Supreme Court Case No. S277893

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ANOTHER PLANET ENTERTAINMENT, LLC,

Petitioner,

vs.

VIGILANT INSURANCE COMPANY,

Respondent.

Application to File *Amici Curiae* Brief and *Amici Curiae* Brief of California Pizza Kitchen, Inc.; French Laundry Partners, LP, DBA The French Laundry; KRM, Inc. DBA Thomas Keller Restaurant Group; and Yountville Food Emporium, LLC DBA Bouchon Bistro; in support of Petitioner Another Planet Entertainment, LLC

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APPLICATION TO FILE *AMICI CURIAE* BRIEF

Pursuant to California Rules of Court Rule 8.520, subdivision (f), California Pizza Kitchen, Inc.; French Laundry Partners, LP, DBA The French Laundry; KRM, Inc. DBA Thomas Keller Restaurant Group; and Yountville Food Emporium, LLC DBA Bouchon Bistro (collectively "*Amici*") request leave to file the *amici curiae* brief submitted herewith. This brief is submitted in support of Petitioner Another Planet Entertainment, LLC ("Another Planet").

I. Interest of *Amici* and Explanation of How Proposed Brief Will Assist the Court

Many California policyholders in the food-service and entertainment industries, including Another Planet and *Amici*, paid substantial premiums for "all risk" property insurance policies providing Business Income coverage and containing no express virus exclusion. These policyholders had reasonable expectations that, if their operations suffered total or partial suspensions from the presence of a deadly virus, their insurance companies would pay the resulting loss of Business Income, just as those companies would have paid for loss from a partial suspension arising from a kitchen fire or the temporary presence of ammonia from a localized release.

Now, in a moment of need, their insurers, like Respondent

Vigilant Insurance Company ("Vigilant"), have denied coverage for Business Income losses arising from SARS-CoV-2 and COVID-19, despite electing, at the point of sale, not to attach an express virus exclusion to the policies they sold.

Amici respectfully request to file this brief with the Court to provide important information that lays the foundation of why Vigilant's proposed interpretation of "direct physical loss or damage" is incorrect and contrary to the long-held industry understanding of that phrase.

An express virus exclusion has been available and widely-used since insurance industry drafting organizations (collectively, ISO)[1] created it in response to the insurance industry's losses from the first coronavirus pandemic, SARS-CoV-1, in 2002-2003. The insurance industry further has additional, recent experience of the dangers posed by viral pandemics, caused by Middle East Respiratory Syndrome ("MERS") in 2012 and the Zika virus in 2015-2016. Indeed, the recurring threat to property insurers from viruses was such that, by the inception of the COVID-19 pandemic in 2020, property insurance companies had inserted express virus

1 This application and accompanying brief will refer to the Insurance Services Office, along with all other drafting organizations, collectively, as "ISO."

exclusions into more than 82% of insurance policies they sold.[2]

It was reasonable for policyholders like Another Planet and *Amici* to conclude that, in the absence of an express virus exclusion, they had coverage for loss related to viruses under the standard-form property wording (triggered by direct physical loss of or physical damage to property); otherwise, what was the purpose of the express virus exclusion? Similarly, policyholders reasonably could expect that, if their policy had no exclusion for mold, they had coverage for loss or damage from mold spores, etc. The reasonableness of these beliefs is, as shown below, confirmed by the statements and actions of ISO, the drafter of the standard-form policy language at issue, which, on behalf of insurers, represented to California insurance regulators that coverage for Business Income loss from a virus could exist under the broad, standard-form Business Income trigger of direct physical "loss" or "damage" **in the absence of an express virus exclusion**.

Insurers should not now – in the face COVID-19 claims – be allowed to rewrite that broad standard-form Business Income trigger to impose additional restrictive language. Such a result would contradict what ISO, the drafter of that trigger who was speaking for insurance companies, represented to regulators. *Amici* has a great interest in enforcing these regulatory representations and holding the insurance industry accountable

2 See COVID-19 Property & Casualty Insurance Business Interruption Data Call (June 2020) (attached hereto as Ex. **1**).

for the policies it writes. If insurance companies know their policies without express virus exclusions provide coverage for lost Business Income as a result of loss or damage from the presence of a virus, they should provide such coverage. At a minimum, if insurance companies know that their insurance policies are at least ambiguous as to whether they provide coverage in such situations, it is their obligation to clarify them, prodded by California law on ambiguity. For these reasons, *Amici* support Another Planet's request that the Court answer the certified question in the affirmative and hold that the actual or potential presence of the COVID-19 virus on an insured's premises does constitute physical loss or damage to property under commercial property insurance policies.

Amici here seek to fulfill the class role of an *amicus curiae*, supplementing the efforts of the parties and their counsel, and drawing the Court's attention to points that are not addressed by the parties but at the core to the interests of California policyholders, including *Amici*. That is an appropriate role for *Amici*, as an *amicus curiae* often can "focus the court's attention on the broad implications of various possible rulings." (Robert L. Stern, Eugene Greggman & Stephen M. Shapiro, Supreme Court Practice: For Practice in the Supreme Court of the United State 570-71 (1986), quoting Bruce J. Ennis, Effective Amicus Briefs, 33 Cath. U. L. Rev. 603, 608 (1984).) *Amici* does that here by providing the history and background of the language at issue, including the insurance industry's response to judicial

construction of that language, which was not to limit it in the way they now suggest but instead to create exclusions for exposure they viewed as threatening.

For the foregoing reasons, *Amici* respectfully request that the Court accept the attached *amici curiae* brief for filing.

DATED: August 2, 2023

REED SMITH LLP

By 

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

AMICI CURIAE BRIEF

I. SUMMARY OF THE ARGUMENT

Property and casualty insurers (including Vigilant) have, for more than sixty years, sold standard-form property insurance policies containing coverage triggered by direct "physical loss" or "physical damage." Throughout this period, in high-profile cases, courts gave a broad legal construction of those terms, finding they were triggered in contexts essentially identical to those here – including where property is infused or threatened with dangerous substances like asbestos, ammonia, smoke, bacteria, mold spores or poisonous spiders – without requiring any physical alteration of the property. Property insurance companies and their drafting organizations, including ISO,[3] knew this because it was their business to know it: they monitored the legal construction courts gave the standard-form terms they chose for their policies, because this construction established the meaning of that language for millions of policies, and they negotiated changes to that standard-form language with regulators if they felt them necessary.

And, during this sixty-year period, the insurance industry did negotiate *limited* changes. Notably, the insurance industry did not seek a *major* change: revising the broad trigger for Business

3 Upon information and belief, Vigilant was, and is, a member of ISO. Vigilant employed ISO copyrighted forms in the insurance policy it sold to Another Planet. (E.g., ER-80, 151-157.)

Income coverage by adding a requirement of physical alteration. Instead, ISO took a targeted approach, from the other direction. When ISO became concerned about claims from a particular substance under its broad trigger, it drafted a "laser" exclusion that insurers could add to exclude loss or damage from that substance. In this way, ISO developed exclusions for radiation, asbestos, silica, mold, bacteria and, most important for this case, viruses. None of these substances necessarily cause physical alteration to property.

As Another Planet persuasively explains, SARS-CoV-2 actually does physically alter and damage property, and Another Planet pleaded this and should be allowed the opportunity to prove it.

Amici make different points in support of Another Planet's alternative case. First, the insurance industry knew and represented that its undefined terms direct "physical loss" or "physical damage" include situations where property cannot safely be used, even if not physically altered. At a minimum, however, Vigilant knew such language is *at least ambiguous* as to whether it is triggered by losses caused by a virus, and Vigilant knew that an express virus exclusion was drafted to address this exposure, but Vigilant chose not to employ the specific virus exclusion language in the Another Planet Policy.

Amici make two other points. Their second point is that

courts, since March 2020 and outside the COVID-19 context, have applied the historic rule that events which render property unsafe or unfit for its intended use cause direct physical loss or damage. The only cases from which courts deviate from their established legal reading of these terms involve SARS-CoV-2, and courts have disclosed why this is so: they fear for the solvency of the insurance industry. But the insurance industry's cries of "wolf" here ring hollow; 82% of the policies in place at the start of the pandemic contained express virus exclusions. While these doomsday predictions are irrelevant to the legal construction of a contract, the doom could not materialized here.

The real threat here is *Amici*'s third point: the insurance industry will use the results in nationwide COVID-19 litigation to claw back the coverage courts have confirmed over the last 60 years. It is already succeeding. Given that the vast, vast majority of insurance coverage cases are settled, short of court, but on the basis of court decisions, this may lead to a massive constriction of coverage for thousands and thousands of policyholders. Such contraction of coverage should not occur outside the review of California's insurance regulator, the only party with the power to negotiate such a change and adjust rates accordingly.

II. ARGUMENT

A. For Sixty Years, Vigilant Has Known That Its Standard-Form Business Income Trigger Was at Least Ambiguous as to Whether It Applied to Loss or Damage from a Virus, and Under California Law Its Election Not to Add an Express Virus Exclusion Must Have Consequences

Vigilant cannot reasonably contest that it was aware that policyholders, courts, insurance companies, and insurance industry drafting organizations had – for decades – concluded that standard-form direct "physical loss" or "physical damage" language was triggered by situations where property was rendered unfit or unsafe for its intended use, regardless of whether such property had suffered "physical alteration." Vigilant further knew that the insurance industry's response to this was not to narrow the broad trigger, but to draft laser exclusions like that for physical loss or damage from "virus." At a minimum, Vigilant knew that its standard-form policy language at least was ambiguous as applied in those situations, and it did not eliminate that ambiguity for loss or damage caused by virus; under California law, its failure to act has a legal consequence.

1. The Insurance Industry Expanded the Business Income Trigger from "Damage" or "Destruction" in "Named Peril" Forms to "Loss" or "Damage" to Match the Breadth of "All Risk" Forms

The first U.S. forms providing Business Income coverage were "Use and Occupancy" forms, which were triggered by "damage" to or "destruction" of property.[4] This limited trigger was a function of the peril covered by these polices – fire – which inexorably causes "damage" or "destruction."[5] In the middle of the last century, Use and Occupancy coverage was increasingly triggered by damage or destruction by additional named perils, including "lightning, strikers, riot, explosion, falling aircraft, (including part, parts or cargo thereof) collapse, earthquake, water or the elements."[6] Again, given that these named perils all wreak "damage" or "destruction," there was no need to employ a broader Business Income trigger.

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4 See, e.g., *Brecher Furniture Co. v. Firemen's Ins. Co. of Newark* (Minn. 1923) 191 N.W. 912, 912 [noting that Use and Occupancy policy was triggered when building was "destroyed or damaged" by fire]; *Chatfield v. Aetna Ins. Co.* (N.Y. App. Div. 1902) 75 N.Y.S. 620, 620 ["It is a condition of this contract that if said building, or any part thereof, shall be destroyed or so damaged by fire…."].

5 See, e.g., *Fidelity-Phenix Fire Ins. Co. v. Benedict Coal Corp.* (4th Cir. 1933) 64 F.2d 347, 349-50; *Grand Pac. Hotel Co. v. Mich. Com. Ins. Co.* (Ill. 1909) 90 N.E. 244, 244.

6 See, e.g., *National Children's Expositions Corp. v. Anchor Ins. Co.* (2d Cir. 1960) 279 F.2d 428, 429 fn.1.

In the 1960s and 1970s, however, insurance companies began to add Business Income coverage to "all risks" forms,[7] which cover loss from all fortuitous causes unless expressly excluded.[8] As a general matter, because the insurance industry expanded coverage beyond certain named perils to all risks, it also had to expand the Business Income trigger from "damage" or "destruction" of property to "loss" or "damage" to property,[9] so as to address all the ways any risk might affect property, such as by theft or burglary.[10] In short, for more than 40 years, the insurance industry's standard forms have expressly covered Business Income from "loss" of property, and for this reason contained no requirement that property suffer physical alteration.

This history is especially relevant in the COVID-19 context. For instance, many cases ruling against policyholders have, urged

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7 See, e.g., *Datatab, Inc. v. St. Paul Fire & Marine Ins. Co.* (S.D.N.Y. 1972) 347 F. Supp. 36, 37; *Burdett Oxygen Co. v. Employers Surplus Lines Ins. Co.* (6th Cir. 1969) 419 F.2d 247, 249.

8 See *Parks Real Estate Purchasing Group v. St. Paul Fire & Marine Ins. Co.* (2d Cir. 2006) 472 F.3d 33, 41 ["Commercial property insurance generally is offered in the form of either an 'all risk' policy or a 'named perils' policy. Under an all-risk policy, 'losses caused by *any* fortuitous peril not specifically excluded under the policy will be covered.'… 'By contrast a "named perils" policy covers only losses suffered from an enumerated peril.'"], citations omitted.

9 See, e.g., *Great N. Oil Co. v. St. Paul Fire & Marine Ins. Co.* (Minn. 1975) 227 N.W.2d 789, 792.

10 Charles M. Miller, Richard P. Lewis and Chris Kozak, "COVID-19 and Business-Income Insurance: The History of 'Physical Loss" and What Insurers Intended It To Mean," 57 TORT, TRIAL & INS. PRAC. L.J. 675, 678.

by insurers, found that "loss" means total destruction and "damage" means something short of total ruin.[11] The insurance industry knows this is wrong: "loss" cannot mean "destruction" because the insurance industry specifically replaced "destruction" with "loss."

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

For the last sixty years, there have been issues as to whether unusual events – *i.e.*, events other than a fire, collapse or tornado – cause direct physical "loss" or "damage" to property. The parties discuss these cases at length, and *Amici* will not duplicate that discussion. What is important for present purposes is that there were cases finding standard-form property insurance policies containing the language at issue here to have been triggered in

11 See, e.g., *Uncork and Create LLC v. Cincinnati Ins. Co.* (4th Cir. 2022) 27 F.4th 926, 931-32; *Colectivo Coffee Roasters, Inc. v. Soc'y Ins.* (Wis. 2022) 974 N.W.2d 442.

such circumstances in the 1950s,[12] the 1960s,[13] the 1970s,[14] the 1980s,[15] and the 1990s.[16]

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

13 *Hughes v. Potomac Ins. Co.* (1962) 199 Cal.App.2d 239, 248 [finding that policyholder's home, which became perched on the edge of a cliff after a sudden landslide deprived it of lateral support and stability, was damaged because it became unsafe to live in and thus useless, and thus covered by policy covering "*all risks of physical loss of or damage to*" property], italics added; *W. Fire Ins. Co. v. First Presbyterian Church* (Colo. 1968) 437 P.2d 52, 54 (en banc) [finding a "*direct physical loss*" where a church complied with the fire department's order to close because gasoline vapors made "use of the building dangerous"], italics added.

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

15 *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.* (8th Cir. 1986) 787 F.2d 349, 352 [finding policyholder could claim Business Income coverage from "*direct physical loss*" where risk of collapse necessitated abandonment of grocery store], italics added; *Pillsbury Co. v. Underwriters at Lloyd's, London* (D. Minn. 1989) 705 F. Supp. 1396, 1398-99 [finding creamed corn that became accidentally susceptible to spoilage had suffered "*physical loss or damage*"], italics added.

16 In chronological order: *Hetrick v. Valley Mut. Ins Co.* (Pa. Ct. Com. Pl. 1992) 15 Pa. D. & C. 4th 271, 1992 WL 524309, at *3 [finding that there would be coverage for "*direct loss*" of a house if an outside oil spill made the house uninhabitable], italics added; *Largent v. State Farm Fire & Cas. Co.* (Or. Ct. App. 1992) 842 P.2d 445, 446 [noting insurance company conceded methamphetamine fumes could cause "*accidental direct physical loss*"], italics added; *Farmers Ins. Co. v. Trutanich* (Or. Ct. App. 1993) 858 P.2d 1332, 1335 [finding costs of methamphetamine odor covered as "*direct*

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

In the early 2000s, more courts found that unusual circumstances rendering property unsafe or unusable caused direct physical loss or damage to that property, triggering standard-form property policies.[17]

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physical loss" or damage], italics added; *Arbeiter v. Cambridge Mut. Fire Ins. Co.* (Mass. Super. Ct. Mar. 15, 1996) No. 9400837, 1996 WL 1250616, at *2 [finding oil fumes present in house after discovery of oil leak constituted "*physical damage*" to the house], emphasis added; *Murray v. State Farm Fire & Cas. Co.* (W. Va. 1998) 509 S.E.2d 1, 17 [concluding that a home rendered dangerously unlivable by the presence of falling rocks had suffered a "*direct physical loss to the property*"], italics added; *Matzner v. Seaco Ins. Co.* (Mass. Super. Ct. Aug. 12, 1998) 9 Mass. L. Rptr. 41, 1998 WL 566658, at *4 [concluding that the phrase "*direct physical loss or damage*" was ambiguous and could mean either "only tangible damage to the structure of insured property" or "more than tangible damage to the structure of insured property," and that "carbon monoxide contamination constitutes 'direct physical loss of or damage to' property"], italics added; *Columbiaknit, Inc. v. Affiliated FM Ins. Co.* (D. Or. Aug. 4, 1999) No. 98-434-HU, 1999 WL 619100, at *7-*8 [finding that policyholder could bear its burden to demonstrate that clothes impregnated with mold or mildew suffered "*direct physical loss or damage*" if it established "at trial a class of garments which has increased microbial counts and that will, as a result, develop either an odor or mold or mildew"], italics added; *Board of Educ. v. International Ins. Co.* (Ill. App. Ct. 1999) 720 N.E.2d 622, 625-26 [citing liability insurance coverage cases finding that incorporation of asbestos into buildings caused "property damage," defined under liability policies to be "*physical injury to or destruction of tangible property*," and finding that policyholder had established that the asbestos fiber contamination constituted Property Damage], italics added.

17 In chronological order: *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.* (Minn. 2000) 615 N.W.2d 819, 825-26 ["A principal function of

Consistent with this, the insurance industry paid claims for loss caused by the original novel coronavirus, SARS-CoV-1, in 2002-2004:

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

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any living space [is] to provide a safe environment for the occupants" and "[i]f rental property is contaminated by asbestos fibers and presents a health hazard to the tenants, its function is seriously impaired" resulting in a "*direct physical loss*"], italics added; *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts* (D. Or. June 18, 2002) No. CV-01-1362-ST, 2002 WL 31495830, at *8-*9 [concluding that mold damage to house could constitute "distinct and demonstrable" damage and that inability to inhabit a building may constitute "*direct, physical loss*"], italics added; *Graff v. Allstate Ins. Co.* (Wash. Ct. App. 2002) 54 P.3d 1266, 1269 [finding methamphetamine vapors constituted "*physical loss*" to a house], italics added; *Yale Univ. v. CIGNA Ins. Co.* (D. Conn. 2002) 224 F. Supp. 2d 402, 413 [finding while the presence of asbestos and lead in buildings did not constitute "*physical loss of or damage to property*," contamination by such materials could, citing "the substantial body of case law" "in which a variety of contaminating conditions have been held to constitute 'physical loss or damage to property'"], italics added

payout to one hotel chain, Mandarin Oriental International.[18]

Accordingly, by the mid-2000s, not only did the insurance industry know that courts had found that standard-form property insurance forms covered claims for loss or damage to property affected by substances rendering it dangerous or unusable, the insurance industry specifically knew that its members had paid claims arising from a virus, the first novel coronavirus and precursor to SARS-CoV-2.

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

The loss-of-function cases continued to multiply in the mid-2000s after the industry paid claims from SARS-CoV-1.[19] The

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

19 In chronological order: *Motorists Mut. Ins. Co. v. Hardinger* (3d Cir. 2005) 131 F. App'x 823, 824, 826–27, 824-26 [finding there was a question of fact as to whether E. coli in house caused "*direct physical loss*"], italics added; *De Laurentis v. United Servs. Auto. Ass'n* (Tex. App. Mar. 31, 2005) 162 S.W.3d 714, 722-23 [finding mold damage constituted "*physical loss to property*"], italics added; *Schlamm Stone & Dolan LLP*. v. *Seneca Ins. Co.* (N.Y. Sup. Ct. 2005) 800 N.Y.S.2d 356 [finding that "the presence of noxious particles, both in the air and on surfaces of the plaintiff's premises, would constitute *property damage* under the terms of the policy"], italics added; *Cook v. Allstate Ins. Co.* (Ind. Super. Nov. 30, 2007)

insurance industry, through ISO, its claims handlers, its coverage counsel, and its employees reading trade journals, was well aware of the decisions; indeed, anyone reading one of these cases recounted above would quickly learn of the larger body of authority.[20]

To the extent there is any doubt of this, ISO admitted that it was part of its responsibility to its member companies (including Vigilant) to monitor the common law on standard-form property insurance policies, and that one of the purposes of that review was to identify, and thereafter draft changes to the standard forms to

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

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

eliminate, troublesome language or ambiguities. Specifically, ISO admitted to regulators that it had drafted specific "laser" exclusions for mold and silica because it believed courts would not find loss or damage from mold and silica excluded by the pollution exclusion.[21] Such laser exclusions are of a piece with previous, and ubiquitous, laser exclusions for asbestos and radiation.[22] Note, again, that none of these substances necessarily causes physical alteration to property.

In 2006, the industry took a similar approach with regard to loss or damage from virus. Specifically, insurance company payments in relation to the 2002-2003 SARS-CoV-1 pandemic motivated ISO to draft the Virus or Bacteria Exclusion.[23] As with mold and silica, ISO's concern was not whether or not virus losses triggered coverage under its standard-form "loss" or "damage" Business Income trigger – it accepted they could. Rather, as with mold and silica, ISO's concern was that courts would not find loss or damage from viruses excluded by the pollution exclusion:

> The current pollution exclusion in property policies encompasses contamination (in fact, uses the term contaminant in addition to other terminology).

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

22 See exclusion for radiation in the Another Planet Policy. (E.R. 470)

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

> Although the pollution exclusion addresses contamination broadly, viral and bacterial contamination are specific types that appear to warrant particular attention at this point in time.
>
> An example of bacterial contamination of a product is the growth of listeria bacteria in milk. In this example, bacteria develop and multiply due in part to inherent qualities in the property itself. Some other examples of viral and bacterial contaminants are rotavirus, SARS, influenza (such as avian flu), legionella and anthrax. The universe of disease-causing organisms is always in evolution.
>
> Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses.[24]

Given that it uses ISO forms, *Amici* submits Vigilant must be a member of the ISO; at a minimum, if Vigilant uses ISO language, it adopts ISO representations as to the meaning and effect of that language. This means ISO's statements to regulators are legally and factually the equivalent of statements by Vigilant directly to Another Planet and should be considered admissions by Vigilant. That is why insurance trade organizations like ISO exist: to prepare, draft, and negotiate policy changes, *on behalf of*

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24 ISO Circular (Ex. **3**).

their members, with the state regulators, *who represent consumers*.[25] ISO's statements that, without a clarification through the Virus or Bacteria exclusion, the standard form language could cover Business Income loss from the presence of a virus are admissions of Vigilant. Vigilant, although it employed other laser exclusions for radiation and fungus, (see E.R. 470, 472-73), chose not to use the virus exclusion, and this choice has consequences under California law.

5. From 2007 through 2018, Courts Continued to Conclude and Insurance Companies Agreed that Events Rendering Property Unfit or Unsafe for Intended Use Caused Physical Loss or Damage

After the insurance industry drafted the Virus or Bacteria Exclusion, courts continued to rule for policyholders in cases like this one under language like that at issue here.[26]

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25 *Id.*

26 In chronological order: *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.* (N.J. Super. App. Div. 2009) 968 A.2d 724, 734 ["In the context of this case, the electrical grid was '*physically damaged*' because, due to a physical incident or series of incidents, the grid and its component generators and transmission lines were physically incapable of performing their essential function of providing electricity."], italics added; *Manpower Inc. v. Insurance Co. of the State of Pa.* (E.D. Wis. Nov. 3, 2009) No. 08C0085, 2009 WL 3738099, at *1 [finding "*direct physical loss … or damage to*" a building adjacent to a building which collapsed despite the fact that the collapse did not cause any noticeable damage to the policyholder's occupied space], italics added; *Travco Ins. Co. v. Ward* (E.D. Va. June 3, 2010) No. 2:10cv14, 2010 WL 2222255, at *8-9 [finding that house built with Chinese drywall which emitted

Prior to the current run of pandemic-related claims, insurance companies had confirmed the status of the law discussed above. For instance, three months before the pandemic, Factory Mutual Insurance Company (part of FM Global, perhaps the most sophisticated property insurance company in the United States) admitted that "physical loss or damage" to property exists when the presence of a physical substance renders property unfit for its

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toxic gases, causing the policyholder to move out, had suffered *direct physical loss*, despite the fact that it was "physically intact, functional and ha[d] no visible damage," noting the majority of cases nationwide find that "physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces"], italics added; *In re Chinese Mfd. Drywall*, 759 F. Supp. 2d at 831 [finding that there "exists a covered *physical loss*" where "potentially injurious material" is "activated, for example by releases gases or fibers," and "that the presence of Chinese-manufactured drywall in a home constitutes a physical loss" because it "renders the [policyholders'] homes useless and/or uninhabitable"], italics added; *Association of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.* (D. Haw. 2013) 939 F. Supp. 2d 1059, 1068 [applying Hawai'i law, finding that intrusion of arsenic into roof caused "*direct physical loss or damage*" to the roof], italics added; *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.* (D.N.J. Nov. 25, 2014) No. 2:12-cv-04418, 2014 WL 6675934, at *5-6 [concluding that "property can sustain *physical loss or damage* without experiencing structural alteration," that "the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated," and therefore that the ammonia discharge caused direct physical loss or damage to the plant], italics added; *Mellin v. N. Sec. Ins. Co.* (N.H. 2015) 115 A.3d 799, 805-06 [holding that pervasive odor of cat urine was "*physical loss*" to condominium], italics added; *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.* (D. Or. June 7, 2016) No. 1:15-cv-01932-CL, 2016 WL 3267247, at *5-6, *vacated by joint stipulation*, 2017 WL 1034203 (Mar. 6, 2017) [finding smoke from wildfires caused "*physical loss or damage*" to outdoor theatre], italics added.

intended use, despite it causing **no** structural alteration to property.[27]

At issue in *Factory Mutual Insurance Co. v. Federal Insurance Co.* was a mold infestation in a "clean room" at a drug manufacturing plant.[28] Mold (and its spores), like SARS-CoV-2 virions, can exist on the surface of property and in the air. FM argued the mold infestation constituted "physical loss or damage" under a property insurance policy sold by Federal Insurance Company because the mold "destroyed the aseptic environment and rendered [the clean room] unfit for its intended use."[29] FM asserted case law "broadly interprets the term 'physical loss or damage' in property insurance policies."[30] Citing several of the cases cited above, FM asserted that loss of use is physical loss or damage:

> *Numerous courts have concluded that loss of functionality or reliability under similar circumstances constitutes physical loss or damage*. *See, e.g.*, *Western Fire Insurance Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (church building sustained physical loss or damage when it was rendered uninhabitable and dangerous due to gasoline under the building); *Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America*,

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

28 *Id.* at 3.

29 *Ibid.*

30 *Ibid.*

> Civ. No. 2:12-cv-04418 2014 U.S. Dist. LEXIS 165232, 2014 WL 6675934 (D. N.J. 2014) (unsafe levels of ammonia in the air inflicted "direct physical loss of or damage to" the juice packing facility "because the ammonia physically rendered the facility unusable for a period of time."); *Port Authority of N.Y. and N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (asbestos fibers); *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (unpleasant odor in home); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 709 (E.D.Va. 2010), *aff'd*, 504 F. App'x. 251 (4th Cir. 2013) ("toxic gases" released by defective drywall).[31]

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

> The period of time as well as costs required to bring [the policyholder's] facility to the *level of cleanliness* following the mold infestation required by [the policyholder's] customers is *also* physical loss or damage covered by the Federal policy. The facility was damaged by stringent requirements of [the policyholder's] customers regarding production to the same extent it was damaged from the mold infestation itself as the facility was unusable as the result of a covered loss. . .. Without the customers' approval of the restored aseptic conditions following the mold infestation, [the] facility remained unusable.[32]

Moreover, FM conceded that, *at the very least*, it had put forward a reasonable interpretation of the undefined phrase

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31 *Id.* at 3-4, italics added.

32 *Id.* at 4-5, italics added.

"physical loss or damage" and even if Federal could propose a reasonable reading, this merely rendered the policy ambiguous.[33]

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

On the eve of the COVID-19 pandemic, the insurance industry acted in conformity with its knowledge, detailed above. Specifically, given SARS-CoV-1, MERS, Zika and other threats, and its decision not to change the core trigger to require physical alteration of property, most insurance companies added express virus exclusions. Specifically, in the wake of the COVID-19 pandemic, the National Association of Insurance Commissioners called on insurance companies nationwide to report the percentage of commercial property policies they sold containing an exclusion "for Viral Contamination, Virus, Disease, Pandemic, or Similar Exclusion," which revealed that 82.83% of such policies sold in in 2020 had such an exclusion.[34]

33 See *id.* at 3 fn.1.

34 See COVID-19 Property & Casualty Insurance Business Interruption Data Call (June 2020) (attached hereto as Ex. **1**).

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

Amici submit it is perfectly plain that the direct physical loss or damage Business Income trigger in the Vigilant policy covers lost income as a result of loss or damage caused by a virus, and that to avoid this result, it was incumbent upon Vigilant to add an express virus exclusion.

At a minimum, however, Vigilant was well aware that the "physical loss" or "physical damage" language in its Policy was at least ambiguous as to whether it was triggered by agents – such as virus, bacteria, ammonia, smoke, *etc.* – making ordinary use of the property dangerous. Where an insurance company has knowledge that its standard-form policy language is ambiguous, and has the ability to resolve that ambiguity with more careful drafting, its failure to resolve the ambiguity will be construed against it and in favor of coverage. As stated in one of the most influential insurance coverage cases, decided nearly fifty years ago and widely known in the insurance industry, when insurance companies fail to use clear and distinct language to exclude a cause of loss known in the market, especially in an all risk policies, they "act at their own peril."[35] Note that *Pan Am* considered exclusions

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

drafted in 1969 for a policy sold later that same year (which did not employ those exclusions); by contrast, in this case, Vigilant had a dozen years to consider appending the ISO virus exclusion (drafted in 2006 introduced in 2007) to the Another Planet Policy (sold in 2019).

Further, Vigilant cannot dispute it could have resolved that ambiguity in several ways:

First, Vigilant could have defined "physical loss," "physical damage," or even the word "physical" in the Another Planet Policy, as it did in its brief to this Court, to require "alteration.".

Second, Vigilant could have changed the "physical loss" or "physical damage" trigger to the simple phrase it now prefers ("alteration to the property," (Resp. Br. at pp. 23-25)).

Third, like nearly 83% of other insurance companies, Vigilant could have added an express "laser" virus exclusion to its policy, like the ISO Virus or Bacteria Exclusion or Vigilant's radiation and fungus exclusions.[36]

Vigilant's failure to resolve an ambiguity, about which it had abundant warning, must be construed against it. Another Planet, and *Amici*, paid significant premiums for this sort of broad

36 See E.R. 470, 472-73, Another Planet Policy.

coverage. They paid those premiums to transfer the risk of virus loss to their insurers. They transferred that risk so that, if a loss of the type for which the insurance industry had paid in 2003 and predicted in 2006 would happen again, did happen again, they would be protected. The Court should not permit insurers to escape their obligation, voluntarily assumed, because they want to be left unscathed by the COVID-19 disaster. Vigilant acted at its peril and its actions have consequences under California law.

Amici make two other limited points as to the historic legal interpretation of the Business Income trigger. First, Vigilant uses a clever bit of casuistry to the effect that SARS-CoV-2 "harms people, not property." (See Resp. Br. at p. 34) Of course, biting spiders (*Cook*) harm people not property, as does radioactive gas (*Keleket*), gasoline vapors (*Presbyterian Church*), oil fumes (*Arbeiter*), asbestos (*Sentinel*), carbon monoxide (*Matzner*), e-coli bacteria (*Cooper*), toxic gases (*TRAVCO*), fumes (*In re Chinese Manufactured Drywall*), *etc.* What is important is that these conditions in or on covered property render it unsafe for normal use: those conditions cause the physical loss or the physical damage.

Second, Vigilant suggests a parade of horribles, and argues that if SARS-CoV-2 can be found to cause physical loss or damage, what about the common cold virus? (See Resp. Br. at pp. 12, 29, 35) The obvious answer is that, as Vigilant knows, the issue is one of degree. The risk that a piece or two of falling gravel may hit a

house does not amount to physical loss or damage, but the risk posed by falling boulders does (*Murray*). Similarly, ambient air throughout the United States contains asbestos fibers, but only extremely large concentrations of such fibers will constitute physical loss or damage (*Sentinel*, *Board of Education*, *Yale*). The same is true for radiation, which exists everywhere, but causes physical loss or damage only when readings are very high (*Keleket*). Applied here, the common cold virus might be said to cause physical loss or damage, but not until it mutates to cause its first fatality, and then mutates further to cause millions of deaths. (By contrast, COVID-19, killing more than one million Americans, was the leading cause of death in the United States from 2020-2022).

B. Courts Ruling Against Policyholders Appear Motivated by a Fear that Confirming Coverage Would Bankrupt the Insurance Industry

A number of post-March 2020 cases have found, consistent with the cases noted in Section II.A of this brief, that events rendering property unfit for its intended use trigger Business Income coverage even without tangible damage to or alteration of property.[37] The result in these cases indicates that something

37 See *Crisco v. Foremost Ins. Co. Grand Rapids, Michigan* (N.D. Cal. 2020) 505 F. Supp. 3d 993, 999 [finding coverage for "direct, sudden and accidental physical loss" to their mobile homes which were not altered but were unusable because of loss of sewage, electricity, water, gas service]; *James W. Fowler Co. v. QBE Ins. Corp.* (D. Or. 2020) 474 F. Supp. 3d 1149, 1153-54 [finding "direct physical loss" coverage triggered by inability to

other than application of the common law as it existed in March 2020 is motivating courts ruling against policyholders in cases addressing insurance coverage for loss or damage from SARS-CoV-2: concern about the solvency of the insurance industry. Decisions accepting arguments by an insurance industry *amicus* – such as American Property & Casualty Insurance Association in *Musso* and *Santo* – essentially concede as much:

> As amicus curiae brief filed on behalf of [APCIA] reminds us that insurers calculate and pool the risks of covered damage to property. To suddenly add nonphysical losses caused by a pandemic would give policyholders more than they bargained for and dramatically affect the insurers' financial obligations. Indeed, the National Association of Insurance Commissioners has explained that business interruption policies were not designed or priced to cover losses from a pandemic, Nationwide losses from

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access underground machine which was otherwise undamaged], *rev'd*, *James W. Fowler Co. v. QBE Ins. Corp.* (9th Cir. Oct. 21, 2021) No. 20-35926, 2021 U.S. App. LEXIS 31714, at *2 [applying Oregon law, agreeing on appeal that the MTBM would suffer "direct physical loss" "if the MTBM is either impossible or unreasonably expensive to recover," but reversing the grant of summary judgment to the policyholder because the parties' experts disagreed as to "whether the MTBM is impossible to recover and assuming it is recoverable whether recovery costs would be unreasonably expensive"]; *Nat'l Ink & Stitch, LLC v. State Auto Prop. & Cas. Ins. Co.* (D. Md. 2020) 435 F. Supp. 3d 679, 686 [finding coverage triggered by loss of ability to use computer system amounted to "direct physical loss of or damage to" property]; *EMOI Servs., LLC v. Owners Ins. Co.* (Ohio App. Ct. Nov. 5, 2021) 2021 Ohio App. LEXIS 3849, at *2-3, *22, *24 [same].

> COVID-19 have been estimated at between $255 billion and $431 billion *per month*.[38]

The insurance industry has known for decades that its direct physical "loss" or "damage" Business Income trigger was being construed by courts to cover Business Income loss from conditions rendering property unfit for use regardless of whether it suffered structural alteration. It specifically knew of the Business Income risk posed by viruses, and it did not change the standard-form Business Income trigger to require tangible physical alteration. Rather, given that it did not believe courts would find this exposure excluded by the Pollution Exclusion, it drafted a specific virus exclusion. Vigilant in this case did not employ the virus exclusion, and therefore the premium rates they charged for the policy at issue included pricing for the risk that a virus would cause loss or damage. This Court should reject the unsupported argument – of the type the insurance industry raises for every new exposure (asbestos, silica, mold, *etc.*) – that it will be ruined by an exposure it consciously chose to insure; rather, it should rely upon the industry to do as it historically has done, draft and use a laser exclusion. If anybody is to relieve the industry for its failures to

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38 *Musso & Frank Grill Co. v. Mitsui Sumitomo Ins. USA Inc.* (2022) 77 Cal.App.5th 753, 761 fn.2; see also *Santo's Italian Café LLC v. Acuity Insurance Co.* (6th Cir. 2021) 15 F.4th 398, 407 ["Fair pricing of insurance turns on correctly accounting for the likelihood of the occurrence of each defined peril and the cost of covering it. Efforts to push coverage beyond its terms creates a mismatch, an insurance product that covers something no paid for and, worse, runs the risk of leaving insufficient funds to pay for perils that insureds did pay for."].

use the pen that is in its hands, it is not this Court, it is the Legislature.

There is another risk, now being realized – that the insurance industry will use results in COVID-19 cases to affect a major restriction in the coverage it provides without securing regulatory approval. And this has now occurred. In one of the cases, cited above, *EMOI*, on appeal, the Supreme Court of Ohio reversed,[39] citing *Santo's Italian Café, L.L.C. v. Acuity Insurance Co.*, 15 F.4th 398, 402 (6th Cir. 2021). Insurers have made arguments citing COVID-19 cases in other contexts.[40]

In short, insurance companies are now attempting to use mostly federal decisions giving them relief in the COVID-19 context to reverse the majority rule in *all contexts*. This will dramatically restrict coverage for thousands of Californians, given that the vast majority of property insurance claims are resolved by

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39 *EMOI Servs., L.L.C. v. Owners Ins. Co.* (Ohio Dec. 27, 2022) 208 N.E.3d 818 [applying Ohio law].

40 See, e.g., *NMA Investments L.L.C. v. Fidelity & Guar. Ins. Co.* (D. Minn. Sept. 13, 2022) No. 22-cv-1618, 2022 U.S. Dist. LEXIS 164606, at *8-10 [citing the COVID-19 case *Oral Surgeons, P.C. v. Cincinnati Ins. Co.* (8th Cir. 2021) 2 F.4th 1141, 1144]; *Cup Foods, Inc. v. Travelers Cas. Ins. Co.* (D. Minn. Jan. 23, 2023) No. 22-cv-1620, 2023 U.S. Dist. LEXIS 10711, citing *Oral Surgeons, supra*, 2 F.4th 1141; *Garland Connect, LLC v. Travelers Cas. Ins. Co.* (C.D. Cal. Feb. 3, 2022) No. CV-20-09252, 2022 U.S. Dist. LEXIS 33960, at *9-11 [applying California law, citing COVID-19 case *Mudpie, Inc. v. Travelers Cas. Ins. Co.* (9th Cir. 2021) 15 F.4th 885, 889-93].

negotiation, not litigation, on the basis of the law set forth by courts. If any party is to accept this dramatic restriction of historic coverage, it is the regulator, who can impose a commensurate cut in insurance rates.

III. CONCLUSION

Insurers like Vigilant have known for decades that standard-form physical loss or physical damage language covered events like the property rendered dangerous by a lethal virus.

At a minimum, Vigilant knew that the standard form language was capable of that reading, and was thus ambiguous. Vigilant sought neither to resolve that ambiguity by defining those terms to require physical alteration to property, nor to include ISO's Virus or Bacteria Exclusion. The still-remaining ambiguity must be construed against Vigilant and in favor of Another Planet.

Accordingly, the Court should answer the certified question in the affirmative.

DATED: August 2, 2023

REED SMITH LLP

By 

John N. Ellison
Richard P. Lewis, Jr.
Katherine J. Ellena
Kathryn M. Bayes

CERTIFICATE OF WORD COUNT

I certify pursuant to California Rules of Court 8.204 and 8.504, subdivision (d) that this *Amici Curiae* Brief is proportionally spaced, has a typeface of 13 points or more, contains 6,871 words, excluding the cover, the tables, the signature block, and this certificate, which is less than the total number of words permitted by the Rules of Court. Counsel relies on the word count of the Microsoft Word word-processing program used to prepare this brief.

DATED: August 2, 2023

REED SMITH LLP

By 

John N. Ellison
Richard P. Lewis, Jr.
Katherine J. Ellena
Kathryn M. Bayes

Exhibit 1

National Association of Insurance Commissioners

COVID-19 PROPERTY & CASUALTY INSURANCE BUSINESS INTERRUPTION DATA CALL

PART 1 | PREMIUMS AND POLICY INFORMATION

JUNE 2020

Notes and Disclaimers Regarding Data Received

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

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

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

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

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

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

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

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

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

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

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

COVID-19 Property Casualty Business Interruption Data Call Summary

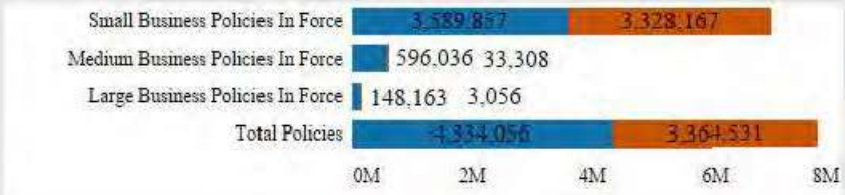
Policy Type
Other than BOP Businessowners Policy (BOP)

239 National Groups with Premiums

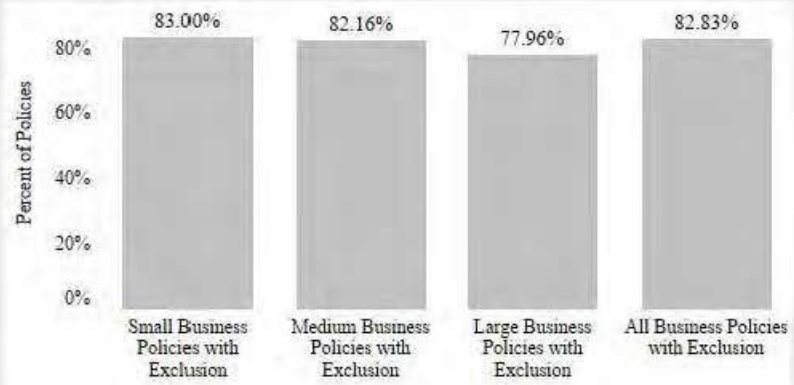
Premium by Business Type National

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

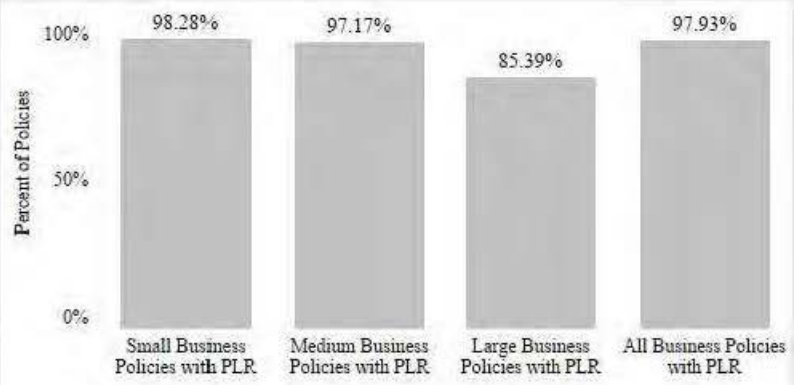
Number of Policies by Business Type National



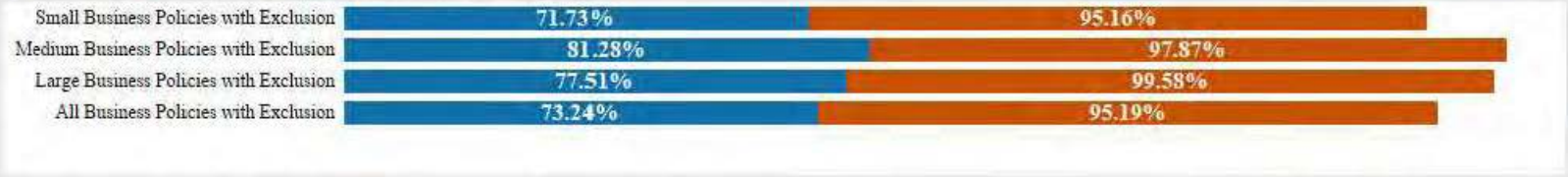
Percent of Policies with Exclusion
All Policy Types & Business Sizes



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



Percent of Policies with Exclusion by Business Size National



Percent of Policies with Physical Loss Requirement by Business Size National

Exhibit 2

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

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

By Todd C. Frankel

April 2, 2020

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

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

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

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

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

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

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

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

A global pandemic presents unique problems for insurers because, Sampson said, “by its very definition, you can’t diversify the risk.”

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

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

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

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

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

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

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

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

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

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

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

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

State insurance commissioners are looking into the potential limitations of business insurance coverage for coronavirus-related claims — with differing viewpoints.

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

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

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

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

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

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

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

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

But not a single policy was sold.

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

Exhibit 3

ISO Circular

FORMS - FILED JULY 6, 2006

FROM: LARRY PODOSHEN, SENIOR ANALYST

COMMERCIAL PROPERTY LI-CF-2006-175

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

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

BACKGROUND

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

ISO ACTION

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

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

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

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

PROPOSED EFFECTIVE DATE

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

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

RATING SOFTWARE IMPACT

New attributes being introduced with this revision:

- A new form is being introduced.

CAUTION

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

RELATED RULES REVISION

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

REFERENCE(S)

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

ATTACHMENT(S)

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

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

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Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

About This Filing

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

New Form

We are introducing:

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

Related Filing(s)

Rules Filing CF-2006- OVBER

Introduction

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

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

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

Current Concerns

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

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

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

Features Of New Amendatory Endorsement

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

Copyright Explanation

Important Note

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

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

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

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

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

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

1. Exclusion of "Fungus", Wet Rot, Dry Rot And Bacteria; and

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

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

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Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

About This Filing

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

New Form

We are introducing:

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

Related Filing(s)

Rules Filing CF-2006-OVBER

Introduction

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

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

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

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

Current Concerns

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

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

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

Features Of New Amendatory Endorsement

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

Copyright Explanation

Important Note

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

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

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

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

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

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

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

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Exhibit 4

INSURANCE JOURNAL

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

Insurance Unlikely to Cushion Coronavirus Losses – But There Are Exceptions

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

The world's largest insurers have learned lessons from previous health crises, including the 2003 SARS outbreak. Over the years, they've tightened up their policies, inserting communicable-disease exclusions to prevent potential losses. That means consumers and companies will bear the brunt of the cost for disruptions related to the virus — which has infected 90,000 people and left more than 3,000 people dead.

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

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

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

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

Health Insurance

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

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

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

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

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

Events Insurance

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

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

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

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

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

Travel Insurance

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

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

Credit Insurance

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

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

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

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

Reinsurance

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

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

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

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

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

Financial Markets

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

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

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

–With assistance from Dan Reichl.

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

Related:

- Parametric Insurance Could Offer Hotels Relief from Coronavirus Cancellations
- Handshakes, Buffets Out. Otherwise It's Insurance Conferences-as-Usual Amid Coronavirus.
- Fitch Sees Only 'Modest Impact' on U.S. P/C Insurance from Coronavirus
- Re/Insurers to Feel Coronavirus Impact From Financial Market Volatility: Moody's
- Global Insurers Face Hefty Claims If Coronavirus Forces Olympics Cancellation

- Coronavirus Raises Insurance Questions But Catastrophe-Tested Insurers Are Prepared
- Insurers Rush to Exclude Coronavirus Epidemic from Event-Cancellation Protection
- Coronavirus Leads Companies with Supply Chain Disruptions to Invoke ‘Force Majeure’
- Coronvirus Led to Cancellation of Telecoms Meeting, but Insurance Cover Is Excluded
- Thai Insurer Offers First Coronavirus Insurance Policy
- Many Global Firms Face High Coronavirus Costs Due to Insurance Exclusions

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Exhibit 5

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

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

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

I. INTRODUCTION

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

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

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

II. ARGUMENT

A. Legal Standard.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

Respectfully submitted,

/s/*Maureen A. Sanders*

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FACTORY MUTUAL INSURANCE COMPANY (individually, and as Assignee of ALBANY MOLECULAR RESEARCH, INC. and OSO BIOPHARMACEUTICALS MANUFACTURING, LLC)

CERTIFICATE OF SERVICE

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

/s/*Maureen A. Sanders*
Maureen A. Sanders
Email: mas@sanwestlaw.com
SANDERS & WESTBROOK, PC

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. I am employed in the office of a member of the bar of this court at whose direction the service was made. My business address is REED SMITH LLP, 355 South Grand Avenue, Suite 2900 Los Angeles, CA 90071-1514.

On August 2, 2023, I served the following document(s) by the method indicated below:

APPLICATION TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF CALIFORNIA PIZZA KITCHEN, INC.; FRENCH LAUNDRY PARTNERS, LP, DBA THE FRENCH LAUNDRY; KRM, INC. DBA THOMAS KELLER RESTAURANT GROUP; AND YOUNTVILLE FOOD EMPORIUM, LLC DBA BOUCHON BISTRO; IN SUPPORT OF PETITIONER ANOTHER PLANET ENTERTAINMENT, LLC

☑ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

☑ by electronically serving via Truefiling to the parties at the email addresses listed below:

SEE SERVICE LIST

I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed on August 2, 2023, at Los Angeles, California.

Charlyn Jones

SERVICE LIST

ELECTRONICALLY SERVED VIA TRUEFILING: Kirk Pasich Pasich LLP 10880 Wilshire Boulevard, Suite 2000 Los Angeles, CA 90024-3109 Nathan M. Davis Pasich LLP 10880 Wilshire Boulevard, Suite 2000 Los Angeles, CA 90024 Kayla Michelle Robinson Pasich LLP 10880 Wilshire Boulevard, Suite 2000 Los Angeles, CA 90024-4118	Attorneys for Plaintiff and Appellant Another Planet Entertainment, LLC
ELECTRONICALLY SERVED VIA TRUEFILING:Jonathan D. Hacker O'Melveny & Myers, LLP 1625 Eye Street, NW Washington, DC 20006 Jenya Godina OMELVENY & MYERS LLP 1625 Eye Street, NW Washington, DC 20006 Douglas J. Collodel Clyde & Co. US LLP 355 South Grand Avenue, Suite 1400 Los Angeles, CA 90071-5556 Gretchen S. Carner Clyde & Co. US LLP 355 South Grand Avenue, Suite 1400 Los Angeles, CA 90071-5058 Brett C. Safford Clyde & Co US LLP 355 South Grand Avenue, Suite	Attorneys for Defendant and Respondent Vigilant Insurance Company

1400 Los Angeles, CA 90071	
BY U.S. MAIL Clarke B. Holland Pacific Law Partners, LLP 2000 Powell Street, Suite 950 Emeryville, CA 94608 David Bernelle Demo LHB Pacific Law Partners 2000 Powell Street, Suite 950 Emeryville, CA 94608 Andrew P. Collier Pacific Law Partners, LLP 2000 Powell Street - Suite 950 Emeryville, CA 94608	Attorneys for Amicus Curiae Oregon Mutual Insurance Company
BY U.S. MAIL United States Court of Appeals for the Ninth Circuit THE JAMES R. BROWNING COURTHOUSE 95 7TH STREET, SAN FRANCISCO, CA 94103	

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **ANOTHER PLANET ENTERTAINMENT v. VIGILANT INSURANCE COMPANY**
Case Number: **S277893**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **kellena@reedsmith.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
APPLICATION	Application to File Amici Curiae Brief and Amici Curiae Brief of California Pizza Kitchen, Inc.,et al. in support of Petitioner Another Planet Entertainment, LLC
MOTION	Amici Curiae California Pizza Kitchen, Inc., et al .'s Motion for Pro Hac Vice Admission of John N. Elliso

Service Recipients:

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

8/2/2023

Date

/s/Katherine Ellena

Signature

Ellena, Katherine (324160)

Last Name, First Name (PNum)

Reed Smith LLP

Law Firm