operating expenses.”<sup>22</sup> Specifically, coverage is afforded for any loss of “business income,” and the policy defines that term to include not only “losses” (lost income), but also “continuing normal operating expenses.” Paying one’s rent/mortgage/employees is not a “loss or damage.” Such a payment is a business expense. And just as paying one’s employees the amounts owed under their employment contracts (or paying one’s rent) was not a “loss or damage” prior to the virus’ appearance, paying one’s employees (or one’s rent) is not a “loss or damage” after the virus’ appearance. At the very least, it is reasonable to interpret a “continuing operating expense” to be an expense as opposed (solely) to a “loss or damage.”

A hypothetical illustrates the point. Suppose that, after the virus’ appearance, the insured did not lose any income. The insured would not have a “loss or damage.” Under the terms of the policy, however, the insured would still be entitled to coverage for his or her “continuing operating expenses.” The insured would be entitled to “operating expense” coverage even though the insured did not have a “loss” - - that is, “operating expense” coverage would be owed even though the insurance company did not have to afford coverage for “loss or damage.”<sup>23</sup> By the same token, if,

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<sup>22</sup>See paragraph A(1) on the first page of the Business Income Coverage form.

<sup>23</sup>In fact, it is not unusual for insurance policies to afford coverage even though the insured has not incurred a loss. See, for example, the discussion in Windt, *Insurance Claims and Disputes* (Thomson/West 6<sup>th</sup> Ed) (2019 supplement), section 11.34, page 11-634.

Disability policies insure against the loss of capacity to do certain work, not against loss of income. It is irrelevant, therefore, under a typically worded disability policy, even if the insured can get another job for higher pay.

See also *Aetna Cas. & Sur. Co. v. Valley Nat. Bank of Ariz.*, 15 Ariz. App. 13, 485 P.2d 837, 840 (Div. 1 1971) (Insured's policy covered theft of funds. Money was stolen out of the insured's bank account. The insured was reimbursed by the bank, but the insured (and the entity to which she had assigned her insurance

by reason of an exclusion, Travelers were not obligated to afford coverage for “loss or damage,” that would not change the fact that Travelers would still be obligated to afford “operating expense” coverage - - a coverage being sought in the matter at hand.

In short, it would have been different if the exclusion had been written to eliminate any coverage that would otherwise have existed. For example, the American Association of Insurance Services has issued a virus exclusion endorsement, form CL0700 1006, that states (1) that it “applies to all coverages... that are provided by the policy,” and (2) that it applies to “loss, cost or expense.”<sup>24</sup> That is not, however, what the Travelers exclusion says. At the very least, it is reasonable to read the Travelers exclusion as applying solely to claims for “loss or damage,” and not to claims that are not for “loss or damage.”

To put it in other words, there is an inconsistency in the insurance policy. The insuring agreement states that there is coverage for “the actual loss of ‘business income.’” The definition of “business income” in the policy, however, does not limit the coverage to an insured’s “losses.” The policy defines “business income,” in relevant part, as follows:

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claim) were still entitled to collect the insurance since, under the terms of the policy, an insurable loss had taken place); Gustafson v. Central Iowa Mut. Ins. Ass'n, 277 N.W.2d 609, 612-13, 7 A.L.R.4th 484 (Iowa 1979) (collecting 12 cases from around the country holding that the insured was entitled to collect insurance even though, by virtue of a third party's payment to the insured for the same loss, the insured ended up with a double recovery); Wolf v. Home Ins. Co., 100 N.J. Super. 27, 241 A.2d 28, 38-39 (Law Div. 1968), judgment aff'd, 103 N.J. Super. 357, 247 A.2d 345 (App. Div. 1968) (Insured had contracted to sell his property prior to a fire, and after the fire, the insured received the full contract price. Nevertheless, court held that the insurance policy had to be applied as written, so that the insured was entitled to all of the policy benefits. The policy language called for paying the insured his loss, and the time of the loss under the policy language was the date of the fire, not the subsequent date when the insured was paid by the buyer); New Ponce Shopping Center, S.E. v. Integrand Assur. Co., 86 F.3d 265, 268-69 (1<sup>st</sup> Cir. 1996) (insured is entitled to coverage when a building that the insured intends to demolish is destroyed by fire).

<sup>24</sup>See Exhibit “B” hereto.

Business income means net income ... and continuing normal operating expenses.

If one plugs that definition into the insuring agreement, the policy would read as follows:

Coverage exists “for the actual loss of net income.”

AND

Coverage exists “for the actual loss of continuing operating expenses.”

The latter language does not even make sense. There can be a loss from continuing operating expenses, but there is no such thing as a loss of continuing operating expenses. Moreover, if the word “of” were changed to “from,” the coverage would be materially different. For example, in the hypothetical discussed above, the insured would no longer be entitled to coverage if the government replaced the insured’s lost revenues. In other words, in order to cause the exclusion to apply to “continuing operating expenses,” a court would have to rewrite the policy in order to make it more favorable to the insurer, something that courts are not allowed to do.

Further proving the point, the Business Income insuring agreement in the policy is not the only insuring agreement in the policy that expressly creates coverage for expenses over and above the coverage afforded for loss/damage. Paragraph 3 (b), on the fifth page of the Property Coverage form, creates coverage for “expenses” incurred by the insured that would not otherwise have been incurred had it not been for the loss/damage. Similarly, paragraphs 2 and 5 (a) on pages one and five of the Business Income form provide coverage for various expenses. Manifestly, an exclusion that is limited to eliminating coverage solely for loss/damage is not an exclusion that eliminates coverage for those “expenses.”

Travelers will likely respond to the foregoing analysis by arguing that when the exclusion states that “we will not pay for loss or damage” caused by a particular risk, what is meant is that the insurer “will not pay for” the loss or damage to property that gives rise to the insured’s loss/damage; what is not meant is that the insurer “will not pay for” the insured’s loss/damage. Even if that policy interpretation were reasonable, however, it is also reasonable to interpret the “loss or damage” language to refer to the insured’s loss/damage.<sup>25</sup>

If the exclusion had been intended to mean what the insurer contends that it means, the exclusion would have stated that “we will not pay if the loss or damage (giving rise to the insured’s loss/damage) is caused by a particular risk. The exclusion, however, uses the word “for”: “we will not pay for loss or damage caused” by a particular risk. The word “for” indicates that the loss/damage being referred to is the loss/damage that the insurer is being asked to pay, not to the loss/damage that gave rise to the loss/damage that the insurer is being asked to pay.

To put it in other words, one reasonable interpretation of the word “for” is “as the equivalent of.” The insurer will, absent an applicable exclusion, pay “for” the insured’s loss/damage; the insurer will pay an amount as the equivalent of the insured’s loss/damage.

The decision in Farmers Texas County Mutual Insurance Company v. Zuniga, 548 SW.3d 646, 652-53 (Tex. App. San Antonio 2017) , is illustrative. In that case, the policy afforded coverage for damages “for” bodily injury, not for damages “arising out of” bodily injury. As a result, coverage did not exist for punitive damages. “The plain meaning of the word ‘for’ is ‘in

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<sup>25</sup> As discussed in Oregon Shakespeare Festival Assn. v. Travelers Ins. Co., 2016 WL 3267247 (D. Or. March 16, 2017), vacated by stipulation of the parties, 2017 WL 1034203, the word “loss” can be used to refer to “the amount of an insured’s financial detriment, “and the word “damage” can be used to refer both to “loss due to injury” and to “harm to (a) person.”

exchange as the equivalent of' .... Thus, the Policy's promise to pay damages for bodily injury was Farmer's commitment to pay a sum of money as compensation in exchange as the equivalent of the physical damage to the injured person's body."<sup>26</sup> By analogy, in the matter at hand, the subject exclusion does not state that "we will not pay as a result of (arising out of) loss or damage caused" by a particular risk. The exclusion states that "we will not pay for loss or damage" (we will not

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<sup>26</sup>See generally Cincinnati Ins. Co v. H.D. Smith, LLC, 829 F.3d 771, 774 (7<sup>th</sup> Cir. 2016).

The policy that Cincinnati issued to H.D. Smith covers suits seeking damages "because of bodily injury." Such a policy provides broader coverage than one that covers only damages "for bodily injury." Medmarc Cas Ins. Co v. Avent Am., Inc. 612 F.3d 607, 616 (7<sup>th</sup> Cir. 2010) (applying Illinois law). We expressed that result with the following example:

(A)n individual has automobile insurance; the insured individual caused an accident in which another individual became paralyzed; the paralyzed individual sues the insured driver only for the cost of making his house wheelchair accessible, not for his physical injuries. If the insured driver had a policy that only covered damages "for bodily injury" it would be reasonable to conclude that the damages sought in the example do not fall within the insurer's duty. However, if the insurance contract provides for damages "because of bodily injury" then the insurer would have a duty to defend and indemnify in this situation. *Id.*

Greenwood Cemetery, Inc v. The Travelers Indem. Co., 238 Ga. 313, 316, 232 SE.2d 910, 913 (1977).

The word "for" has numerous meanings. The insurer would read the word "for" as meaning 'equivalent to' (and therefore not greater than) or 'to the amount, value or extent of.' The insured would read the word "for" as meaning 'by reason of' or 'because, on account of.' See Black's Law Dictionary (Rev. 4<sup>th</sup> Ed., 1968); Webster's Third New International Dictionary 1967. See also Lumbermens Mutual Casualty Co v. Yeroyan, 90 N.H. 145, 5 A.2d 726 (1949); American Ins. Co v. Naylor, 103 Colo. 461, 87 P.2d 260 (1939).

make a payment equivalent to the loss or damage) if the loss/damage (that the insurer would otherwise have had to make a payment for) is caused by a particular risk.

Note, too, that in the first sentence of the Business Income form, the word “loss” is used to refer to the “loss of business income you sustain.” It does not refer to the “loss that the property sustains.” It is the next sentence that refers to a “loss” to property. For that additional reason, the word “loss” in the exclusion can refer either to the insured’s loss or to a loss to property. The exclusion is ambiguous. And as discussed above, since the exclusion applies only to an insured’s loss, the exclusion does not apply to an insured’s continuing expenses, since continuing expenses do not constitute a loss.

Summarizing, the fact that the policy excludes coverage for an insured’s loss/damage does not mean that the policy excludes coverage for an insured’s “expenses.” In addition, by the same token, it is reasonable to read the words “loss or damage” in the virus exclusion to be addressing the amount owed by the insurer. That is, it is reasonable to read the exclusion to be addressing what the insurer owes to the insured - - for the insured’s loss or damage - - as a result of the underlying loss or damage to property. The words “loss or damage” in the exclusion are not addressing the loss/damage that gave rise to the insured’s loss/damage. Travelers contends that for the foregoing reasons, the virus exclusion eliminates coverage for a claim for lost income (a “loss”). Travelers cannot contend that the exclusion does not (unambiguously) eliminate coverage for continuing operating expenses (which do not unambiguously constitute a “loss”). Windber is entitled to coverage.

**(f) If Windber Were Not Entitled to Coverage for  
“Continuing Operating Expenses,” The Coverage  
Afforded by the Policy Would Be Illusory**

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As discussed above, the policy affords coverage for “Business Income,” and the policy defines that term to include two things: (1) lost income, and (2) “continuing normal operating expenses.”<sup>27</sup> Plugging each part of the definition into the insuring agreement, the policy reads as follow:

We will pay the actual loss of profits you sustain due to the necessary suspension of your operations.

AND

We will pay the actual loss of “continuing normal operating expenses” you sustain due to the necessary suspension of your operations.

The latter coverage is nonsensical. Continuing expenses are never owed because of (“due to”) a suspension of operations; they are owed despite a suspension of operations. For example, monthly rent that an insured has to pay is never owed because of a suspension of operations; the monthly rent has to be paid despite a suspension of operations. Moreover, not only is the policy language nonsensical, but if the “loss of” operating expenses “due to a suspension of operations” requirement were enforced as written, the coverage for operating expenses would be illusory.

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<sup>27</sup>See the first page of the Business Income Coverage form.



A hypothetical illustrates the point. Suppose that an insured suspends its operations at the insured premises because an explosion destroys the building. Manifestly, the insured would be entitled to coverage for its continuing operating expenses because: (a) those expenses are encompassed by the policy's definition of "Business Income,"<sup>28</sup> and (b) the insured's Business Income claim was "due to the necessary suspension of your operations ...." Nevertheless, the insured in the hypothetical would not be able to collect for its continuing operating expenses because those expenses were not owed because of the suspension of operations. The insured's obligation to pay its expenses (e.g., rent) was not "due to" the suspension of operations. In fact, the insured's obligation to pay its continuing expenses has nothing whatever to do with the suspension of operations. Accordingly, under the terms of the policy, an insured's continuing expenses can never be covered because the expenses can never constitute a loss due to a suspension of operations.

In summary, a court has only two options for dealing with claims for "continuing normal operating expenses": either

(1) allow the insured to recover those expenses even though continuing expenses (e.g., the monthly rent) are never "due to the necessary suspension of... operations"- - e.g., the rent has to be paid whether or not there was a suspension of operations.

or

(2) never allow the insured to recover those expenses - - effectively rewriting the policy to change the definition of "Business Income" to delete the portion defining the term to include "continuing

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<sup>28</sup>It is irrelevant, in the hypothetical, whether the insured incurred a loss of profit due to the suspension of its operations.

operating expenses” - - because continuing expenses are never due to a suspension of operations.

If for no other reason, the Court must adopt the first option because if the Court were to hold that coverage could never exist for “continuing normal operating expenses” because continuing normal expenses can never be a loss caused by a suspension of operations, the coverage for continuing normal expenses would be illusory. That is, adopting the second option set forth above would mean that although the policy expressly affords coverage for continuing normal expenses, the policy will never, in fact, afford coverage for continuing expenses. As discussed in Windt, section 6.2, page 6-48, it is a fundamental principle of insurance law that a court will not interpret a policy to create illusory coverage.

(A) court will not allow an exclusion to eliminate coverage that is expressly and specifically provided for in the same policy form. More generally stated, a policy will not be interpreted to create illusory coverage.<sup>29</sup>

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<sup>29</sup>Among the cases cited in Windt and the 2020 supplement are Glen Lincoln, Inc. Zurich Ins. Co., 945 F. Supp. 844 (E.D. Pa. 1996), *affd in part rev'd in part*, 142 F.3d 428 (3d Cir. 1998) (“The law does not countenance illusory coverage”); Monticello Ins. Co. v. Mike’s Speedway Lounge, Inc., 949 F. Supp. 694, 699 (S.D. Ind. 1996) (“an insurance policy provides illusory coverage when a premiums was paid for coverage which would not pay benefits under any reasonably expected set of circumstances”); Hullverson Law Firm, P.C. v. Liberty Ins. Underwriters, Inc. 25 F.Supp.3d 1185, 1191-95 (E.D. Mo. 2014) (coverage illusory because “the policy’s definition of personal injury appears to provide coverage for (the insured’s) advertising activities, but the definition of wrongful act then takes that coverage away”); Sletten & Brettin Orthodontic, LLC v. Continental Cas. Co., 782 F.3d 931, 938 (8<sup>th</sup> Cir. 2015) (Minnesota law) (“illusory coverage doctrine operates as a remedy where an insured seeks coverage under a provision that purports to provide coverage but such coverage turns out to be functionally nonexistent”); McAninch v. Wintermute, 491 F.3d 759, 769–70 (8<sup>th</sup> Cir. 2007) (Arkansas law) (Insurer’s policy interpretation rejected because “(i)f the policy only provides coverage to directors sued solely because of their status . . . language (in the policy) is rendered nugatory”); Pharmacists Mut. Ins. Co. v. Myer, 2010 VT 10, 993 A.2d 413, 418 (Vt. 2010) (Exclusion for defamatory statements that the insured “had reason to believe” were false did not bar coverage for negligently made defamatory statements because such an interpretation “would virtually eviscerate the coverage provision for” defamation); First National Bank of Manitowoc v. Cincinnati Ins. Co., 485 F.3d 971, 981 (7<sup>th</sup> Cir. 2007) (Wisconsin law) (exclusion not enforceable because it operated as a “complete cancellation of (the) coverage granted in the insuring agreement”); Radil v. National Union Fire Ins. Co. of Pittsburgh, Pa., 207 P.3d 849, 857 (Colo. App. 2008), cert. denied, 2009 WL 1383815 (Colo. 2009) (Policy affords coverage for nonowned vehicles, but policy’s definition of nonowned vehicles

### **CONCLUSION**

Windber is entitled to coverage under the Travelers' Policy under both the "Business Income" and the "Civil Authority" portions of the policy. Further, there are no exclusions applicable to the claims for coverage of Windber. "Continuing normal operating expenses" are covered by the policy. Accordingly, it is respectfully requested that Judgment be entered in favor

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did not include vehicles that were not owned, leased, rented or borrowed. Coverage for nonowned vehicles was held to be illusory); Murray Ohio Mfg. Co. v. Continental Ins. Co., 705 F. Supp. 442, 444 (N.D. Ill. 1989) ("the law does not countenance illusory coverage"); Liberty Life Ins. Co. v. Commercial Union Ins. Co., 857 F.2d 945, 951 (4<sup>th</sup> Cir. 1988) (policy will not be interpreted so as to make any of the coverage given "illusory"); Schwartz v. State Farm Mut. Auto. Ins. Co., 174 F.3d 875, 879 (7th Cir. 1999) (Indiana law) ("an insurance provision is considered illusory if a premium was paid for coverage which would not pay benefits under any reasonably expected set of circumstances").

of Windber and against Travelers.<sup>30</sup>

Respectfully,

HAGGERTY, GOLDBERG, SCHLEIFER &  
KUPERSMITH, P.C.

SCHMIT KRAMER, P.C.

BY: /s/ James Haggerty  
JAMES C. HAGGERTY, Esquire  
PA Attorney I.D. # 30003  
1835 Market Street, Suite 2700  
Philadelphia, PA 19103  
(267) 350-6600

BY: /s/ Scott Cooper  
SCOTT B. COOPER, Esquire  
PA Attorney I.D. #70242  
209 State Street  
Harrisburg, PA 17101  
(717) 232-6300

JACK GOODRICH & ASSOCIATES

SHUB LAW FIRM, LLC

BY: /s/ Jack Goodrich  
JOHN P. GOODRICH, Esquire  
PA Attorney I.D. #49648  
429 Fourth Avenue  
Pittsburg, PA 15219  
(412) 261-4663

BY: /s/ Jonathan Shub  
JONATHAN SHUB, Esquire  
PA Attorney I.D. #53965  
134 Kings Highway East, 2<sup>nd</sup> Floor  
Haddonfield, NJ 08033  
(856) 772-7200

Attorneys for Plaintiffs

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<sup>30</sup> The recent decision of the Michigan Court in Gavrilides Management Company et al. vs. Michigan Insurance Co. is of no consequence. That decision did not consider the issues in the case at bar. See Fernandez v. Farmers Insurance Co., 115 N.M. 622, 627, 857 P. 2d 22, 27 (1993) (“Cases are not authority for propositions not considered”). The arguments raised by Windber in this case were not addressed by the Michigan Court. Therefore, that decision is of little or no value. See Rivota v. Fidelity & Guaranty Life Insurance Co., 497 F. 2d 1225, 1229 (7<sup>th</sup> Cir. 1974) (“We need not regard as strictly binding a state decision in which the rule now argued may have failed for want of an advocate”).

**CERTIFICATE OF SERVICE**

I, Scott Cooper, Esquire, hereby certifies that a copy of the Response of Plaintiff to Motion for Judgment on Pleadings of the Defendant and accompanying Memorandum of Law were served on the date noted below via electronic filing on all counsel of record.

HAGGERTY, GOLDBERG, SCHLEIFER &  
KUPERSMITH, P.C.

SCHMIT KRAMER, P.C.

BY: /s/ James Haggerty  
JAMES C. HAGGERTY, Esquire  
PA Attorney I.D. # 30003  
1835 Market Street, Suite 2700  
Philadelphia, PA 19103  
(267) 350-6600

BY: /s/ Scott Cooper  
SCOTT B. COOPER, Esquire  
PA Attorney I.D. #70242  
209 State Street  
Harrisburg, PA 17101  
(717) 232-6300

JACK GOODRICH & ASSOCIATES

KOHN, SWIFT & GRAF, P.C.

BY: /s/ Jack Goodrich  
JOHN P. GOODRICH, Esquire  
PA Attorney I.D. #49648  
429 Fourth Avenue  
Pittsburg, PA 15219  
(412) 261-4663

BY: /s/ Jonathan Shub  
JONATHAN SHUB, Esquire  
PA Attorney I.D. #53965  
134 Kings Highway East, 2<sup>nd</sup> Floor  
Haddonfield, NJ 08033  
(856) 772-7200

Attorneys for Plaintiffs

Date: 7/10/20

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

|                                     |   |                          |
|-------------------------------------|---|--------------------------|
| WINDBER HOSPITAL d/b/a CHAN         | : | No: 3:20-cv-00080-KRG    |
| SOON SHIONG MEDICAL CENTER,         | : |                          |
| on behalf of himself and all others | : |                          |
| similarly situated                  | : |                          |
|                                     | : |                          |
|                                     | : |                          |
| Plaintiff,                          | : | COMPLAINT – CLASS ACTION |
|                                     | : |                          |
|                                     | : |                          |
| vs.                                 | : |                          |
|                                     | : |                          |
| TRAVELERS PROPERTY CASUALTY         | : |                          |
| COMPANY OF AMERICA                  | : | JURY TRIAL DEMANDED      |
|                                     | : |                          |
|                                     | : |                          |
| Defendant.                          | : |                          |

**ORDER**

AND NOW, this \_\_\_\_ day of \_\_\_\_, 2020, upon consideration of the Motion for Judgment on the Pleadings of the defendant, Travelers Property Casualty Company of America, and the Answer of the plaintiff, Windber Hospital d/b/a Chan Soon Shiong Medical Center, thereto, it is hereby,

ORDERED AND DECREED that the Motion for Judgment on the Pleadings of the is denied,

AND FURTHER, that the plaintiff, Windber Hospital d/b/a Chan Soon Shiong Medical Center, is entitled to Summary Judgment in its favor.

BY THE COURT:

\_\_\_\_\_  
J.

COMMERCIAL PROPERTY  
CP 00 30 10 12

### BUSINESS INCOME (AND EXTRA EXPENSE) 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. The words "we", "us" and "our" refer to the company providing this insurance.

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

#### A. Coverage

##### 1. Business Income

Business Income means the:

- a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
- b. Continuing normal operating expenses incurred, including payroll.

For manufacturing risks, Net Income includes the net sales value of production.

Coverage is provided as described and limited below for one or more of the following options for which a Limit Of Insurance is shown in the Declarations:

- (1) Business Income Including "Rental Value".
- (2) Business Income Other Than "Rental Value".
- (3) "Rental Value".

If option (1) above is selected, the term Business Income will include "Rental Value". If option (3) above is selected, the term Business Income will mean "Rental Value" only.

If Limits of Insurance are shown under more than one of the above options, the provisions of this Coverage Part apply separately to each.

We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.

With respect to the requirements set forth in the preceding paragraph, if you occupy only part of a building, your premises means:

- (a) The portion of the building which you rent, lease or occupy;
- (b) The area within 100 feet of the building or within 100 feet of the premises described in the Declarations, whichever distance is greater (with respect to loss of or damage to personal property in the open or personal property in a vehicle); and
- (c) Any area within the building or at the described premises, if that area services, or is used to gain access to, the portion of the building which you rent, lease or occupy.

##### 2. Extra Expense

- a. Extra Expense Coverage is provided at the premises described in the Declarations only if the Declarations show that Business Income Coverage applies at that premises.
- b. Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss.

We will pay Extra Expense (other than the expense to repair or replace property) to:

- (1) Avoid or minimize the "suspension" of business and to continue operations at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location.

(2) Minimize the "suspension" of business if you cannot continue "operations".

We will also pay Extra Expense to repair or replace property, but only to the extent it reduces the amount of loss that otherwise would have been payable under this Coverage Form.

3. Covered Causes Of Loss, Exclusions And Limitations

See applicable Causes Of Loss form as shown in the Declarations.

4. Additional Limitation - Interruption Of Computer Operations

a. Coverage for Business Income does not apply when a "suspension" of "operations" is caused by destruction or corruption of electronic data, or any loss or damage to electronic data, except as provided under the Additional Coverage, Interruption Of Computer Operations.

b. Coverage for Extra Expense does not apply when action is taken to avoid or minimize a "suspension" of "operations" caused by destruction or corruption of electronic data, or any loss or damage to electronic data, except as provided under the Additional Coverage, Interruption Of Computer Operations.

c. Electronic data means information, facts or computer programs stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), on hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other repositories of computer software which are used with electronically controlled equipment. The term computer programs, referred to in the foregoing description of electronic data, means a set of related electronic instructions which direct the operations and functions of a computer or device connected to it, which enable the computer or device to receive, process, store, retrieve or send data.

d. This Additional Limitation does not apply when loss or damage to electronic data involves only electronic data which is integrated in and operates or controls a building's elevator, lighting, heating, ventilation, air conditioning or security system.

5. Additional Coverages

a. Civil Authority

Within Additional Coverage, Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations.

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

(1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and

(2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began.

Civil Authority Coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the described premises and will end:

(1) Four consecutive weeks after the date of that action; or

(2) When your Civil Authority Coverage for Business Income ends;

whichever is later.



**b. Alterations And New Buildings**

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense you incur due to direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss to:

- (1) New buildings or structures, whether complete or under construction;
- (2) Alterations or additions to existing buildings or structures; and
- (3) Machinery, equipment, supplies or building materials located on or within 100 feet of the described premises and:
  - (a) Used in the construction, alterations or additions; or
  - (b) Incidental to the occupancy of new buildings.

If such direct physical loss or damage delays the start of "operations", the "period of restoration" for Business Income Coverage will begin on the date "operations" would have begun if the direct physical loss or damage had not occurred.

**c. Extended Business Income**

**(1) Business Income Other Than "Rental Value"**

If the necessary "suspension" of your "operations" produces a Business Income loss payable under this policy, we will pay for the actual loss of Business Income you incur during the period that:

- (a) Begins on the date property (except "finished stock") is actually repaired, rebuilt or replaced and "operations" are resumed; and
- (b) Ends on the earlier of:
  - (i) 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 had occurred; or
  - (ii) 60 consecutive days after the date determined in (1)(a) above.

However, Extended Business Income does not apply to loss of Business Income incurred as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the described premises are located.

Loss of Business Income must be caused by direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss.

**(2) "Rental Value"**

If the necessary "suspension" of your "operations" produces a "Rental Value" loss payable under this policy, we will pay for the actual loss of "Rental Value" you incur during the period that:

- (a) Begins on the date property is actually repaired, rebuilt or replaced and tenantability is restored; and
- (b) Ends on the earlier of:
  - (i) The date you could restore tenant occupancy, with reasonable speed, to the level which would generate the "Rental Value" that would have existed if no direct physical loss or damage had occurred; or
  - (ii) 60 consecutive days after the date determined in (2)(a) above.

However, Extended Business Income does not apply to loss of "Rental Value" incurred as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the described premises are located.

Loss of "Rental Value" must be caused by direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss.

**d. Interruption Of Computer Operations**

- (1) Under this Additional Coverage, electronic data has the meaning described under Additional Limitation - Interruption Of Computer Operations.

(2) Subject to all provisions of this Additional Coverage, you may extend the insurance that applies to Business Income and Extra Expense to apply to a "suspension" of "operations" caused by an interruption in computer operations due to destruction or corruption of electronic data due to a Covered Cause of Loss. However, we will not provide coverage under this Additional Coverage when the Additional Limitation - Interruption Of Computer Operations does not apply based on Paragraph A.4.d, therein.

(3) With respect to the coverage provided under this Additional Coverage, the Covered Causes of Loss are subject to the following:

(a) If the Causes Of Loss - Special Form applies, coverage under this Additional Coverage, Interruption Of Computer Operations, is limited to the "specified causes of loss" as defined in that form and Collapse as set forth in that form.

(b) If the Causes Of Loss - Broad Form applies, coverage under this Additional Coverage, Interruption Of Computer Operations, includes Collapse as set forth in that form.

(c) If the Causes Of Loss form is endorsed to add a Covered Cause of Loss, the additional Covered Cause of Loss does not apply to the coverage provided under this Additional Coverage, Interruption Of Computer Operations.

(d) The Covered Causes of Loss include a virus, harmful code or similar instruction introduced into or enacted on a computer system (including electronic data) or a network to which it is connected, designed to damage or destroy any part of the system or disrupt its normal operation. But there is no coverage for an interruption related to manipulation of a computer system (including electronic data) by any employee, including a temporary or leased employee, or by an entity retained by you or for you to inspect, design, install, maintain, repair or replace that system.

(4) The most we will pay under this Additional Coverage, Interruption Of Computer Operations, is \$2,500 (unless a higher limit is shown in the Declarations) for all loss sustained and expense incurred in any one policy year, regardless of the number of interruptions or the number of premises, locations or computer systems involved. If loss payment relating to the first interruption does not exhaust this amount, then the balance is available for loss or expense sustained or incurred as a result of subsequent interruptions in that policy year. A balance remaining at the end of a policy year does not increase the amount of insurance in the next policy year. With respect to any interruption which begins in one policy year and continues or results in additional loss or expense in a subsequent policy year(s), all loss and expense is deemed to be sustained or incurred in the policy year in which the interruption began.

(5) This Additional Coverage, Interruption Of Computer Operations, does not apply to loss sustained or expense incurred after the end of the "period of restoration", even if the amount of insurance stated in (4) above has not been exhausted.

6. Coverage Extension

If a Coinsurance percentage of 50% or more is shown in the Declarations, you may extend the insurance provided by this Coverage Part as follows:

Newly Acquired Locations

a. You may extend your Business Income and Extra Expense Coverages to apply to property at any location you acquire other than fairs or exhibitions.

b. The most we will pay under this Extension, for the sum of Business Income loss and Extra Expense incurred, is \$100,000 at each location, unless a higher limit is shown in the Declarations.

c. Insurance under this Extension for each newly acquired location will end when any of the following first occurs:

(1) This policy expires;

(2) 30 days expire after you acquire or begin to construct the property; or

(3) You report values to us.

We will charge you additional premium for values reported from the date you acquire the property.

The Additional Condition, Coinsurance, does not apply to this Extension.

**B. Limits Of Insurance**

The most we will pay for loss in any one occurrence is the applicable Limit Of Insurance shown in the Declarations.

Payments under the following coverages will not increase the applicable Limit of Insurance:

- 1. Alterations And New Buildings;
- 2. Civil Authority;
- 3. Extra Expense; or
- 4. Extended Business Income.

The amounts of insurance stated in the Interruption Of Computer Operations Additional Coverage and the Newly Acquired Locations Coverage Extension apply in accordance with the terms of those coverages and are separate from the Limit(s) Of Insurance shown in the Declarations for any other coverage.

**C. Loss Conditions**

The following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions:

**1. Appraisal**

If we and you disagree on the amount of Net Income and operating expense or the amount of loss, either 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, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the amount of Net Income and operating expense or amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

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

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

**2. Duties In The Event Of Loss**

a. You must see that the following are done in the event of loss:

- (1) Notify the police if a law may have been broken.
- (2) Give us prompt notice of the direct physical loss or damage. Include a description of the property involved.
- (3) As soon as possible, give us a description of how, when and where the direct physical loss or damage occurred.
- (4) Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim. This will not increase the Limit of Insurance. However, we will not pay for any subsequent loss or damage resulting from a cause of loss that is not a Covered Cause of Loss. Also, if feasible, set the damaged property aside and in the best possible order for examination.
- (5) As often as may be reasonably required, permit us to inspect the property proving the loss or damage and examine your books and records.

Also permit us to take samples of damaged and undamaged property for inspection, testing and analysis, and permit us to make copies from your books and records.

- (6) Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.
- (7) Cooperate with us in the investigation or settlement of the claim.
- (8) If you intend to continue your business, you must resume all or part of your "operations" as quickly as possible.

b. We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed.

**3. Loss Determination**

a. The amount of Business Income loss will be determined based on:

- (1) The Net Income of the business before the direct physical loss or damage occurred;
- (2) The likely Net Income of the business if no physical loss or damage had occurred, but not including any Net 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;
- (3) The operating expenses, including payroll expenses, necessary to resume "operations" with the same quality of service that existed just before the direct physical loss or damage; and
- (4) Other relevant sources of information, including:
  - (a) Your financial records and accounting procedures;
  - (b) Bills, invoices and other vouchers; and
  - (c) Deeds, leases or contracts.

b. The amount of Extra Expense will be determined based on:

- (1) All expenses that exceed the normal operating expenses that would have been incurred by "operations" during the "period of restoration" if no direct physical loss or damage had occurred. We will deduct from the total of such expenses:
  - (a) The salvage value that remains of any property bought for temporary use during the "period of restoration", once "operations" are resumed; and
  - (b) Any Extra Expense that is paid for by other insurance, except for insurance that is written subject to the same plan, terms, conditions and provisions as this insurance; and
- (2) Necessary expenses that reduce the Business Income loss that otherwise would have been incurred.

**c. Resumption Of Operations**

We will reduce the amount of your:

- (1) 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 described premises or elsewhere.
- (2) Extra Expense loss to the extent you can return "operations" to normal and discontinue such Extra Expense.

d. If you do not resume "operations", or do not resume "operations" as quickly as possible, we will pay based on the length of time it would have taken to resume "operations" as quickly as possible.

**4. Loss Payment**

We will pay for covered loss within 30 days after we receive the sworn proof of loss, if you have complied with all of the terms of this Coverage Part, and:

- a. We have reached agreement with you on the amount of loss; or
- b. An appraisal award has been made.

**D. Additional Condition**

**COINSURANCE**

If a Coinsurance percentage is shown in the Declarations, the following condition applies in addition to the Common Policy Conditions and the Commercial Property Conditions.

We will not pay the full amount of any Business Income loss if the Limit of Insurance for Business Income is less than:

- 1. The Coinsurance percentage shown for Business Income in the Declarations; times
- 2. The sum of:
  - a. The Net Income (Net Profit or Loss before income taxes), and
  - b. Operating expenses, including payroll expenses,

that would have been earned or incurred (had no loss occurred) by your "operations" at the described premises for the 12 months following the inception, or last previous anniversary date, of this policy (whichever is later).

Instead, we will determine the most we will pay using the following steps:

- Step (1): Multiply the Net Income and operating expense for the 12 months following the inception, or last previous anniversary date, of this policy by the Coinsurance percentage;
- Step (2): Divide the Limit of Insurance for the described premises by the figure determined in Step (1); and
- Step (3): Multiply the total amount of loss by the figure determined in Step (2).

We will pay the amount determined in Step (3) or the limit of insurance, whichever is less. For the remainder, you will either have to rely on other insurance or absorb the loss yourself.

In determining operating expenses for the purpose of applying the Coinsurance condition, the following expenses, if applicable, shall be deducted from the total of all operating expenses:

- (1) Prepaid freight - outgoing;
- (2) Returns and allowances;
- (3) Discounts;
- (4) Bad debts;
- (5) Collection expenses;
- (6) Cost of raw stock and factory supplies consumed (including transportation charges);
- (7) Cost of merchandise sold (including transportation charges);
- (8) Cost of other supplies consumed (including transportation charges);
- (9) Cost of services purchased from outsiders (not employees) to resell, that do not continue under contract;
- (10) Power, heat and refrigeration expenses that do not continue under contract (if Form CP 15 11 is attached);
- (11) All payroll expenses or the amount of payroll expense excluded (if Form CP 15 10 is attached); and
- (12) Special deductions for mining properties (royalties unless specifically included in coverage; actual depletion commonly known as unit or cost depletion - not percentage depletion, welfare and retirement fund charges based on tonnage; hired trucks).

**Example 1 (Underinsurance)**

When: The Net Income and operating expenses for the 12 months following the inception, or last previous anniversary date, of this policy at the described premises would have been: \$ 400,000

The Coinsurance percentage is: 50%

The Limit of Insurance is: \$ 150,000

The amount of loss is: \$ 80,000

Step (1):  $\$400,000 \times 50\% = \$200,000$   
(the minimum amount of insurance to meet your Coinsurance requirements)

Step (2):  $\$150,000 \div \$200,000 = .75$

Step (3):  $\$80,000 \times .75 = \$60,000$

We will pay no more than \$60,000. The remaining \$20,000 is not covered.

**Example 2 (Adequate Insurance)**

When: The Net Income and operating expenses for the 12 months following the inception, or last previous anniversary date, of this policy at the described premises would have been: \$ 400,000

The Coinsurance percentage is: 50%

The Limit of Insurance is: \$ 200,000

The amount of loss is: \$ 80,000

The minimum amount of insurance to meet your Coinsurance requirement is \$200,000 ( $\$400,000 \times 50\%$ ). Therefore, the Limit of Insurance in this example is adequate and no penalty applies. We will pay no more than \$80,000 (amount of loss).

This condition does not apply to Extra Expense Coverage.

**E. Optional Coverages**

If shown as applicable in the Declarations, the following Optional Coverages apply separately to each item.

**1. Maximum Period Of Indemnity**

- a. The Additional Condition, Coinsurance, does not apply to this Coverage Form at the described premises to which this Optional Coverage applies.



- b. The most we will pay for the total of Business Income loss and Extra Expense is the lesser of:
  - (1) The amount of loss sustained and expenses incurred during the 120 days immediately following the beginning of the "period of restoration"; or
  - (2) The Limit Of Insurance shown in the Declarations.

**2. Monthly Limit Of Indemnity**

- a. The Additional Condition, Coinsurance, does not apply to this Coverage Form at the described premises to which this Optional Coverage applies.
- b. The most we will pay for loss of Business Income in each period of 30 consecutive days after the beginning of the "period of restoration" is:
  - (1) The Limit of Insurance, multiplied by
  - (2) The fraction shown in the Declarations for this Optional Coverage.

**Example**

When: The Limit of Insurance is: \$ 120,000  
 The fraction shown in the Declarations for this Optional Coverage is: 1/4  
 The most we will pay for loss in each period of 30 consecutive days is: \$ 30,000  
 (\$120,000 x 1/4 = \$30,000)  
 If, in this example, the actual amount of loss is:

|             |           |
|-------------|-----------|
| Days 1-30:  | \$ 40,000 |
| Days 31-60: | \$ 20,000 |
| Days 61-90: | \$ 30,000 |
|             | \$ 90,000 |

We will pay:

|             |           |
|-------------|-----------|
| Days 1-30:  | \$ 30,000 |
| Days 31-60: | \$ 20,000 |
| Days 61-90: | \$ 30,000 |
|             | \$ 80,000 |

The remaining \$10,000 is not covered.

**3. Business Income Agreed Value**

- a. To activate this Optional Coverage:
  - (1) A Business Income Report/Work Sheet must be submitted to us and must show financial data for your "operations":
    - (a) During the 12 months prior to the date of the Work Sheet; and

- (b) Estimated for the 12 months immediately following the inception of this Optional Coverage.
- (2) The Declarations must indicate that the Business Income Agreed Value Optional Coverage applies, and an Agreed Value must be shown in the Declarations. The Agreed Value should be at least equal to:
  - (a) The Coinsurance percentage shown in the Declarations; multiplied by
  - (b) The amount of Net Income and operating expenses for the following 12 months you report on the Work Sheet.

- b. The Additional Condition, Coinsurance, is suspended until:
  - (1) 12 months after the effective date of this Optional Coverage; or
  - (2) The expiration date of this policy; whichever occurs first.

- c. We will reinstate the Additional Condition, Coinsurance, automatically if you do not submit a new Work Sheet and Agreed Value:

- (1) Within 12 months of the effective date of this Optional Coverage; or
- (2) When you request a change in your Business Income Limit of Insurance.

- d. If the Business Income Limit of Insurance is less than the Agreed Value, we will not pay more of any loss than the amount of loss multiplied by:

- (1) The Business Income Limit of Insurance; divided by
- (2) The Agreed Value.

**Example**

When: The Limit of Insurance is: \$ 100,000  
 The Agreed Value is: \$ 200,000  
 The amount of loss is: \$ 80,000

Step (1):  $\$100,000 \div \$200,000 = .50$   
 Step (2):  $.50 \times \$80,000 = \$40,000$   
 We will pay \$40,000. The remaining \$40,000 is not covered.

**4. Extended Period Of Indemnity**

Under Paragraph A.5.c., Extended Business Income, the number 60 in Subparagraphs (1)(b) and (2)(b) is replaced by the number shown in the Declarations for this Optional Coverage.

**F. Definitions**

1. "Finished stock" means stock you have manufactured.

"Finished stock" also includes whiskey and alcoholic products being aged, unless there is a Coinsurance percentage shown for Business Income in the Declarations.

"Finished stock" does not include stock you have manufactured that is held for sale on the premises of any retail outlet insured under this Coverage Part.

2. "Operations" means:

- a. Your business activities occurring at the described premises; and
- b. The tenability of the described premises, if coverage for Business Income including "Rental Value" or "Rental Value" applies.

3. "Period of restoration" means the period of time that:

a. Begins;

(1) 72 hours after the time of direct physical loss or damage for Business Income Coverage; or

(2) Immediately after the time of direct physical loss or damage for Extra Expense Coverage;

caused by or resulting from any Covered Cause of Loss at the described premises;

and

b. Ends on the earlier of:

(1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or

(2) The date when business is resumed at a new permanent location.

"Period of restoration" does not include any increased period required due to the enforcement of or compliance with any ordinance or law that:

(1) Regulates the construction, use or repair, or requires the tearing down, of any property; or

(2) 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".

The expiration date of this policy will not cut short the "period of restoration".

4. "Pollutants" means 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.

5. "Rental Value" means Business Income that consists of:

a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred as rental income from tenant occupancy of the premises described in the Declarations as furnished and equipped by you, including fair rental value of any portion of the described premises which is occupied by you; and

b. Continuing normal operating expenses incurred in connection with that premises, including:

(1) Payroll; and

(2) The amount of charges which are the legal obligation of the tenant(s) but would otherwise be your obligations.

6. "Suspension" means:

a. The slowdown or cessation of your business activities; or

b. That a part or all of the described premises is rendered untenable, if coverage for Business Income including "Rental Value" or "Rental Value" applies.

COMMERCIAL PROPERTY  
CP 10 30 10 12

### CAUSES OF LOSS - SPECIAL FORM

Words and phrases that appear in quotation marks have special meaning. Refer to Section 6, Definitions.

#### A. Covered Causes Of Loss

When Special is shown in the Declarations, Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy.

#### B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

##### a. Ordinance Or Law

The enforcement of or compliance with any ordinance or law:

- (1) Regulating the construction, use or repair of any property; or
- (2) Requiring the tearing down of any property, including the cost of removing its debris.

This exclusion, Ordinance Or Law, applies whether the loss results from:

- (a) An ordinance or law that is enforced even if the property has not been damaged; or
- (b) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property, or removal of its debris, following a physical loss to that property.

##### b. Earth Movement

- (1) Earthquake, including tremors and aftershocks and any earth sinking, rising or shifting related to such event;
- (2) Landslide, including any earth sinking, rising or shifting related to such event;
- (3) Mine subsidence, meaning subsidence of a man-made mine, whether or not mining activity has ceased;
- (4) Earth sinking (other than sinkhole

collapse), rising or shifting including soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of realty. Soil conditions include contraction, expansion, freezing, thawing, erosion, improperly compacted soil and the action of water under the ground surface.

But if Earth Movement, as described in b.(1) through (4) above, results in fire or explosion, we will pay for the loss or damage caused by that fire or explosion.

(5) Volcanic eruption, explosion or effusion. But if volcanic eruption, explosion or effusion results in fire, building glass breakage or Volcanic Action, we will pay for the loss or damage caused by that fire, building glass breakage or Volcanic Action.

Volcanic Action means direct loss or damage resulting from the eruption of a volcano when the loss or damage is caused by:

- (a) Airborne volcanic blast or airborne shock waves;
- (b) Ash, dust or particulate matter; or
- (c) Lava flow.

With respect to coverage for Volcanic Action as set forth in (5)(a), (5)(b) and (5)(c), all volcanic eruptions that occur within any 168-hour period will constitute a single occurrence.

Volcanic Action does not include the cost to remove ash, dust or particulate matter that does not cause direct physical loss or damage to the described property.

This exclusion applies regardless of whether any of the above, in Paragraphs (1) through (5), is caused by an act of nature or is otherwise caused.



**c. Governmental Action**

Seizure or destruction of property by order of governmental authority.

But we will pay for loss or damage caused by or resulting from acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread, if the fire would be covered under this Coverage Part.

**d. Nuclear Hazard**

Nuclear reaction or radiation, or radioactive contamination, however caused.

But if nuclear reaction or radiation, or radioactive contamination, results in fire, we will pay for the loss or damage caused by that fire.

**e. Utility Services**

The failure of power, communication, water or other utility service supplied to the described premises, however caused, if the failure:

- (1) Originates away from the described premises; or
- (2) Originates at the described premises, but only if such failure involves equipment used to supply the utility service to the described premises from a source away from the described premises.

Failure of any utility service includes lack of sufficient capacity and reduction in supply.

Loss or damage caused by a surge of power is also excluded, if the surge would not have occurred but for an event causing a failure of power.

But if the failure or surge of power, or the failure of communication, water or other utility service, results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

Communication services include but are not limited to service relating to Internet access or access to any electronic, cellular or satellite network.

**f. 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 in hindering or defending against any of these.

**g. Water**

- (1) Flood, surface water, waves (including tidal waves and tsunami), tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driven by wind (including storm surge);
- (2) Mudslide or mudflow;
- (3) Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;
- (4) Water under the ground surface pressing on, or flowing or seeping through:
  - (a) Foundations, walls, floors or paved surfaces;
  - (b) Basements, whether paved or not; or
  - (c) Doors, windows or other openings; or
- (5) Waterborne material carried or otherwise moved by any of the water referred to in Paragraph (1), (3) or (4), or material carried or otherwise moved by mudslide or mudflow.

This exclusion applies regardless of whether any of the above, in Paragraphs (1) through (5), is caused by an act of nature or is otherwise caused. An example of a situation to which this exclusion applies is the situation where a dam, levee, seawall or other boundary or containment system fails in whole or in part, for any reason, to contain the water.

But if any of the above, in Paragraphs (1) through (5), results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage (if sprinkler leakage is a Covered Cause of Loss).

**h. "Fungus", Wet Rot, Dry Rot And Bacteria**

Presence, growth, proliferation, spread or any activity of "fungus", wet or dry rot or bacteria.

But if "fungus", wet or dry rot or bacteria result in a "specified cause of loss", we will pay for the loss or damage caused by that "specified cause of loss".

This exclusion does not apply:

- (1) When "fungus", wet or dry rot or bacteria result from fire or lightning; or
- (2) To the extent that coverage is provided in the Additional Coverage, Limited Coverage For "Fungus", Wet Rot, Dry Rot And Bacteria, with respect to loss or damage by a cause of loss other than fire or lightning.

Exclusions B.1.a. through B.1.h. apply whether or not the loss event results in widespread damage or affects a substantial area.

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

- 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.

For the purpose of this exclusion, electrical, magnetic or electromagnetic energy includes but is not limited to:

- (a) Electrical current, including arcing;
- (b) Electrical charge produced or conducted by a magnetic or electromagnetic field;
- (c) Pulse of electromagnetic energy; or
- (d) Electromagnetic waves or microwaves.

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

- b. Delay, loss of use or loss of market.
- c. Smoke, vapor or gas from agricultural smudging or industrial operations.
- d. (1) Wear and tear;
- (2) Rust or other corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;
- (3) Smog;
- (4) Settling, cracking, shrinking or expansion;

(5) Nesting or infestation, or discharge or release of waste products or secretions, by insects, birds, rodents or other animals.

(6) Mechanical breakdown, including rupture or bursting caused by centrifugal force. But if mechanical breakdown results in elevator collision, we will pay for the loss or damage caused by that elevator collision.

(7) The following causes of loss to personal property:

- (a) Dampness or dryness of atmosphere;
- (b) Changes in or extremes of temperature; or
- (c) Marring or scratching.

But if an excluded cause of loss that is listed in 2.d.(1) through (7) results in a "specified cause of loss" or building glass breakage, we will pay for the loss or damage caused by that "specified cause of loss" or building glass breakage.

- e. Explosion of steam boilers, steam pipes, steam engines or steam turbines owned or leased by you, or operated under your control. But if explosion of steam boilers, steam pipes, steam engines or steam turbines results in fire or combustion explosion, we will pay for the loss or damage caused by that fire or combustion explosion. We will also pay for loss or damage caused by or resulting from the 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.
- f. Continuous or repeated seepage or leakage of water, or the presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more.
- g. Water, other liquids, powder or molten material that leaks or flows from plumbing, heating, air conditioning or other equipment (except fire protective systems) caused by or resulting from freezing, unless:
  - (1) You do your best to maintain heat in the building or structure; or

(2) You drain the equipment and shut off the supply if the heat is not maintained.

h. Dishonest or criminal act (including theft) by you, any of your partners, members, officers, managers, employees (including temporary employees and leased workers), directors, trustees or authorized representatives, whether acting alone or in collusion with each other or with any other party; or theft by any person to whom you entrust the property for any purpose, whether acting alone or in collusion with any other party.

This exclusion:

(1) Applies whether or not an act occurs during your normal hours of operation;

(2) Does not apply to acts of destruction by your employees (including temporary employees and leased workers) or authorized representatives; but theft by your employees (including temporary employees and leased workers) or authorized representatives is not covered.

i. 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.

j. Rain, snow, ice or sleet to personal property in the open.

k. Collapse, including any of the following conditions of property or any part of the property:

(1) An abrupt falling down or caving in;

(2) Loss of structural integrity, including separation of parts of the property or property in danger of falling down or caving in; or

(3) Any cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion as such condition relates to (1) or (2) above.

But if collapse results in a Covered Cause of Loss at the described premises, we will pay for the loss or damage caused by that Covered Cause of Loss.

This exclusion, k., does not apply:

(a) To the extent that coverage is provided under the Additional Coverage, Collapse, or

(b) To collapse caused by one or more of the following:

(i) The "specified causes of loss";

(ii) Breakage of building glass;

(iii) Weight of rain that collects on a roof; or

(iv) Weight of people or personal property.

l. Discharge, dispersal, seepage, migration, release or escape of "pollutants" unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the "specified causes of loss". But if the discharge, dispersal, seepage, migration, release or escape of "pollutants" results in a "specified cause of loss", we will pay for the loss or damage caused by that "specified cause of loss".

This exclusion, l., does not apply to damage to glass caused by chemicals applied to the glass.

m. Neglect of an insured to use all reasonable means to save and preserve property from further damage at and after the time of loss.

3. We will not pay for loss or damage caused by or resulting from any of the following, 3.a. through 3.c. But if an excluded cause of loss that is listed in 3.a. through 3.c. results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

a. Weather conditions. But this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in Paragraph 1. above to produce the loss or damage.

b. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

c. Faulty, inadequate or defective:

(1) Planning, zoning, development, surveying, siting;

(2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

(3) Materials used in repair, construction, renovation or remodeling; or

(4) Maintenance;

of part or all of any property on or off the described premises.

**4. Special Exclusions**

The following provisions apply only to the specified Coverage Forms:

**a. Business Income (And Extra Expenses) Coverage Form, Business Income (Without Extra Expense) Coverage Form, Or Extra Expense Coverage Form**

We will not pay for:

- (1) Any loss caused by or resulting from:
  - (a) Damage or destruction of "finished stock"; or
  - (b) The time required to reproduce "finished stock".

This exclusion does not apply to Extra Expense.

- (2) Any loss caused by or resulting from direct physical loss or damage to radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers.

- (3) Any increase of loss caused by or resulting from:

- (a) Delay in rebuilding, repairing or replacing the property or resuming "operations", due to interference at the location of the rebuilding, repair or replacement by strikers or other persons; or

- (b) Suspension, lapse or cancellation of any license, lease or contract. But if the suspension, lapse or cancellation is directly caused by the "suspension" of "operations", we will cover such loss that affects your Business Income during the "period of restoration" and any extension of the "period of restoration" in accordance with the terms of the Extended Business Income Additional Coverage and the Extended Period Of Indemnity Optional Coverage or any variation of these.

- (4) Any Extra Expense caused by or resulting from suspension, lapse or cancellation of any license, lease or contract beyond the "period of restoration".

- (5) Any other consequential loss.

**b. Leasehold Interest Coverage Form**

- (1) Paragraph B.1.a., Ordinance Or Law, does not apply to insurance under this Coverage Form.

- (2) We will not pay for any loss caused by:

- (a) Your cancelling the lease;
- (b) The suspension, lapse or cancellation of any license; or
- (c) Any other consequential loss.

**c. Legal Liability Coverage Form**

- (1) The following exclusions do not apply to insurance under this Coverage Form:

- (a) Paragraph B.1.a. Ordinance Or Law;
- (b) Paragraph B.1.c. Governmental Action;
- (c) Paragraph B.1.d. Nuclear Hazard;
- (d) Paragraph B.1.e. Utility Services; and
- (e) Paragraph B.1.f. War And Military Action.

- (2) The following additional exclusions apply to insurance under this Coverage Form:

**(a) Contractual Liability**

We will not defend any claim or "suit", or pay damages that you are legally liable to pay, solely by reason of your assumption of liability in a contract or agreement. But this exclusion does not apply to a written lease agreement in which you have assumed liability for building damage resulting from an actual or attempted burglary or robbery, provided that:

- (i) Your assumption of liability was executed prior to the accident; and
- (ii) The building is Covered Property under this Coverage Form.

**(b) Nuclear Hazard**

We will not defend any claim or "suit", or pay any damages, loss, expense or obligation, resulting from nuclear reaction or radiation, or radioactive contamination, however caused.

**5. Additional Exclusion**

The following provisions apply only to the specified property:

**Loss Or Damage To Products**

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

**C. Limitations**

The following limitations apply to all policy forms and endorsements, unless otherwise stated:

1. We will not pay for loss of or damage to property, as described and limited in this section. In addition, we will not pay for any loss that is a consequence of loss or damage as described and limited in this section.

a. Steam boilers, steam pipes, steam engines or steam turbines caused by or resulting from any condition or event inside such equipment. But we will pay for loss of or damage to such equipment caused by or resulting from an 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. Hot water boilers or other water heating equipment caused by or resulting from any condition or event inside such boilers or equipment, other than an explosion.

c. The interior of any building or structure, or to personal property in the building or structure, caused by or resulting from rain, snow, sleet, ice, sand or dust, whether driven by wind or not, unless:

(1) The building or structure first sustains damage by a Covered Cause of Loss to its roof or walls through which the rain, snow, sleet, ice, sand or dust enters; or

(2) The loss or damage is caused by or results from thawing of snow, sleet or ice on the building or structure.

d. Building materials and supplies not attached as part of the building or structure, caused by or resulting from theft.

However, this limitation does not apply to:

(1) Building materials and supplies held for sale by you, unless they are insured under the Builders Risk Coverage Form; or

(2) Business Income Coverage or Extra Expense Coverage.

e. Property that is missing, where the only evidence of the loss or damage is a shortage disclosed on taking inventory, or other instances where there is no physical evidence to show what happened to the property.

f. Property that has been transferred to a person or to a place outside the described premises on the basis of unauthorized instructions.

g. Lawns, trees, shrubs or plants which are part of a vegetated roof, caused by or resulting from:

(1) Dampness or dryness of atmosphere or of soil supporting the vegetation;

(2) Changes in or extremes of temperature;

(3) Disease;

(4) Frost or hail; or

(5) Rain, snow, ice or sleet.

2. We will not pay for loss of or damage to the following types of property unless caused by the "specified causes of loss" or building glass breakage:

a. Animals, and then only if they are killed or their destruction is made necessary.

b. Fragile articles such as statuary, marbles, chinaware and porcelains, if broken. This restriction does not apply to:

(1) Glass; or

(2) Containers of property held for sale.

c. Builders' machinery, tools and equipment owned by you or entrusted to you, provided such property is Covered Property.

However, this limitation does not apply:

(1) If the property is located on or within 100 feet of the described premises, unless the premises is insured under the Builders Risk Coverage Form; or

(2) To Business Income Coverage or to Extra Expense Coverage.



- 3. The special limit shown for each category, a. through d., is the total limit for loss of or damage to all property in that category. The special limit applies to any one occurrence of theft, regardless of the types or number of articles that are lost or damaged in that occurrence. The special limits are (unless a higher limit is shown in the Declarations):
  - a. \$2,500 for furs, fur garments and garments trimmed with fur.
  - b. \$2,500 for jewelry, watches, watch movements, jewels, pearls, precious and semiprecious stones, bullion, gold, silver, platinum and other precious alloys or metals. This limit does not apply to jewelry and watches worth \$100 or less per item.
  - c. \$2,500 for patterns, dies, molds and forms.
  - d. \$250 for stamps, tickets, including lottery tickets held for sale, and letters of credit.

These special limits are part of, not in addition to, the Limit of Insurance applicable to the Covered Property.

This limitation, C.3., does not apply to Business Income Coverage or to Extra Expense Coverage.

- 4. We will not pay the cost to repair any defect to a system or appliance from which water, other liquid, powder or molten material escapes. But we will pay the cost to repair or replace damaged parts of fire-extinguishing equipment if the damage:
  - a. Results in discharge of any substance from an automatic fire protection system; or
  - b. Is directly caused by freezing.

However, this limitation does not apply to Business Income Coverage or to Extra Expense Coverage.

**D. Additional Coverage - Collapse**

The coverage provided under this Additional Coverage, Collapse, applies only to an abrupt collapse as described and limited in D.1, through D.7.

- 1. For the purpose of this Additional Coverage, Collapse, abrupt collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose.

- 2. We will pay for direct physical loss or damage to Covered Property, caused by abrupt collapse of a building or any part of a building that is insured under this Coverage Form or that contains Covered Property insured under this Coverage Form, if such collapse is caused by one or more of the following:

- a. Building decay that is hidden from view, unless the presence of such decay is known to an insured prior to collapse;
- b. Insect or vermin damage that is hidden from view, unless the presence of such damage is known to an insured prior to collapse;
- c. Use of defective material or methods in construction, remodeling or renovation if the abrupt collapse occurs during the course of the construction, remodeling or renovation.
- d. Use of defective material or methods in construction, remodeling or renovation if the abrupt collapse occurs after the construction, remodeling or renovation is complete, but only if the collapse is caused in part by:
  - (1) A cause of loss listed in 2.a. or 2.b.;
  - (2) One or more of the "specified causes of loss";
  - (3) Breakage of building glass;
  - (4) Weight of people or personal property; or
  - (5) Weight of rain that collects on a roof.

- 3. This Additional Coverage - Collapse does not apply to:

- a. A building or any part of a building that is in danger of falling down or caving in;
- b. A part of a building that is standing, even if it has separated from another part of the building; or
- c. A building that is standing or any part of a building that is standing, even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.

- 4. With respect to the following property:

- a. Outdoor radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers;

- b. Awnings, gutters and downspouts;
- c. Yard fixtures;
- d. Outdoor swimming pools;
- e. Fences;
- f. Piers, wharves and docks;
- g. Beach or diving platforms or appurtenances;
- h. Retaining walls; and
- i. Walks, roadways and other paved surfaces;

If an abrupt collapse is caused by a cause of loss listed in 2.a. through 2.d., we will pay for loss or damage to that property only if:

- (1) Such loss or damage is a direct result of the abrupt collapse of a building insured under this Coverage Form; and
- (2) The property is Covered Property under this Coverage Form.

5. If personal property abruptly falls down or caves in and such collapse is not the result of abrupt collapse of a building, we will pay for loss or damage to Covered Property caused by such collapse of personal property only if:
- a. The collapse of personal property was caused by a cause of loss listed in 2.a. through 2.d.;
  - b. The personal property which collapses is inside a building; and
  - c. The property which collapses is not of a kind listed in 4., regardless of whether that kind of property is considered to be personal property or real property.

The coverage stated in this Paragraph 5. does not apply to personal property if marring and/or scratching is the only damage to that personal property caused by the collapse.

- 6. This Additional Coverage, Collapse, does not apply to personal property that has not abruptly fallen down or caved in, even if the personal property shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.
- 7. This Additional Coverage, Collapse, will not increase the Limits of Insurance provided in this Coverage Part.
- 8. The term Covered Cause of Loss includes the Additional Coverage, Collapse, as described and limited in D.1 through D.7.

**E. Additional Coverage - Limited Coverage For "Fungus", Wet Rot, Dry Rot And Bacteria**

1. The coverage described in E.2. and E.6. only applies when the "fungus", wet or dry rot or bacteria are the result of one or more of the following causes that occur during the policy period and only if all reasonable means were used to save and preserve the property from further damage at the time of and after that occurrence:

- a. A "specified cause of loss" other than fire or lightning; or
- b. Flood, if the Flood Coverage Endorsement applies to the affected premises.

This Additional Coverage does not apply to lawns, trees, shrubs or plants which are part of a vegetated roof.

2. We will pay for loss or damage by "fungus", wet or dry rot or bacteria. As used in this Limited Coverage, the term loss or damage means:

- a. Direct physical loss or damage to Covered Property caused by "fungus", wet or dry rot or bacteria, including the cost of removal of the "fungus", wet or dry rot or bacteria;
- b. The cost to tear out and replace any part of the building or other property as needed to gain access to the "fungus", wet or dry rot or bacteria; and
- c. The cost of testing performed after removal, repair, replacement or restoration of the damaged property is completed, provided there is a reason to believe that "fungus", wet or dry rot or bacteria are present.

3. The coverage described under E.2. of this Limited Coverage is limited to \$15,000. Regardless of the number of claims, this limit is the most we will pay for the total of all loss or damage arising out of all occurrences of "specified causes of loss" (other than fire or lightning) and Flood which take place in a 12-month period (starting with the beginning of the present annual policy period). With respect to a particular occurrence of loss which results in "fungus", wet or dry rot or bacteria, we will not pay more than a total of \$15,000 even if the "fungus", wet or dry rot or bacteria continue to be present or active, or recur, in a later policy period.

4. The coverage provided under this Limited Coverage does not increase the applicable Limit of Insurance on any Covered Property. If a particular occurrence results in loss or damage by "fungus", wet or dry rot or bacteria, and other loss or damage, we will not pay more, for the total of all loss or damage, than the applicable Limit of Insurance on the affected Covered Property.

If there is covered loss or damage to Covered Property, not caused by "fungus", wet or dry rot or bacteria, loss payment will not be limited by the terms of this Limited Coverage, except to the extent that "fungus", wet or dry rot or bacteria cause an increase in the loss. Any such increase in the loss will be subject to the terms of this Limited Coverage.

5. The terms of this Limited Coverage do not increase or reduce the coverage provided under Paragraph F.2. (Water Damage, Other Liquids, Powder Or Molten Material Damage) of this Causes Of Loss form or under the Additional Coverage, Collapse.

6. The following, 6.a. or 6.b., applies only if Business Income and/or Extra Expense Coverage applies to the described premises and only if the "suspension" of "operations" satisfies all terms and conditions of the applicable Business Income and/or Extra Expense Coverage Form:

a. If the loss which resulted in "fungus", wet or dry rot or bacteria does not in itself necessitate a "suspension" of "operations", but such "suspension" is necessary due to loss or damage to property caused by "fungus", wet or dry rot or bacteria, then our payment under Business Income and/or Extra Expense is limited to the amount of loss and/or expense sustained in a period of not more than 30 days. The days need not be consecutive.

b. If a covered "suspension" of "operations" was caused by loss or damage other than "fungus", wet or dry rot or bacteria but remediation of "fungus", wet or dry rot or bacteria prolongs the "period of restoration", we will pay for loss and/or expense sustained during the delay (regardless of when such a delay occurs during the "period of restoration"), but such coverage is limited to 30 days. The days need not be consecutive.

**F. Additional Coverage Extensions**

**1. Property In Transit**

This Extension applies only to your personal property to which this form applies.

a. You may extend the insurance provided by this Coverage Part to apply to your personal property (other than property in the care, custody or control of your salespersons) in transit more than 100 feet from the described premises. Property must be in or on a motor vehicle you own, lease or operate while between points in the coverage territory.

b. Loss or damage must be caused by or result from one of the following causes of loss:

(1) Fire, lightning, explosion, windstorm or hail, riot or civil commotion, or vandalism.

(2) Vehicle collision, upset or overturn. Collision means accidental contact of your vehicle with another vehicle or object. It does not mean your vehicle's contact with the roadbed.

(3) Theft of an entire bale, case or package by forced entry into a securely locked body or compartment of the vehicle. There must be visible marks of the forced entry.

c. The most we will pay for loss or damage under this Extension is \$5,000.

This Coverage Extension is additional insurance. The Additional Condition, Coinsurance, does not apply to this Extension.

**2. Water Damage, Other Liquids, Powder Or Molten Material Damage**

If loss or damage caused by or resulting from covered water or other liquid, powder or molten material damage loss occurs, we will also pay the cost to tear out and replace any part of the building or structure to repair damage to the system or appliance from which the water or other substance escapes. This Coverage Extension does not increase the Limit of Insurance.

**3. Glass**

a. We will pay for expenses incurred to put up temporary plates or board up openings if repair or replacement of damaged glass is delayed.



b. We will pay for expenses incurred to remove or replace obstructions when repairing or replacing glass that is part of a building. This does not include removing or replacing window displays.

This Coverage Extension F.3. does not increase the Limit of Insurance.

**G. Definitions**

1. "Fungus" means any type or form of fungus, including mold or mildew, and any mycotoxins, spores, ascents or by-products produced or released by fungi.

2. "Specified causes of loss" means the following: fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire-extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.

a. Sinkhole collapse means the sudden sinking or collapse of land into underground empty spaces created by the action of water on limestone or dolomite. This cause of loss does not include:

- (1) The cost of filling sinkholes; or
- (2) Sinking or collapse of land into man-made underground cavities.

b. Falling objects does not include loss or damage to:

- (1) Personal property in the open; or
- (2) The interior of a building or structure, or property inside a building or structure, unless the roof or an outside wall of the building or structure is first damaged by a falling object.

c. Water damage means:

(1) Accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of a plumbing, heating, air conditioning or other system or appliance (other than a sump system including its related equipment and parts), that is located on the described premises and contains water or steam; and

(2) Accidental discharge or leakage of water or waterborne material as the direct result of the breaking apart or cracking of a water or sewer pipe that is located off the described premises and is part of a municipal potable water supply system or municipal sanitary sewer system, if the breakage or cracking is caused by wear and tear.

But water damage does not include loss or damage otherwise excluded under the terms of the Water Exclusion. Therefore, for example, there is no coverage under this policy in the situation in which discharge or leakage of water results from the breaking apart or cracking of a pipe which was caused by or related to weather-induced flooding, even if wear and tear contributed to the breakage or cracking. As another example, and also in accordance with the terms of the Water Exclusion, there is no coverage for loss or damage caused by or related to weather-induced flooding which follows or is exacerbated by pipe breakage or cracking attributable to wear and tear.

To the extent that accidental discharge or leakage of water falls within the criteria set forth in c.(1) or c.(2) of this definition of "specified causes of loss," such water is not subject to the provisions of the Water Exclusion which preclude coverage for surface water or water under the surface of the ground.

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This endorsement changes  
the policy  
-- PLEASE READ THIS CAREFULLY --

### VIRUS OR BACTERIA EXCLUSION

#### DEFINITIONS

**Definitions Amended --**

When "fungus" is a defined "term", the definition of "fungus" is amended to delete reference to a bacterium.

When "fungus or related perils" is a defined "term", the definition of "fungus or related perils" is amended to delete reference to a bacterium.

#### PERILS EXCLUDED

The additional exclusion set forth below applies to all coverages, coverage extensions, supplemental coverages, optional coverages, and endorsements that are provided by the policy to which this endorsement is attached, including, but not limited to, those that provide coverage for property, earnings, extra expense, or interruption by civil authority.

1. The following exclusion is added under Perils Excluded, item 1.:

**Virus or Bacteria --**

"We" do not pay for loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress.

This exclusion applies to, but is not limited to, any loss, cost, or expense as a result of:

- a. any contamination by any virus, bacterium, or other microorganism; or
- b. any denial of access to property because of any virus, bacterium, or other microorganism.

2. **Superseded Exclusions --** The Virus or Bacteria exclusion set forth by this endorsement supersedes the "terms" of any other exclusions referring to "pollutants" or to contamination with respect to any loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress.

#### OTHER CONDITIONS

**Other Terms Remain in Effect --**

The "terms" of this endorsement, whether or not applicable to any loss, cost, or expense, cannot be construed to provide coverage for a loss, cost, or expense that would otherwise be excluded under the policy to which this endorsement is attached.



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