cIN THE DISTRICT COURT OF CHEROKEE COUNTY
STATE OF OKLAHOMA

CHEROKEE NATION; CHEROKEE NATION BUSINESSES, LLC; CHEROKEE NATION ENTERTAINMENT, LLC, Plaintiff, v. (1) LEXINGTON INSURANCE COMPANY, et al., Defendants.	)	Case No. CV-20-150 FILED AUG 17 2020 LESA ROUSEY-DANIELS, Court Clerk CHEROKEE COUNTY By _____ Deputy

THE NATION'S FIRST MOTION FOR PARTIAL
SUMMARY JUDGMENT ON BUSINESS INTERRUPTION COVERAGE

Cherokee Nation, Cherokee Nation Businesses, LLC, and Cherokee Nation Entertainment, LLC, (collectively referred to in the singular and as the "Nation") submits its First Motion for Partial Summary Judgment (the "Motion") and respectfully requests this Court find that the all-risk Tribal Property Insurance Program ("TPIP") Policy (the "Policy") issued on behalf of the Defendant Insurers requires the Nation be indemnified for fortuitous losses related to the COVID-19 Pandemic Disaster ("CPD") under its business interruption coverage. [1] This Motion does not address the Defendant Insurers' liability for ingress/egress or interruption by civil authority, but reserves argument related to those provisions for another time. In support of this Motion, the Nation states:

INTRODUCTION

In July 2019, the Nation purchased an all-risk property insurance policy from Defendant Insurers that included business interruption coverage, but the Nation did not receive a copy of its Policy until weeks after the COVID-19 pandemic began. By January 31, 2020, the United States Secretary of Health and Human Services declared a public health emergency, and President Trump

[1] While the Plaintiffs all have separate policies (Policy Nos. 017471589/06 (Dec 37) 9109; (Dec 31) 9496; and (Dec 15) 9110), they are all governed by TPIP USA FORM No. 15—*i.e.* the same policy language—attached hereto as *Ex. 5*.

issued a Proclamation "to control the spread of the virus in the United States." [2] Thereafter, Governor Stitt declared a public health emergency in all of Oklahoma,[3] and the Nation reasonably and responsibly closed its properties due to risk of direct physical loss or damage to the Nation's property.[4] Like other business owners, the Nation could not risk exposing employees, patrons, and tribal members to COVID-19. It would have been dangerous and irresponsible to continue to operate businesses without time to develop appropriate protective measures, as the only alternative would be to allow vulnerable people to potentially become sick and/or die from COVID-19.

Despite the fact the Nation has already lost an employee to COVID, [5] Defendant Insurers have failed the Nation. While it cannot be disputed the Nation suffered a loss when it closed its properties due to a fortuitous event—the only requirement for indemnity under an all-risk policy—Defendant Insurers failed to render payment as promised. Oklahoma law provides that an insurer breaches its duty of good faith and fair dealing when it unreasonably withholds payments.[6] Yet instead of focusing on preventing the spread of disease to its employees and members, the Nation must fight its insurance carrier to recover already paid for benefits—risking furloughs, layoffs, and

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[2] *Ex. 1,* President Donald Trump, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak* (Mar. 13, 2020).
[3] *Ex. 2*, Oklahoma Governor J. Kevin Stitt, *Executive Order 2020-07 Declaring COVID-19 a Public Emergency* (March 15, 2020).
[4] *Ex. 3*, Principal Chief Chuck Hoskin, Jr., *Cherokee Nation Emergency Disaster Declaration* (March 16, 2020).
[5] K. Butcher, *Beloved Cherokee Nation employee passes away due to COVID-19*, KFOR (Apr. 20, 2020), https://kfor.com/news/local/beloved-cherokee-nation-employee-passes-away-due-to-covid-19/.
[6] *Newport v. USAA*, 2000 OK 59, ¶ 9, 11 P.3d 190, 195, as corrected (Aug. 1, 2000) ("The essence of a bad-faith action is the insurer's unreasonable, bad-faith conduct, including the unjustified withholding of payment due under a policy."); *Buzzard v. Farmers Ins. Co.*, 1991 OK 127, 824 P.2d 1105, 1108–09 ("We held that the insurer is under a legal duty to act in good faith when dealing with its insured. The insurer's duty includes, but is not limited to, the duty not to unreasonably withhold payment of claims.").

recession to its home counties. In response, the Court should require Defendant Insurers to fulfill their legal obligation owed to the Nation by declaring the Nation is entitled to indemnity for fortuitous losses related to the CPD under its business interruption coverage.

MATERIAL FACTS

1. The Nation purchased an all-risk property insurance policy, with business interruption coverage, from Defendant Insurers for a term from July 1, 2019 to July 1, 2020.

2. The Nation experienced a loss.

3. That loss was fortuitous.

ARGUMENTS AND AUTHORITIES

I. SUMMARY JUDGMENT IS THE PROPER.

Summary judgment is appropriate when "there are no disputed questions of material fact and the moving party is entitled to judgment as a matter of law." *Haworth v. Jantzen*, 2006 OK 35, ¶ 19; Okla. Dist. Ct. R. 13. This Motion is more precise in application, however, as "[t]he interpretation of an insurance policy, with its exclusions, is a question of law." *Oklahoma Attorneys Mut. Ins. Co. v. Cox*, 2019 OK CIV APP 25, ¶ 8; *Serra v. Estate of Broughton*, 2015 OK 82, ¶ 10; *Nat'l Am. Ins. Co. v. Gerlicher Co.*, LLC, 2011 OK CIV APP 94, ¶ 8 ("Insurance policies are contracts interpreted as a matter of law."). That is all the Nation seeks through its Motion.

For its part, the Court must determine if the Policy terms are unambiguous and, if so, "unambiguous insurance contracts are construed, as are other contracts, according to their terms." *Ex. 4, Max True Plastering Co. v. U.S. Fid. & Guar. Co.*, 1996 OK 28, 912 P.2d 861, 869. But unlike other contracts, insurance policies have unique canons of constructions due to "their adhesive nature." *Id.* at 865. To that end, the Court must note that:

1) ambiguities are construed most strongly against the insurer;

2) in cases of doubt, words of inclusion are liberally applied in favor of the insured and words of exclusion are strictly construed against the insurer;

3) an interpretation which makes a contract fair and reasonable is selected over that which yields a harsh or unreasonable result;

4) insurance contracts are construed to give effect to the parties' intentions;

5) the scope of an agreement is not determined in a vacuum, but instead with reference to extrinsic circumstances; and

6) words are given effect according to their ordinary or popular meaning.

Id. After the Court applies those principles to the Policy, granting summary judgment in favor of the Nation is appropriate.[7]

II. THE POLICY PROVIDES BUSINESS INTERRUPTION COVERAGE.

The Policy provides business interruption coverage for "all risk of direct physical loss or damage."[8] When business interruption coverage is triggered, Defendant Insurers must pay for the "actual loss sustained by the Named Insured for gross earnings as defined herein and rental value as defined herein resulting from such interruption of business, services, or rental value; less all charges and expenses which do not necessarily continue during the period of restoration."[9] But coverage is not limited to lost revenues or the time the Nation's property is closed; instead, the

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[7] Although insurance contract interpretation has no material facts, the standards are nonetheless stated as: To succeed on summary judgment, the Nation must show there is "no substantial controversy as to any material fact." Okla. Dist. Ct. R. 13. Summary judgment "should be granted where facts set forth in detail in affidavits, depositions, admissions on file, and other competent extraneous materials show there is no substantial conflict as to any material fact." *RST Serv. Mfg., Inc. v. Musselwhite*, 1981 OK 45, 628 P.2d 366, 368. When reviewing the record, inferences "must be viewed in the light most favorable to the non-moving party." *Feightner v. Bank of Okla., N.A.*, 2003 OK 20, ¶ 2, 65 P.3d 624, 627. Defendant Insurers cannot merely disagree with the Nation on a matter but must produce "a substantial controversy as to one material fact." *Ross By & Through Ross v. City of Shawnee*, 1984 OK 43, 683 P.2d 535, 536.

[8] *Ex. 5, TPIP Section III Business Interruption, Extra Expenses & Rental Income* at 19 *and Section IV General Conditions* at 24.

[9] "Each occurrence is defined as a loss, incident or series of losses or incidents not otherwise excluded by this Policy and arising out of a single event or originating cause and includes all resultant or concomitant insured losses." *Ex. 5*, TPIP *Section IV General Conditions (AF. Definitions)* at 40.

extra expense and extended period of indemnity (commonly called business interruption extension) provisions greatly expanded business interruption coverage. More specifically, the extra expense provision obligates Defendant Insurers to pay the "necessary and reasonable extra expenses . . . incurred by the Named Insured in order to continue as nearly as practicable the normal operation of the Named Insured's business following damage to or destruction of covered property. . . ."[10] Meanwhile, the business interruption extension further expands the time period for indemnity:

> Business interruption . . . is extended for the additional length of time required to restore the business of the Named Insured to the condition that would have existed had no loss occurred commencing on either;
>
> a. the date on which the Company's liability would otherwise terminate or;
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> b. the date on which rebuilding, repairing or replacement of such property as has been lost, damaged or destroyed is actually completed, whichever is later.
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> The Company's liability shall terminate no later than **180 (one hundred and eighty) days** from the commencement date set forth above, unless a different time period is agreed to by the Company through an endorsement to this policy.

Ex. 5, TPIP Section III Business Interruption, Extra Expenses & Rental Income at 21 (emphasis and coloring in original). While those provisions describe the breadth of business interruption coverage under the TPIP Policy, the central issue before the Court is when that coverage is triggered. That is an easy task here, however, because the TPIP Policy is an all-risk policy.

[10] *Ex. 5, TPIP Section III Business Interruption, Extra Expenses & Rental Income* at 19.

III. ALL-RISK INSURANCE POLICIES PROVIDE COVERAGE TO AN INSURED WHEN: (1) THERE IS A LOSS, AND (2) THE LOSS IS FORTUITOUS.

Business interruption coverage exists "to put the Insured in as good a condition, so far as practicable, the Insured would have been in if the loss had not occurred." *C.f. Gutkowski v. Oklahoma Farmers Union Mut. Ins. Co.*, 2008 OK CIV APP 8, ¶ 12. But not all policies are created equal. For example, "named-peril" policies cover "only losses suffered from a peril enumerated in the policy." *Ex. 6, Oklahoma Sch. Risk Mgmt. Tr. v. McAlester Pub. Sch.*, 2019 OK 3, ¶ 16. All-risk policies, in contrast, were "developed to protect the insured in cases where loss or damage to property is difficult or impossible to explain." *Pillsbury Co. v. Underwriters at Lloyd's, London*, 705 F. Supp. 1396, 1399 (D. Minn. 1989).[11] With an all-risk policy the Nation is in the best position possible, as:

> All-risk insurance is thought to be advantageous in several respects: the coverage is presumably simpler to understand; duplication of coverages and premiums from separate, specified-risk policies is avoided; pressures toward adverse selection are minimized; and the policies are easier and less expensive for the insurer to administer. The most widely perceived advantage, however, is the avoidance of gaps in coverage: losses that would otherwise fall within the gaps of specified-risk coverage will be indemnified if a policy is deemed to be all-risk.

1 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 1.06[4] (2019). Consequently, when the Nation purchased its all-risk policy, it purchased "a special type of insurance extending to risks **not usually contemplated**, and recovery under the policy will generally be allowed, at least **for all losses of a fortuitous nature** . . . unless the policy contains a specific provision expressly excluding the loss from coverage." *Ex. 7, Texas E. Transmission Corp. v. Marine Office–Appleton & Cox Corp.*, 579 F.2d 561, 564 (10th Cir. 1978) (emphasis added); *Ex. 6, Oklahoma Sch. Risk*

[11] Citing *Morrison Grain Co. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 430 (5th Cir.1980); *Atlantic Lines Ltd. v. American Motorists Ins. Co.*, 547 F.2d 11, 13 (2d Cir.1976).

Mgmt. Tr., 2019 OK 3, ¶ 16; 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 44.02[2] (2019). That is due to the burden shift that accompanies all-risk policies:

> The insured under a specified-risk policy must establish not only that a loss occurred but also that the loss was caused by one of the specified, covered perils. Once this showing is made, the burden shifts to the insurer to show an applicable exclusion, if any. In contrast, **the all-risk insured needs to establish only that a loss occurred**; the burden then shifts to the insurer to show that the loss was caused by an exception. Thus, where the cause of a loss is difficult to identify and prove, an all-risk policy can be highly beneficial to the insured.

1 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 1.06[4] (2019) (emphasis added). Simply put: "The insured's burden under an all risks policy is **limited.** The insured need only show that **a loss occurred** and that **the loss was fortuitous.**" *Pillsbury Co.*, 705 F. Supp. at 1399 (emphasis added) (citing *Ex. 7, Texas E. Transmission Corp.*, 579 F.2d at 564 (10th Cir. 1978)).

A. A LOSS OCCURRED.

1. A loss occurs when property cannot be used for its intended purpose.

Like many other all-risk policies, *direct physical loss or damage* is not defined by the TPIP Policy, but nonetheless occurs when property is rendered *unusable for its intended purpose*.[12] That

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[12] *E.g., Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-CV-04418 WHW, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) ("[P]roperty can be physically damaged, without undergoing structural alteration, when it loses its essential functionality."); *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524, 543–44 (App. Div. 2009) ("We therefore cannot agree with the trial court's conclusion that "the definition of 'physical damage' cannot be extended in this case to include the temporary loss of use due to a power interruption. . . ."); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co. of Connecticut,* No. CIV. 05-1315-JE, 2007 WL 464715, at *8 (D. Or. Feb. 7, 2007) ("[D]irect physical loss of or damage to" a furnace occurs when it cannot be used for "its ordinary expected purpose."); *Motorists Mutual Insurance Company v. Hardinger*, 131 F. App'x 823 (3d Cir. 2005) (Physical loss or damage occurs when: "function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable, or if there exists an imminent threat . . . that would cause such loss of utility."); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts,* No. CV-01-1362-ST, 2002 WL 31495830, (D. Or. June 18, 2002) (Physical loss occurs when property is "rendered uninhabitable."); *Matzner v. Seaco Ins. Co.,* No. CIV. A. 96-0498-B, 1998 WL 566658, (Mass. Super. Aug. 12, 1998) ("I am persuaded by the reasoning of those cases that have construed the phrase 'direct physical loss or damage' broadly,

conclusion is clear from reading the Policy itself, as it contemplates *physical loss **or** damage*.[13] As elementary grammar dictates, physical damage must then be distinct from physical loss. Otherwise, the Policy would not place a disjunction between *loss* and *damage*. Simultaneously, the Policy also identifies and excludes perils like infidelity, loss of market, and fines—none of which require damage. Reading the policy as a whole, physical loss must mean something other than damage. *Ex. 6, Oklahoma Sch. Risk Mgmt. Tr.*, 2019 OK 3, ¶ 22 ("The parties' agreement is read as a whole giving the language its ordinary and plain meaning to carry out the parties' intentions.").

But the Court does not need to delve into "the catacombs of insurance policy English" alone to find the definition of *physical loss*. *Cf. Ins. Co. of N. Am. v. Home & Auto Ins. Co.*, 256 Ill. App. 3d 801, 802, 628 N.E.2d 643, 644 (1993). Numerous courts have already illuminated that "dimly lit underworld"[14] and found the "only reasonable interpretation" is that physical loss occurs when property is rendered "unusable for its intended purpose." *Ex. 8, Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-CV-01932-CL, 2016 WL 3267247, at *7-9 (D. Or. June 7, 2016).[15] "The majority of cases," in fact, support that position. *TRAVCO Ins. Co. v. Ward*, 715 F.

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to include more than tangible damage to the structure of insured property."); *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 493, 509 S.E.2d 1, 17 (1998) ("[A]n 'accidental direct physical loss' to insured property requires only that the property be damaged, not destroyed. Losses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property."); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (Direct physical loss occurs when "a building's function may be seriously impaired or destroyed and the property rendered useless by the presence of contaminants.").

[13] Indeed, physical loss must mean something distinct from damage or the carrier would have used the conjunctive "and," rather than disjunctive "or."

[14] *Cf. Ins. Co. of N. Am.*, 256 Ill. App. 3d 801, 802, 628 N.E.2d 643, 644 (1993).

[15] As an aside, the *Oregon* opinion was subsequently vacated "on a joint stipulated request from the parties," presumptively for settlement purposes. *Oregon Shakespeare Festival Ass'n*, No. 1:15-CV-01932-CL, 2017 WL 1034203, at *1. Regardless, the decision was never reversed on the merit by the United States Court of Appeals for the Ninth Circuit.

Supp. 2d 699, 708 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013). The Court need only follow the lead of *Western Fire Insurance Company. v. First Presbyterian Church*, the seminal opinion on this issue to validate that interpretation. *Ex. 9,* 165 Colo. 34, 35 (1968).[16]

In *Western Fire*, the local fire department discovered an "infiltration of gasoline in the soil under and around" a church that made "use of the building dangerous." *Id.* at 36-37. Nonetheless, the carrier argued that "loss of use" was not covered. *Id.* at 38. The court disagreed finding the loss could not be "viewed in splendid isolation, but must be viewed in proper context." *Id.* There, loss of use was never a choice but the **necessary result** of dangerous circumstances external to the property. *Id.* at 38-39. Consequently, all-risk policies must cover losses without damage:

> To accept [carrier's] interpretation of its policy would be to conclude that a building which has been overturned or which has been placed in such a position as to overhang a steep cliff has not been 'damaged' so long as its paint remains intact and its walls still adhere to one another. Despite the fact that a 'dwelling building' might be rendered completely useless to its owners, appellant would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner.

Id. at 40-41.[17] Thus when a dangerous condition renders property unusable it equates "to a direct physical loss within the meaning of that phrase." *Id.* at 38-39, 42. That conclusion has not changed.

In 2016, the United States District Court of Oregon determined a theatre company was entitled business interruption indemnity under an all-risk policy when it voluntarily closed due to poor air quality. *Ex. 8, Oregon Shakespeare Festival Ass'n*, No. 1:15-CV-01932-CL, 2016 WL 3267247, at *1. In the Summer of 2013, wildfire smoke began to affect the air quality at an open theatre. *Id.* at 1. The insured cancelled several performances based on a multiple factor analysis.

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[16] "The central issue here to be resolved is whether the insured suffered a 'direct physical loss' within the period of coverage provided for by the insurance contract."
[17] *Quoting* 199 Cal. App. 2d 239, 18 Cal. Rptr. 650 (Ct. App. 1962)).

Id. During its investigation, the carrier determined the Oregon Shakespeare Festival "did not suffer any permanent or structural damage to its property," even if the performances were cancelled "due to poor air quality and the related health concerns." *Id.*

The dispute turned on the definition of "direct physical loss or damage." *Id.* at 5. The insured argued that because the smoke could harm the air within the theatre, there was physical loss. *Id.* The carrier urged in opposition that air was neither property nor physical, and because the smoke naturally abated there was no period of restoration requiring repair as contemplated in the policy. *Id.* The *Oregon Shakespeare* court agreed with the insured. *Id.* at 6.

The court rejected the carrier's argument that damage to air was not physical: "Certainly, air is not mental or emotional, nor is it theoretical. . . . [W]hile air may often be invisible to the naked eye, surely the fact that air has physical properties cannot reasonably be disputed." *Id.* at 5. And while the air itself is not property, it was "undisputed that the [...] smoke in the air within the theater had to dissipate before business could be resumed." *Id.* The carrier kept asserting that structural damage and repairs were required for physical loss, but the court found "no such limitation within the terms of the policy." *Id.* Instead, the carrier was free to include that prerequisite within the contract but, by failing to do so, "case law from Oregon and other jurisdictions would favor the Plaintiff's argument." *Id.* at 7. "Other courts around the country have held that damage does not have to be 'structural' to be 'physical,' as long as it renders the property unusable for its intended purpose." *Id.*[18] Like these cases, there was a loss to the Nation's property.

Taken together, the Nation believes the phrase *all risk of physical loss or damage* unambiguously provides coverage in this case. And the Court has no reason to pity carriers that must provide the coverage they sold. To be honest, the TPIP Policy was a major benefit to the

[18] Citing *Ex. 9*, *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 437 P.2d 52 (1968).

carriers prior to the claim at issue—they collected a higher premium based on expansive coverage. No one forced them to offer the Policy to the Nation. But Oklahoma does not look kindly upon carriers that take their policies to market only to renege on their obligations, as Justice Taylor observed:

> Insurance companies, like other companies seeking to increase their market and customer base, have turned to mass marketing of liability insurance policies just as other companies market soap and cars. Through its advertising, the insurance company beckons the consumer to do business with it based upon slogans that suggest the liability insurance company will look after its customer's best interest. The insurance company promises the customer will be in good hands and treated with caring and neighborly concern. Soothing and comforting music plays in the background of these advertisements. Based on these advertisements, it is only reasonable for customers to rely on the insurance company to handle claims with care and concern for the customer's financial and legal interests.

Badillo v. Mid Century Ins. Co., 2005 OK 48, ¶ 22 (J. Taylor concurring).

2. The Nation's property could not be used for its intended purpose.

There is no reason to doubt physical loss occurred under the TPIP Policy, as the Nation was unable to use its property without unreasonably subjecting tribal members, employees, and patrons to a deadly pandemic. As far as other courts have found odor from cat urine[19] and power outages[20] constitute physical loss or damage, the CPD certainly passes the threshold to constitute a loss—no other event in recent history has resulted in the closure (temporary and permanent) of so many businesses throughout the United States. To that point, *Oregon Shakespeare* demonstrates that even though the Nation closed its properties based on objective factors related to health, coverage exists. Mirroring the plaintiffs in *Oregon Shakespeare*, the Nation took tangible steps

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[19] *Mellin v. N. Sec. Ins. Co., Inc.*, 167 N.H. 544, 115 A.3d 799 (2015).
[20] *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524, 968 A.2d 724 (App. Div. 2009)

demonstrating its belief that the threat was real—shutting down, disinfecting its entire properties, and implementing protective measures before reopening. None of the Defendants Insurers have informed the Nation, or even alleged, that those actions were unnecessary, unreasonable, or done to fraudulently secure indemnity.

In fact, as numerous courts have already observed, the Nation had to close.[21] In *Friends of DeVito v. Wolf*, the Pennsylvania Supreme Court determined that because of the CPD, "businesses where two or more people can congregate **is within the disaster area**." *Id.* at 13 (emphasis added). Rather than wait for actual COVID-19 contamination, the mechanism to preserve life and property is the "enforcement of social distancing to suppress transmission of the disease[, which] is currently the only mitigation tool." *Id.* (citation omitted). Thus, preemptive action is necessary as COVID-19 "spreads exponentially." *Id.* Any argument that "there is no significant risk of the spread of COVID-19 in locations where the disease has not been detected (including at their places of business), is similarly unpersuasive." *Id.* "Instead it spreads because of person-to-person contact, as it has an incubation period of up to fourteen days and that one in four carriers of the virus are asymptomatic." *Id.*[22] And, the imminent threat to property cannot be disputed, as "[t]he virus can live on surfaces for up to four days and can remain in the air within confined areas and structures." *Id.*[23] For those reasons, CPD is a "natural disaster," like any "hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide,

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[21] *E.g, Cross Culture Christian Ctr. v. Newsom*, No. 220CV00832JAMCKD, 2020 WL 2121111, at *5 (E.D. Cal. May 5, 2020) ("[E]ven fundamental rights must give way to a deeper need to control the spread of infectious disease and protect the lives of society's most vulnerable.").

[22] Citing Respondents' Brief at 4.

[23] Citing National Institutes of Health, "Study suggests new coronavirus may remain on surfaces for days," (Mar. 27, 2020) https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days (last accessed 4/9/2020) and Joshua Rabinowitz and Caroline Bartman, "These Coronavirus Exposures Might be the Most Dangerous," The New York Times (Apr. 1, 2020) https://www.nytimes.com/2020/04/01/opinion/coronavirus-viral-dose.html)."

snowstorm, drought, fire, explosion or other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life." *Id.* at 10, 12.

Though the court there was dealing with the validity of executive orders in response to the Pandemic, the risk of CPD does not change within this legal context. Given what was known about COVID-19 at the time, taking preventative measures was necessary.

B. THE LOSS WAS FORTUITOUS.

> A fortuitous event . . . is an event which so far as the parties to the contract are aware, is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event, as the loss of a vessel, provided that the fact is unknown to the parties.

Ex. 7, Texas E. Transmission Corp., 579 F.2d at 564.[24] The Nation had no plans to close its businesses prior to the CPD, and it would be absurd to claim anyone knew a pandemic would force businesses to close in 2020. Rather, the unforeseeable nature of the CPD must be understood as purely fortuitous. And the fact that an insured took preemptory action to prevent a harm does not render the loss anything else. In *Oregon Shakespeare*, for example, the carrier argued that by voluntarily shutting down its theatre the insured rendered the loss non-fortuitous. *Ex. 8, Oregon Shakespeare Festival Ass'n*, No. 1:15-CV-01932-CL, 2016 WL 3267247, at *9. Disagreeing, the court held the smoke was the actual harm and not in the "Plaintiff's control." *Id.*

Meanwhile, the Supreme Court of Montana previously held that even where property was voluntarily destroyed by the insured due to suspected viral contamination, coverage was not preempted. *Ex. 10, Duensing v. Traveler's Companies*, 257 Mont. 376 (1993). In *Duensing*, candy store owners destroyed their confections after learning an employ with hepatitis A handled the product. *Id.* There, the carrier denied the claim for business interruption of a candy store because

[24] *Quoting* Restatement of Contracts § 291, comment a (1932). (omission in original); *see also Bank of Oklahoma, N.A. v. Cont'l Cas. Co.*, 1992 OK CIV APP 128, 849 P.2d 1091, 1092.

the goods were contaminated by the virus, which was excluded by the policy. *Id.* at 379. But the Montana Supreme Court determined that "contamination requires the actual presence of a foreign substance," but because "the candy was destroyed before it was tested," the carriers could not verify "whether it was actually contaminated by the hepatitis virus." *Id.* at 381. The Court concluded the carrier could not deny coverage based on the assumption the property was infected even though the insured voluntarily destroyed the property. *Id.* at 383. Here, it would have been inherently and unreasonably dangerous for the Nation to remain open until COVID-19 was found in the insured businesses, or until after an employee or patron of one of the Nation's businesses tested positive for COVID-19.

Moreover, the TPIP Policy demands the Nation protect property from suspected or imminent harm like COVID-19, for which "the expenses incurred by the Named Insured in taking reasonable and necessary actions for the temporary protection and preservation of property insured hereunder shall be added to the total physical loss or damage otherwise recoverable under the Policy...." *Ex. 5, TPIP Section II Property Damage* at 15.[25] That is also consistent with the Policy providing coverage for "all risks of physical loss or damage," as that phrase has been interpreted to mean that "if there is a danger of direct physical loss coupled with a condition that creates the threat or danger of physical loss, then there is coverage." 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 42.02[3] (2019) (citing *Hampton Foods v. Aetna Cas. and Sur. Co.*, 787 F.2d 349,351–352 (8th Cir. 1986)). In fact, had the Nation failed to take preventative measures, Defendant Insurers—and the Nation's liability carriers—would claim indemnity was not owed

[25] *But also Gutkowski*, 2008 OK CIV APP at ¶¶ 11-12 ("risk of physical loss" covered the "*anticipated damage* to the wood shingles.") (emphasis added).

because the Nation failed to mitigate damage.[26] To avoid that predicament, the Nation was obligated to mitigate harm, just as Defendant Insurers are required to pay for such mitigation.

IV. TO DENY COVERAGE UNDER AN ALL-RISK POLICY, THE CARRIER MUST SHOW THERE IS AN APPLICABLE, EXPRESS EXCLUSION IN THE POLICY.

Beyond providing coverage against all possible perils not explicitly and clearly excluded or limited, all-risk policies also shift the burden between the parties: "Once an insured under an all-risk policy shows the loss is a covered loss, then the insurer has a burden to show the loss is excluded by the policy." *Ex. 6, Oklahoma Sch. Risk Mgmt. Tr.*, 2019 OK 3, ¶ 16. For example, in *Texas Eastern Transmission Corporation*, the Tenth Circuit Court of Appeals applied Oklahoma law to precisely address the burden between insured and carrier under an all-risk insurance policy. *Ex. 7*, 579 F.2d 561.[27] There, the carrier claimed that the insured failed to show the specific cause of loss and denied coverage. *Id.* at 563-64. Disagreeing, the Tenth Circuit bluntly concluded that under an all-risk policy "**the insured need not prove the cause of loss.**" *Id.* at 563-65. Because all-risk policies presumptively covered all perils, **the burden belongs to the carrier** "to show that the loss was one excluded by some language set out in the policy." *Id.* Because the carrier could

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[26] "Furthermore, assuming that there is imminent peril to the insured property if not removed or protected, the insured should exert himself to save the property, even though he has not expressly contracted to do so. Thus, it has been held in effect that, even where there is no stipulation as to removal of goods or other efforts to save property, the insured is obligated to act in good faith, and to do all that he can to lighten the burden of probable or possible loss, and to exert himself to save, as far as he reasonably can, the property from threatened destruction; he ought not negligently or carelessly to stand by and permit the destruction of the property by the peril insured against, or the injury or damage to the property by others, when it is in his power to avert the same by the exercise of ordinary prudence, such as an uninsured man would use under the same circumstances." *Commercial Union Assur. Co. v. Planters Co-op. Ass'n of Lone Wolf*, 1952 OK 405, 207 Okla. 626, 628–29, 252 P.2d 146, 149.

[27] The Tenth Circuit recognized the policy as all-risk, because it covered "all risks of direct physical loss of or damage." *Ex. 7, Texas Eastern Transmission Corporation*, 579 F.2d 561.

not identify the particular cause of loss, the Tenth Circuit found for the insured. The same result is required here.

Oklahoma has long recognized that "if an insurer desires to limit its liability under a policy, it must employ language that clearly and distinctly reveals its stated purpose." *First United Methodist Church of Stillwater, Inc. v. Philadelphia Indem. Ins. Co.*, 2016 OK CIV APP 59, ¶ 34; *Ex. 4, Max True Plastering Co.*, 1996 OK 28, 912 P.2d at 865 ("in cases of doubt . . . words of exclusion are strictly construed against the insurer."). Here, the TPIP Policy outlines more than fifty exclusions—none of which are pandemics:

(1) moths,
(2) vermin,
(3) termites,
(4) insects,
(5) inherent vices,
(6) latent defects,
(7) faulty materials,
(8) error in design,
(9) faulty workmanship,
(10) wear, tear or gradual deterioration,
(11) rust,
(12) corrosion,
(13) wet or dry rot,
(14) settling,
(15) shrinkage,
(16) expansion in a building or foundation,
(17) loss of markets,
(18) misappropriation,
(19) conversion,
(20) infidelity,
(21) breakdown or derangement of machinery,
(22) steam boiler explosions,
(23) inventory shortage,
(24) unexplained disappearance,
(25) dishonest acts,
(26) electrical injury,
(27) disturbance from artificial causes to electrical appliances,
(28) war,
(29) hostile or warlike action,
(30) weapons of war employing atomic fission or radioactive force,
(31) insurrection,
(32) rebellion,
(33) revolution,
(34) civil war,
(35) usurped power,
(36) nuclear reaction,
(37) nuclear radiation,
(38) radioactive contamination,
(39) earthquakes,
(40) flood,
(41) recognition, interpretation, calculation, comparison, differentiation, sequencing or procession of data involving dates or times,
(42) fungus,
(43) mold(s),
(44) mildew, seepage,
(45) pollution,
(46) contamination,
(47) yeast and related spores,
(48) toxins,
(49) actual or threatened malicious use of pathogenic or poisonous biological or chemical materials,
(50) death of animals,
(51) fines, penalties, or costs incurred from governmental agencies, courts, or other authorities, and,
(52) terrorism.

Ex. 5, TPIP, *Section IV General Conditions*, at 24.

And, to be certain, the Defendant Insurers know how to exclude pandemics from coverage, as the TPIP Policy was updated to include a new exclusion for communicable diseases, which may have addressed the Nation's claim for coverage due to CPD:[28]

COMMUNICABLE DISEASE EXCLUSION

> 1. This policy, subject to all applicable terms, conditions and exclusions, covers losses attributable to direct physical loss or physical damage occurring during the period of insurance. Consequently and notwithstanding any other provision of this policy to the contrary, this policy does not insure any loss, damage, claim, cost, expense or other sum, directly or indirectly arising our of, attributable to, or occurring concurrently or in any sequence with a Communicable Disease or ***the fear or threat (whether actual or perceived) of a Communicable Disease.***

Ex. 11, New TPIP Policy, Exclusion 5 (Mar. 25, 2020) (emphasis added). Coincidentally, **that new exclusion was created one (1) day after the Choctaw Nation of Oklahoma and Chickasaw Nation filed their respective actions against the Defendant Insurers,** but it created a problem for Defendant Insurers. If communicable disease and/or pandemics (*i.e.* the suspected or imminent contamination by a virus) were *clearly* not covered by the all-risk policy as Oklahoma law requires,[29] then a new exclusion would not be necessary. And yet, there it is. Defendant Insurers have consequently shown they know how to draft such language and failed to do so here. Such

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[28] Defendant Insurer Hallmark has also published a new and similar exclusion in other policies, excluding: "[The] ***threat or fear of Communicable Disease*** *(whether actual or perceived)* or ***the outbreak of*** an Epidemic or ***Pandemic***, whether declared as such or not by any person or entity, including foreign and domestic governments and their representatives, agencies, and courts...." *Ex 12*, Pandemic and Epidemic Exclusion, Hallmark, HP PA 01 03 20 (emphasis added).

[29] "We uphold 'clear and unambiguous' exclusionary clauses when shown by an insurer, but a lack of specificity in the language may make an exclusion ambiguous when applied to a particular event." *Ex. 6*, *Oklahoma Sch. Risk Mgmt. Tr.*, 2019 OK 3, ¶ 24.

failure must not be allowed to operate as a mechanism to deny coverage rightfully owed pursuant to the TPIP Policy purchased by the Nation from Defendant Insurers.

CONCLUSION

The Nation respectfully requests the Court find the TPIP Policy issued by Defendant Insurers requires the Nation be indemnified for fortuitous losses related to the COVID-19 Pandemic Disaster under its business interruption coverage.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 11th day of August, 2020, a true and correct copy of the foregoing instrument was served by electronic mail and/or U.S. Mail upon the following:

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EXHIBIT 1

Presidential Documents

Proclamation 9994 of March 13, 2020

Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak

By the President of the United States of America

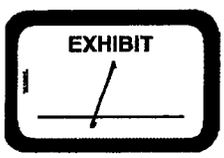
A Proclamation

In December 2019, a novel (new) coronavirus known as SARS–CoV–2 ("the virus") was first detected in Wuhan, Hubei Province, People's Republic of China, causing outbreaks of the coronavirus disease COVID–19 that has now spread globally. The Secretary of Health and Human Services (HHS) declared a public health emergency on January 31, 2020, under section 319 of the Public Health Service Act (42 U.S.C. 247d), in response to COVID–19. I have taken sweeping action to control the spread of the virus in the United States, including by suspending entry of foreign nationals seeking entry who had been physically present within the prior 14 days in certain jurisdictions where COVID–19 outbreaks have occurred, including the People's Republic of China, the Islamic Republic of Iran, and the Schengen Area of Europe. The Federal Government, along with State and local governments, has taken preventive and proactive measures to slow the spread of the virus and treat those affected, including by instituting Federal quarantines for individuals evacuated from foreign nations, issuing a declaration pursuant to section 319F–3 of the Public Health Service Act (42 U.S.C. 247d–6d), and releasing policies to accelerate the acquisition of personal protective equipment and streamline bringing new diagnostic capabilities to laboratories. On March 11, 2020, the World Health Organization announced that the COVID–19 outbreak can be characterized as a pandemic, as the rates of infection continue to rise in many locations around the world and across the United States.

The spread of COVID–19 within our Nation's communities threatens to strain our Nation's healthcare systems. As of March 12, 2020, 1,645 people from 47 States have been infected with the virus that causes COVID–19. It is incumbent on hospitals and medical facilities throughout the country to assess their preparedness posture and be prepared to surge capacity and capability. Additional measures, however, are needed to successfully contain and combat the virus in the United States.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 201 and 301 of the National Emergencies Act (50 U.S.C. 1601 *et seq.*) and consistent with section 1135 of the Social Security Act (SSA), as amended (42 U.S.C. 1320b–5), do hereby find and proclaim that the COVID–19 outbreak in the United States constitutes a national emergency, beginning March 1, 2020. Pursuant to this declaration, I direct as follows:

Section 1. *Emergency Authority.* The Secretary of HHS may exercise the authority under section 1135 of the SSA to temporarily waive or modify certain requirements of the Medicare, Medicaid, and State Children's Health Insurance programs and of the Health Insurance Portability and Accountability Act Privacy Rule throughout the duration of the public health emergency declared in response to the COVID–19 outbreak.



Sec. 2. *Certification and Notice.* In exercising this authority, the Secretary of HHS shall provide certification and advance written notice to the Congress as required by section 1135(d) of the SSA (42 U.S.C. 1320b–5(d)).

Sec. 3. *General Provisions.* (a) Nothing in this proclamation shall be construed to impair or otherwise affect:

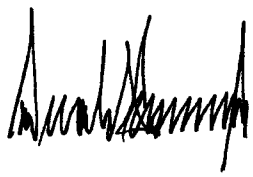
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This proclamation shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This proclamation is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

IN WITNESS WHEREOF, I have hereunto set my hand this thirteenth day of March, in the year of our Lord two thousand twenty, and of the Independence of the United States of America the two hundred and forty-fourth.



[FR Doc. 2020–05794
Filed 3–17–20; 8:45 am]
Billing code 3295–F0–P

EXHIBIT 2

J. Kevin Stitt
Office of the Governor
State of Oklahoma

FILED
MAR 15 2020
OKLAHOMA SECRETARY OF STATE

EXECUTIVE DEPARTMENT
EXECUTIVE ORDER 2020-07

On March 15, 2020, the eighth case of a novel coronavirus ("COVID-19"), was confirmed in the State of Oklahoma. As noted in a previous Executive Order, the United States Centers for Disease Control and Prevention has identified the potential public health threat posed by COVID-19 as "high" both globally and in the United States. In addition, on March 14, 2020, the President of the United States declared a national health emergency in the United States as a result of the national spread of COVID-19.

While impact in Oklahoma has continued to be relatively minimal to date, it is increasingly important for Oklahoma to be ready for this threat. Therefore, I believe, after consultation with numerous health experts within my administration, it is now necessary to provide for the rendering of mutual assistance among the State and political subdivisions of the State and to cooperate with the Federal government with respect to carrying out emergency functions during the continuance of the State emergency pursuant to the provisions of the Oklahoma Emergency Management Act of 2003.

Therefore, I, J. Kevin Stitt, Governor of the State of Oklahoma, pursuant to the power vested in me by Section 2 of Article VI of the Oklahoma Constitution, hereby declare and order the following:

1. There is hereby declared an emergency caused by the impending threat of COVID-19 to the people of this State and the public's peace, health, and safety. The counties included in this declaration are:

All 77 Oklahoma Counties

2. The State Emergency Operations Plan has been activated, and resources of all State departments and agencies available to meet this emergency are hereby committed to the reasonable extent necessary to prepare for and respond to COVID-19 and to protect the health and safety of the public. These efforts shall be coordinated by the Director of the Department of Emergency Management with comparable functions of the federal government and political subdivisions of the State.

3. State agencies, in responding to this emergency, may make necessary emergency acquisitions to fulfill the purposes of this declaration without regard to limitations or bidding requirements on such acquisitions to include the use of

EXHIBIT 2

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the state purchase card. Such necessary emergency purchases shall be capped at $250,000.00 per transaction. All such purchases must be readily identifiable as such, as following the conclusion of this threat, all such necessary emergency acquisitions will be audited to determine if they were made for emergency purposes.

4. State agencies, in responding to this emergency, may employ additional staff without regard to the classification requirements of such employment.

5. State agencies shall continue to follow guidance for interaction with the public provided by the Oklahoma Department of Health.

In addition, I direct all state agencies as follows:

1. Transmit a clear delegation of authority for state agency directors and designate an Emergency Management Liaison by 5:00 p.m. on March 16, 2020;

2. Establish and, if necessary, implement a remote work policy that balances the safety and welfare of state employees with the critical services they provide;

3. Encourage Oklahomans interacting with agency services to utilize online options whenever possible;

4. Ensure continued compliance with Executive Order 2019-13, which limits non-essential out-of-state travel.

5. Promulgate any emergency rules necessary to respond to the emergency and to comply with the directives contained herein.

This Order shall be effective until the end of thirty (30) days after the filing of this Order.

Copies of this Executive Order shall be distributed to the Director of Emergency Management, the Oklahoma State Health Commissioner, and the Director of the Office of Management and Enterprise Services who shall cause the provisions of this Order to be implemented by all appropriate agencies of State government.

IN WITNESS WHEREOF, I have set my hand and caused the Great Seal of the State of Oklahoma to be affixed at Oklahoma City, this 15th day of March, 2020.

BY THE GOVERNOR OF THE STATE OF OKLAHOMA

J. KEVIN STITT

ATTEST:

MICHAEL ROGERS, SECRETARY OF STATE

EXHIBIT 3

CHEROKEE NATION
EMERGENCY DISASTER DECLARATION

WHEREAS, the Cherokee Nation since time immemorial has exercised the sovereign rights of self-government on behalf of the Cherokee people;

WHEREAS, the Cherokee Nation is a federally recognized Indian Nation with a historic and continual government-to-government relationship with the United States of America; and

WHEREAS, on March 12, 2020, the World Health Organization declared the COVID-19 virus outbreak a global pandemic; and

WHEREAS, on March 13, 2020 a national emergency was declared by the President of the United States, for COVID-19; and

WHEREAS, on March 15, 2020 the State of Oklahoma declared an emergency in all 77 Oklahoma counties, including the fourteen counties in northeast Oklahoma, (Adair, Cherokee, Craig, Delaware, Mayes, McIntosh, Muskogee, Nowata, Ottawa, Rogers, Sequoyah, Tulsa, Wagoner and Washington counties); this event will affect our citizens, partners and tribal brethren, causing a public health emergency with disruption to critical infrastructure and systems throughout our territorial jurisdiction of the Cherokee Nation; and

WHEREAS, immediate and continued attention is required to protect public health, ensure public safety and render emergency relief;

NOW THEREFORE, I, Chuck Hoskin Jr., Principal Chief of Cherokee Nation, do find that the aforementioned event constitutes a threat to public safety and welfare of our neighboring, local communities, tribal enterprises and concerns, (nationally and internationally), partners and tribal brethren, and do hereby declare a state of emergency to exist throughout the territorial jurisdiction of the Cherokee Nation.

BE IT FURTHER DECLARED, I hereby activate the Cherokee Nation Emergency Operations Plan and Cherokee Nation Emergency Operations Center to assist and respond to the issues threatening the safety and well-being of our citizens, tribal enterprises and concerns (nationally and internationally), partners and tribal brethren, and fellow Oklahomans and authorize all appropriate Tribal resources and personnel to respond to this emergency status;

BE IT FURTHER DECLARED, that pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, 42 U.S.C. 5151 et seq., (Stafford Act), I request that the President of the United States declare a major disaster for the impacted areas within the Cherokee Nation and that federal aid be directed to the Cherokee Nation to supplement our efforts in the areas affected by the COVID-19.

THIS DECLARATION SHALL EXPIRE AFTER SIXTY (60) DAYS, UNLESS OTHERWISE EXTENDED.

[redacted]

IN WITNESS WHEREOF, I have hereunto set my hand and seal to this instrument on this sixteenth day of March in the year of our Lord, two thousand and twenty.

Chuck Hoskin Jr., Principal Chief
Cherokee Nation

EXHIBIT
3

EXHIBIT 4

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Simpson v. Farmers Ins. Co., Inc., Okla., May 25, 1999

912 P.2d 861
Supreme Court of Oklahoma.

MAX TRUE PLASTERING COMPANY, Plaintiff,
v.
UNITED STATES FIDELITY AND GUARANTY COMPANY, Defendant/Third Party Plaintiff,
v.
BOB H. JOHNSON AGENCY and Jeff R. Johnson, Third Party Defendants.

No. 85860.
|
Feb. 27, 1996.
|
As Corrected March 5 and 8, 1996.

Synopsis

Insured filed suit against insurer to recover under fidelity bond for losses arising from employee dishonesty. The United States District Court for the Northern District of Oklahoma, Sven Erik Holmes, J., certified questions. The Oklahoma Supreme Court, Kauger, V.C.J., held that: (1) doctrine of reasonable expectations applies to construction of insurance contracts, and (2) use of doctrine should be limited to situations in which the policy contains ambiguity or to contracts containing unexpected exclusions that arise from technical or obscure language or that are hidden in insurance policy provisions.

Questions answered.

Opala, J., concurred in part and dissented in part.

Hodges, J., dissented.

***862 Certified Questions of Law from the United States District Court, Northern District of Oklahoma; Honorable Sven Erik Holmes, Judge.**

The United States District Court for the Northern District of Oklahoma certified the following questions pursuant to the Uniform Certification of Questions of Law Act, 20 O.S.1991 § 1601 et seq.:

1) Does the State of Oklahoma recognize the "reasonable expectations" doctrine with regard to insurance contracts?

2) If so, what does the doctrine provide and in what circumstances is the doctrine applicable?

We find that: 1) under Oklahoma law, the reasonable expectations doctrine may be applied in the construction of insurance contracts; and 2) the doctrine may apply to ambiguous contract language or to exclusions which are masked by technical or obscure language or which are hidden in a policy's provisions.

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EXHIBIT 4

Scott D. Cannon, Tulsa, for Third Party Defendants, Bob H. Johnson Agency and Jeff R. Johnson.

Opinion

KAUGER, Vice Chief Judge.

Two issues are presented by the questions certified:[1] 1) whether the doctrine of reasonable expectations applies to the construction of insurance contracts in Oklahoma; and 2) what circumstances give rise to the doctrine's operation. Under the reasonable expectations doctrine, the objectively reasonable expectations of applicants, insureds and intended beneficiaries concerning the terms of insurance contracts are honored even though painstaking study of the policy provisions might have negated those expectations. ***863** [2] We find that the reasonable expectations doctrine may apply to the construction of ambiguous insurance contracts or to contracts containing exclusions which are masked by technical or obscure language or which are hidden in policy provisions.

1 Title 20 O.S.1991 § 1602 provides in pertinent part:

> "The Supreme Court ... may answer questions of law certified to it by ... a United States District Court ... if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court..."

2 *Johnson v. Farm Bureau Mut. Ins. Co.*, 533 N.W.2d 203, 206 (Iowa 1995); *Atwater Creamery v. Western Nat'l Mut. Ins.*, see note 5 at 277, infra; *State v. Underwriters at Lloyds London*, 755 P.2d 396, 400 (Alaska 1988); *American Family Mut. Ins. Co. v. Elliot*, 523 N.W.2d 100, 103 (S.D.1994); H. Wood, Jr., "The Insurance Fallout Following Hurricane Andrew: Whether Insurance Companies are Legally Obligated to Pay for Building Code Upgrades Despite the 'Ordinance or Law' Exclusion Contained in Most Homeowners Policies," 48 U.Miami L.Rev. 949, 956 (1994); 6B J. Appleman, *Insurance Law & Practice*, § 4254 at pp. 24–26 (1979); R. Keeton, "Insurance Law Rights at Variance with

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Policy Provisions," 83 Harv.L.Rev. 961, 966 (1970).

FACTS

The third-party defendant, Jeff R. Johnson (Johnson/agent), sold a fidelity bond to the plaintiff, Max True Plastering Company (True/insured), insuring True for some losses arising from employee dishonesty.[3] The bond was purchased from the defendant, United States Fidelity and Guaranty Company (USF & G/insurer).

3 The policy provides in pertinent part:
"A. COVERAGE
1. Covered Property: 'Money', 'securities', and 'property other than money and securities'...."

In the summer of 1991, True discovered that employees[4] in his Dallas office had formed a corporation, LCR, Inc. (LCR), and that they were diverting True business to it. True filed suit against LCR and the employees in October of 1991. The following June, True wrote the agent notifying him of losses from employee dishonesty; and he claimed coverage under the USF & G policy. USF & G denied coverage on August 16, 1993, asserting that True had not complied with the policy's notice and proof of loss requirements and that losses of intellectual property, such as the diversion of job opportunities and lost profits, were not covered by the policy.

4 The facts certified do not indicate how many True employees may have been accused of wrongdoing. There is deposition testimony asserting that at least three employees were involved.

True filed suit against USF & G to recover under the policy on August 30, 1993. True contended that coverage existed either under the express terms of the policy or that he was insured because of his reasonable expectations that the losses were covered. On July 28, 1994, USF & G filed a third-party petition against Johnson and his agency claiming indemnity if True prevailed. USF & G and Johnson both filed motions for summary judgment on December 2, 1994. True filed an objection to USF & G'S motion on December 9th claiming coverage either under the plain reading of the policy or pursuant to his reasonable expectations. Finding no Oklahoma precedent to resolve the questions of law, the trial court certified two questions to this Court pursuant to the Uniform Certification of Questions of Law Act, 20 O.S.1991 § 1601 et seq., on July 14, 1995. We set a briefing cycle which was completed when the final reply brief was filed on October 30, 1995.

I.

UNDER OKLAHOMA LAW, THE REASONABLE EXPECTATIONS DOCTRINE MAY BE APPLICABLE TO CONSTRUE INSURANCE CONTRACTS.

True argues that although this Court has not expressly adopted the reasonable expectations doctrine, many of the principles applied in Oklahoma to the construction of insurance contracts conform to the spirit of the doctrine. It urges us to join the majority[5] of jurisdictions

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which have considered ***864** the doctrine by recognizing it as part of Oklahoma law. USF & G and Johnson insist that insureds are adequately protected by existing principles applied to the construction of insurance contracts and they contend that those courts which have rejected the doctrine[6] offer the better reasoned opinions.

5 *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710, 715 (D.C.Cir.1986), *cert. denied*, 479 U.S. 1060, 107 S.Ct. 940, 93 L.Ed.2d 991 (1987) (Applying Indiana law.); *Keene v. Insurance Co. of N. America*, 215 U.S.App.D.C. 156, 667 F.2d 1034, 1041 (1981), *cert. denied*, 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875 (1982), *reh'g denied*, 456 U.S. 951, 102 S.Ct. 2023, 72 L.Ed.2d 476 (1982); *Crawford v. Ranger Ins. Co.*, 653 F.2d 1248, 1251 (9th Cir.1981) (Applying Hawaii law.); *Macon Light House Revival Center, Inc. v. Continental Ins. Co.*, 651 F.Supp. 417–18 (M.D.Ga.1987) (Applying Georgia law.); *Commercial Union Assur. Co. v. Aetna Casualty & Sur. Co.*, 455 F.Supp. 1190, 1193 (D.N.H.1987) (Applying New Hampshire law.); *Gleason v. Merchants Mut. Ins. Co.*, 589 F.Supp. 1474, 1480 (D.R.I.1984) (Applying Rhode Island law.); *Dronge v. Monarch Ins. Co.*, 511 F.Supp. 1, 4 (D.Kan.1979) (Applying Kansas law.); *Fritz v. Old American Ins. Co.*, 354 F.Supp. 514, 516 (S.D.Tex.1973) (Applying Texas law.); *Peerless Ins. Co. v. Brennon*, 564 A.2d 383, 386 (Me.1989); *Grinnell Mut. Reinsurance Co. v. Voeltz*, 431 N.W.2d 783, 785–86 (Iowa 1988); *Travelers Ins. Co., Inc. v. Jones*, 529 So.2d 234, 239 (Ala.1988); *Woodson v. Manhattan Life Ins. Co. of New York*, 743 S.W.2d 835, 839 (Ky.1987); *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 739, 356 S.E.2d 488, 495 (1987); *Steigler v. Insurance Co. of N. America*, 384 A.2d 398, 400 (Del.Supr.1987); *Davis v. M.L.G. Corp.*, 712 P.2d 985, 989 (Colo.1986); *Meier v. New Jersey Life Ins. Co.*, 101 N.J. 597, 503 A.2d 862, 869 (1986); *Home Indem. Ins. Co. v. Merchants Distributors, Inc.*, 396 Mass. 103, 483 N.E.2d 1099, 1101 (1985); *Atwater Creamery Co. v. Western Nat'l Ins. Co.*, 366 N.W.2d 271, 278–79 (Minn.1985); *Kracl v. Aetna Casualty & Sur. Co.*, 220 Neb. 869, 374 N.W.2d 40, 44 (1985); *National Union Fire Ins. Co. v. Reno's Executive Air, Inc.*, 100 Nev. 360, 682 P.2d 1380, 1383–84 (1984); *Gross v. Lloyds of London Ins. Co.*, 121 Wis.2d 78, 358 N.W.2d 266, 270 (1984); *Darner Motor Sales v. Universal Underwriters*, 140 Ariz. 383, 389, 682 P.2d 388, 394 (1984); *Transamerica Ins. Co. v. Royle*, 202 Mont. 173, 656 P.2d 820, 824 (1983); *Great American Ins. Co. v. C.G. Tate Constr. Co.*, 303 N.C. 387, 279 S.E.2d 769, 774 (1981); *United States Fire Ins. Co. v. Colver*, 600 P.2d 1, 3–4 (Alaska 1979);

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Collister v. Nationwide Life Ins. Co., 479 Pa. 579, 388 A.2d 1346, 1354 (1978), *cert. denied*, 439 U.S. 1089, 99 S.Ct. 871, 59 L.Ed.2d 55 (1979); *Mills v. Agrichemical Aviation, Inc.*, 250 N.W.2d 663, 673 (N.D.1977); *Crowell v. Federal Life & Casualty Co.*, 397 Mich. 614, 247 N.W.2d 503, 506 (1976); *Gyler v. Mission Ins. Co.*, 10 Cal.3d 216, 110 Cal.Rptr. 139, 514 P.2d 1219, 1221 (1973); *Pribble v. Aetna Life Ins. Co.*, 84 N.M. 211, 501 P.2d 255, 260 (1972); *Katz Drug Co. v. Commercial Standard Ins. Co.*, 647 S.W.2d 831, 835 (Mo.App.1983); *Atlantic Cement Co., Inc. v. Fidelity & Casualty Co. of New York*, 91 A.D.2d 412, 459 N.Y.S.2d 425, 429 (1983), *aff'd*, 63 N.Y.2d 798, 481 N.Y.S.2d 329, 471 N.E.2d 142 (1984).

6 *Allen v. Prudential Property & Casualty Ins. Co.*, 839 P.2d 798, 803–04 (Utah 1992); *American Country Ins. Co. v. Cash*, 171 Ill.App.3d 9, 120 Ill.Dec. 834, 524 N.E.2d 1016, 1018 (1988); *Meckert v. Transamerica Ins. Co.*, 108 Idaho 597, 701 P.2d 217, 221 (1985); *Sterling Merchandise Co. v. Hartford Ins. Co.*, 30 Ohio App.3d 131, 506 N.E.2d 1192, 1196 (1986).

An adhesion contract is a standardized contract prepared entirely by one party to the transaction for the acceptance of the other. These contracts, because of the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected on a "take it or leave it" basis without opportunity for bargaining—the services contracted for cannot be obtained except by acquiescing to the form agreement.[7] Insurance contracts are contracts of adhesion because of the uneven bargaining positions of the parties.[8] The doctrine of reasonable expectations has evolved as an interpretative tool to aid courts in discerning the intention of the parties bound by adhesion contracts.[9] It developed in part because established equitable doctrines were inadequate,[10] and it takes into account the realities of present day commercial practice.[11]

7 *Rodgers v. Tecumseh Bank*, 756 P.2d 1223, 1226 (Okla.1988).

8 *Wilson v. Travelers Ins. Co.*, 605 P.2d 1327, 1329 (Okla.1980).

9 *Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co.*, see note 5 at 278, supra; *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, see note 5, supra; *Mills v. Agrichemical Aviation, Inc.*, see note 5 at 671, supra.

10 *Allen v. Prudential Property & Casualty Ins. Co.*, see note 6 at 806, supra; R. Keeton, "Insurance Law Rights at Variance with Policy Provisions, 83 Harv.L.Rev. 961 (pt. 1) & 83 Harv.L.Rev. 1381 (pt. 2) (1970). See also, W. Mayhew, "Reasonable Expectations: Seeing a Principled Application," 13 Pepp.L.Rev. 267, 269–72 (1986).

11 *Anderson v. Country Life Ins. Co.*, 180 Ariz. 625, 632, 886 P.2d 1381, 1388 (App.1994); Trakman, "Interpreting

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Contracts: A Common Law Dilemma," 59 Canadian Bar Review 241 (1981).

Under the doctrine, if the insurer or its agent creates a reasonable expectation of coverage in the insured which is not supported by policy language, the expectation will prevail over the language of the policy.[12] ***865** The doctrine does not negate the importance of policy language. Rather, it is justified by the underlying principle that generally the language of the policy will provide the best indication of the parties' reasonable expectations.[13] The standard under the doctrine is a "reasonable expectation";[14] and courts must examine the policy language objectively to determine whether an insured could reasonably have expected coverage.[15] Courts adopting the reasonable expectations doctrine have found its rationale for interpretation of the usual insurance contract to be sensible.[16] They also recognize that insurance law is the basis of the doctrine.[17] These courts acknowledge that different rules of construction have traditionally been applied to insurance contracts because of their adhesive nature.[18] Tribunals embracing the doctrine recognize that it is consistent with numerous other interpretive rules pertaining to adhesion contracts.[19] Many of these rules are a part of Oklahoma law. For instance: 1) ambiguities are construed most strongly against the insurer;[20] 2) in cases of doubt, words of inclusion are liberally applied in favor of the insured and words of exclusion are strictly construed against the insurer;[21] 3) an interpretation which makes a contract fair and reasonable is selected over that which yields a harsh or unreasonable result;[22] 4) insurance contracts are construed to give effect to the parties' intentions;[23] 5) the scope of an agreement is not determined in a vacuum, but instead with reference to extrinsic circumstances;[24] and 6) words are given effect according to their ordinary or popular meaning.[25] Nevertheless, these rules of construction are often inadequate because they may fail to recognize the realities of the insurance business and the methods used in modern insurance practice.[26]

12 *Bensalem Township v. International Surplus Lines Ins. Co.*, 38 F.3d 1303, 1311–12 (3rd Cir.1994); *Johnson v. Farm Bureau Mut. Ins. Co.*, see note 2, supra; *Gordinier v. Aetna Casualty & Sur. Co.*, 154 Ariz. 266, 742 P.2d 277, 283–84 (1987).

13 *Frain v. Keystone Ins. Co.*, 433 Pa.Super. 462, 640 A.2d 1352, 1354 (1994) (While reasonable expectations of the insured are the focal points in interpreting the contract language of insurance policies, an insured may not complain that his or her reasonable expectations were frustrated by policy limitations which are clear and unambiguous.); *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, see note 5, supra.

14 *Bracy v. American Family Mut. Ins. Co.*, 189 Neb. 631, 204 N.W.2d 174, 175 (1973); *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 311–12 (Minn.1989); *Carlson v. New York*

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Life Ins. Co., 76 Ill.App.2d 187, 222 N.E.2d 363, 367–68 (1966).

15 *Allstate Ins. Co. v. Keillor*, 450 Mich. 412, 537 N.W.2d 589, 591 (1995); *Louisiana Ins. Guaranty Ass'n v. Interstate Fire & Casualty Co.*, 630 So.2d 759, 764 (La.1994).

16 *Darner Motor Sales, Inc. v. Universal Underwriters Insurance Co.*, see note 5 at 402, 682 P.2d at 397, supra.

17 Id.

18 *Bering Strait School Dist. v. RLI Ins.*, 873 P.2d 1292, 1295 (Alaska 1994); *Stordahl v. Government Employees Ins. Co.*, 564 P.2d 63, 65 (Alaska 1977).

19 *Davis v. M.L.G. Corp.*, see note 5 at 990, supra.

20 *Littlefield v. State Farm Fire & Casualty Co.*, see note 25, infra; *Dodson v. St. Paul Ins. Co.*, see note 22, infra; *Wilson v. Travelers Ins. Co.*, see note 8, supra.

21 *Phillips v. Estate of Greenfield*, see note 23, infra; *Dodson v. St. Paul Ins. Co.*, see note 22, infra; *Great Northern Life Ins. Co. v. Cole*, 207 Okla. 171, 248 P.2d 608, 610 (1952); *National Aid Life Ass'n v. May*, 201 Okla. 450, 207 P.2d 292, 295 (1949); *Pitchford v. Electrical Workers' Ben. Ass'n*, 189 Okla. 82, 113 P.2d 591, 593 (1941).

22 *Dodson v. St. Paul Ins. Co.*, 812 P.2d 372, 376 (Okla.1991); *Wilson v. Travelers Ins. Co.*, see note 8, supra; *American Iron & Mach. Works Co. v. Insurance Co. of N. America*, 375 P.2d 873, 875 (Okla.1962).

23 *Phillips v. Estate of Greenfield*, 859 P.2d 1101, 1104 (Okla.1993); *Torres v. Kansas City Fire & Marine Ins. Co.*, 849 P.2d 407, 411–12 (Okla.1993)

24 *Continental Casualty Co. v. Goodnature*, 170 Okla. 477, 41 P.2d 77, 79–80 (1935).

25 *Littlefield v. State Farm Fire & Casualty Co.*, 857 P.2d 65, 69 (Okla.1993); *Flitton v. Equity Fire & Casualty Co.*, 824 P.2d 1132, 1134 (Okla.1992); *Continental Oil Co. v. National Fire Ins. Co. of Connecticut*, 541 P.2d 1315, 1320 (Okla.1975).

26 *Darner Motor Sales Inc. v. Universal Underwriters Ins. Co.*, see note 5 at 394; Abraham, "Judge–Made Law & Judge–Made Insurance: Honoring the Reasonable Expectations of the Insured," 67 Va.L.Rev. 1151 (1981); Murray, "The Parole Evidence Process and Standardized Agreements under the Restatement (Second) of Contracts," 123 U.Pa.L.Rev. 1342 (1975).

***866** Of the thirty-six jurisdictions which have addressed the reasonable expectations doctrine, our research reveals only four courts which have rejected the rule. Although the Utah court recognized its duty to invalidate insurance provisions contrary to public policy, it refused

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to adopt the doctrine on the basis that its operation is not well-defined, and its deference to the occupation of the insurance field by the legislative and the executive branches.[27] The three other courts rejected the doctrine in favor of traditional construction guidelines relating to insurance contracts.[28]

27 *Allen v. Prudential Property & Casualty Ins. Co.*, see note 6 at 804, supra.

28 *Insurance Co. of North America v. Adkisson*, 121 Ill.App.3d 224, 76 Ill.Dec. 673, 459 N.E.2d 310, 313 (1984); *Casey v. Highlands Ins. Co.*, 100 Idaho 505, 509, 600 P.2d 1387, 1391 (1979); *Sterling Merchandise Co. v. Hartford Ins. Co.*, 30 Ohio App.3d 131, 506 N.E.2d 1192, 1196 (1986).

Although the reasonable expectations doctrine has not been adopted per se in Oklahoma, several cases indicate that the reasonable expectations of an insured will be considered in the construction of insurance contracts. In *Homestead Fire Ins. Co. v. De Witt*, 206 Okla. 570, 245 P.2d 92, 94 (1952), this Court quoted from *Bird v. St. Paul Fire & Marine Ins. Co.*, 224 N.Y. 47, 120 N.E. 86–87, 13 A.L.R. 875 (1918) referring to the construction of an insurance policy:

> "Our guide is the reasonable expectation and purpose of the ordinary business man making an ordinary business contract. It is his intention, expressed or fairly to be inferred, that counts." (Emphasis supplied.)

In *Conner v. Transamerica Ins. Co.*, 496 P.2d 770, 774 (Okla.1972), we held that the insurer was obligated to defend its insureds in actions involving dishonest, fraudulent, criminal and malicious conduct or omissions. The Court's holding in *Conner* was buttressed by a quotation from *Gray v. Zurich Ins. Co.*, 65 Cal.2d 263, 54 Cal.Rptr. 104, 419 P.2d 168 (1966) providing in pertinent part:

> "... This language, in its broad sweep, would lead the insured **reasonably to expect** defense of any suit regardless of merit or cause.... The basic promise would support the insured's **reasonable expectation** that he had bought the rendition of legal services to defend against a suit for bodily injury which alleged he had caused it, negligently, nonintentionally, intentionally or in any other manner ..." (Emphasis supplied.)

The *Conner* Court acknowledged that the views expressed in *Gray* comported with the rules established in Oklahoma for interpretation of insurance contracts.

The reasonable expectation doctrine is a double-edged sword—both parties to the insurance contract may rely upon their reasonable expectations. We refused to extend a homeowner's policy to provide coverage for negligent supervision or failure to control in *Phillips v. Estate of Greenfield*, 859 P.2d 1101, 1106 (Okla.1993). The rationale for denying coverage was based upon our belief that to do so would "negate the **reasonable expectations** of the parties as expressed in their contract."

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In a series of cases involving the stacking of uninsured motorist coverage, we have relied on the reasonable expectations of the insurer and the insured. This Court held in *Scott v. Cimarron Ins. Co., Inc.*, 774 P.2d 456, 458 (Okla.1989) that an insurer was not required to allow stacking of uninsured motorist policies when only one premium for one vehicle had been collected. We distinguished other cases which had allowed stacking based on the "**reasonable contractual expectations** of the parties as reflected, in part, by the number and amount of uninsured motorist premiums paid." (Emphasis supplied.) We relied heavily on *Scott* in *Withrow v. Pickard*, 905 P.2d 800, 804–06 (Okla.1995) finding that, like the parties in *Scott*, the **contractual expectation** of the litigants was to have singular uninsured motorist coverage. On December 12, 1995, we denied certiorari in *Kramer v. Allstate Ins.*, No. 83,822 (Okla.Ct.App.1995). In *Kramer*, the Court of Appeals held that because the insurer had charged a higher uninsured motorist ***867** premium for coverage of multiple vehicles than it did for a single automobile that it had created the **reasonable contractual expectation** that the amount of uninsured motorist coverage would be correspondingly greater than the amount of coverage on one car. The Court of Appeals refused to allow the insurer to defeat that expectation of greater coverage by policy language purporting to limit coverage.

Some courts rely upon a form of the reasonable expectations doctrine[29] espoused in § 211 of the Restatement (Second) of Contracts[30] to protect the expectations of the contracting parties. Under the Restatement, reformation of an insurance contract is allowed if the insurer has reason to believe that the insured would not have signed the contract if the inclusion of certain limitations had been known.

29 *State Farm Mut. Auto. Ins. Co. v. Falness*, 178 Ariz. 281, 872 P.2d 1233–34 (1994); *St. Paul Fire & Marine Ins. Co. v. Russo Bros., Inc.*, 641 A.2d 1297, 1300 (R.I.1994); *Lauvetz v. Alaska Sales & Serv.*, 828 P.2d 162, 165 (Alaska 1991).

30 Restatement (Second) of Contracts § 211 (1979) formulates the doctrine in a manner which allows a fact finder to look at the totality of the circumstances in determining the intent of the parties, rather than being strictly confined to the four corners of a standardized agreement. Section 211 provides:

> "(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.
> (2) Such a writing is interpreted whenever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.
> (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing

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contained a particular term, the term is not part of the agreement." Comment (b) to § 211 points out that parties regularly using standardized agreements ordinarily do not expect customers to understand or even to read the standard terms. Customers trust to the good faith of the party using the form and to the tacit representation that like terms are being accepted regularly by others similarly situated. Subsection (3) of § 211 is the Restatement's characterization of the reasonable expectations doctrine. Comment (f) to the subsection outlines a sensible rationale for interpretation of the usual insurance agreement. It provides in pertinent part:

> "Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation.... [An insured] who adheres to the [insurer's] standard terms does not assent to a term if the [insurer] has reason to believe that the [insured] would not have accepted the agreement if he had known that the agreement contained the particular term. Such a belief or assumption may be shown by the prior negotiations or inferred from the circumstances. Reason to believe may be inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction. The inference is reinforced if the adhering party never had an opportunity to read the term, or if it is illegible or otherwise hidden

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> from view. This rule is closely related to the policy against unconscionable terms and the rule of interpretations against the draftsman."

In *Gay v. Hartford Underwriters Ins. Co.*, 904 P.2d 83 (Okla.1995) (*Gay II*), we held that the insurer was bound by the settled law of case of *Gay I.*[31] In *Gay I,* the Court of Appeals found that despite contract language providing for uninsured motorist coverage of $10,000/$20,000, the insurance company had acted in a manner indicating a mutual mistake warranting contract reformation to allow coverage of $100,000/$300,000. The insured in the *Gay* cases had on at least two occasions requested that his coverage be upgraded to $100,000/$300,000, and the insurance agent had indicated that the policy change would be made. Nevertheless, at the time Gay was injured, the policy language provided only for $10,000/$20,000 in coverage. We held in *Gay II* that the insurer was bound by the settled law of *Gay I* finding a mutual mistake. Although in doing so, we did not cite § 211 of the Restatement or refer to the reasonable expectations doctrine, the reasoning of the case coincides with the doctrine as outlined in § 211—the insurer was required to provide the higher coverage because of the expectations it had induced in the insured to believe that he had purchased ***868** coverage of $100,000/ $300,000 as uninsured motorist insurance.

31 *Gay v. Hartford Underwriters Ins. Co.*, No. 76,577 (Okla.Ct.App.1992).

Generally, absent an ambiguity, insurance contracts are subject to the same rules of construction as other contracts.[32] However, because of their adhesive nature, these contracts are liberally construed to give reasonable effect to all their provisions.[33] Our case law and the interpretive rules applied to insurance contracts demonstrate that Oklahoma law is consistent with the spirit and the policy of the reasonable expectations doctrine. The same case law coincides with the reasoning of the majority of jurisdictions adopting the doctrine.

32 *Carraco Oil Co. v. Mid–Continent Cas. Co.*, 484 P.2d 519, 521 (Okla.1971); *National Life & Accident Ins. Co. v. Cudjo*, 304 P.2d 322, 325 (Okla.1956); *C.P.A. Co. v. Jones*, 263 P.2d 731, 734 (Okla.1953).

33 *Dodson v. St. Paul Ins. Co.*, see note 22, supra.

II.

THE REASONABLE EXPECTATIONS DOCTRINE MAY APPLY TO THE CONSTRUCTION OF AMBIGUOUS INSURANCE CONTRACTS OR TO CONTRACTS CONTAINING EXCLUSIONS MASKED BY TECHNICAL OR OBSCURE LANGUAGE OR HIDDEN POLICY PROVISIONS.

True urges us to adopt a version of the reasonable expectations doctrine which does not require a finding of ambiguity in policy language before the doctrine is applied. Although they urge us not to adopt the doctrine, USF & G and Johnson argue that if the doctrine is to apply in Oklahoma, it should be limited to situations in which the policy contains an ambiguity or to contracts containing unexpected exclusions arising from technical or obscure language or which are hidden in policy provisions. We agree with this limitation.

If the doctrine is not put in the proper perspective, insureds could develop a "reasonable expectation" that every loss will be covered by their policy and courts would find themselves engaging in wholesale rewriting of insurance policies.[34] Therefore, the jurisdictions which have adopted the doctrine apply it to cases where an ambiguity is found in the policy language[35] or where the exclusions are obscure or technical or are hidden in complex policy language.[36] In these cases, the doctrine is utilized to resolve ambiguities in insurance policies and considers the language of the policies in a manner which ***869** conforms the policies with the parties' "reasonable expectations."[37]

34 *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, see note 5, supra; 1 Corbin, *Contracts*, § 1 (1963). See also, *Regional Bank of Colorado v. St. Paul Fire & Marine Ins. Co.*, 35 F.3d 494–95 (10th Cir.1994).

35 *Shook v. State Farm Mut. Ins. Co. of Bloomington*, 872 F.Supp. 768, 772 (D.Mont.1994); G. White, "La Jolla Beach & Tennis Club v. Industrial Indemnity Co.: Redefining the Role of the Insured's Expectations in Shaping the Insurer's Duty to Defend," 30 Tort & Ins. L.J. 859, 869 (1994). See, *Eli Lilly & Co. v. Home Ins. Co.*, note 5, supra; *Keene v. Insurance Co. of N. America*, note 5, supra; *Crawford v. Ranger Ins. Co.*, note 5, supra; *Macon Light House Revival Center, Inc. v. Continental Ins. Co.*, note 5, supra; *Gleason v. Merchants Mut. Ins. Co.*, note 5, supra; *Dronge v. Monarch Ins. Co.*, note 5, supra; *Fritz v. Old American Ins. Co.*, note 5, supra; *Peerless Ins. Co. v. Brennon*, note 5, supra; *Grinnell Mut. Reinsurance Co. v. Voeltz*, note 5 supra; *Woodson v. Manhattan Life Ins. Co.*, note 5, supra; *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, note 5, supra; *Steigler v. Insurance Co. of N. America*, note 5, supra; *Davis v. M.L.G. Corp.*, note 5, supra; *Meier v. New Jersey Life Ins. Co.*, note 5, supra; *Kracl v. Aetna Casualty & Sur. Co.*, note 5, supra; *Bond Bros., Inc. v. Robinson*, 393 Mass. 546, 471 N.E.2d 1332–33 (1984); *National Union Fire Ins. Co. v. Reno's Executive Air, Inc.*, note 5, supra; *Mills v. Agrichemical Aviation, Inc.*, note 5, supra; *Crowell v. Federal Life & Casualty Co.*, note 5, supra; *Gyler v. Mission Ins. Co.*, note 5, supra; *Pribble v. Aetna Life Ins. Co.*, note 5, supra; *Katz Drug Co. v.*

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Commercial Standard Ins. Co., note 5, supra; *Atlantic Cement Co. v. Fidelity & Casualty Co.*, note 5, supra.

36 *State Farm Mut. Auto. Ins. Co. v. Falness*, 39 F.3d 966–67 (9th Cir.1994); *Johnson v. Farm Bureau Mut. Ins. Co.*, 533 N.W.2d 203, 206 (Iowa 1995); *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 311 (Minn.1989); *Atwood v. Hartford Accident & Indem. Co.*, 116 N.H. 636, 365 A.2d 744, 746 (1976); *Independent School Dist No. 197 v. Accident & Casualty Ins. of Winterthur*, 525 N.W.2d 600, 609 (Minn.App.1995); *Lehrhoff v. Aetna Casualty & Surety Co.*, 271 N.J.Super. 340, 638 A.2d 889, 892 (N.J.Sup.Ct.App.1994); *State Farm Mut. Auto. Ins. Co. v. Dimmer*, 160 Ariz. 453, 773 P.2d 1012, 1019 (Ct.App.1989), *review denied* (6/13/89).

37 *Shook v. State Farm Mutual Ins. Co. of Bloomington*, see note 35, supra. See also, *Auto-Owners Ins. Co. v. Jensen*, 667 F.2d 714, 721 (8th Cir.1981); *Progressive Casualty Ins. Co. v. Marnel*, 587 F.Supp. 622, 624 (D.Conn.1983); *Wilson v. Insurance Co. of N. America*, 453 F.Supp. 732, 734 (N.D.Cal.1978).

A policy term is ambiguous under the reasonable expectations doctrine if it is reasonably susceptible to more than one meaning. When defining a term found in an insurance contract, the language is given the meaning understood by a person of ordinary intelligence.[38] The doctrine does not mandate either a pro-insurer or pro-insured result because only **reasonable** expectations of coverage are warranted.[39]

38 *Regional Bank of Colorado v. St. Paul Fire & Marine Ins. Co.*, see note 34, supra; G. Dixon, D. Gische, M Hirsh, "The Nordstrom Decision & Settlement Allocation Under D & O Policies," 5 No. 3 CVRG 1, 26 (May/June 1995).

39 See, *Atwater Creamery v. Western Nat'l Mutual Ins.*, note 5 at 278, supra; *Hubred v. Control Data Corp.*, see note 36, supra; H. Wood, "The Insurance Fallout Following Hurricane Andrew: Whether Insurance Companies are Legally Obligated to Pay for Building Code Upgrades Despite the 'Ordinance or law' Exclusion Contained in Most Homeowners Policies," see note 2 at 957, supra.

In Oklahoma, unambiguous insurance contracts are construed, as are other contracts, according to their terms.[40] The interpretation of an insurance contract and whether it is ambiguous is determined by the court as a matter of law.[41] Insurance contracts are ambiguous only if they are susceptible to two constructions.[42] In interpreting an insurance contract, this Court will not make a better contract by altering a term for a party's benefit.[43] We do not indulge in forced or constrained interpretations to create and then to construe ambiguities in insurance contracts.[44]

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40 *Starrett v. Oklahoma Farmers Union Mut. Ins. Co.*, 849 P.2d 397, 400 (Okla.1993); *Frank v. Allstate Ins. Co.*, 727 P.2d 577, 580 (Okla.1986); *Carraco Oil Co. v. Mid–Continent Casualty Co.*, see note 32, supra; *C.P.A. Co. v. Jones*, see note 32, supra.

41 *Dodson v. St. Paul Ins. Co.*, see note 22 at 376, supra; *Harjo Gravel Co. v. Luke–Dick Co.*, 194 Okla. 537, 153 P.2d 112, 114 (1944); *National Ins. Underwriters v. Walker*, 206 Okla. 629, 245 P.2d 737–38 (1952).

42 *Littlefield v. State Farm Fire & Casualty Co.*, see note 25, supra; *Dodson v. St. Paul Ins. Co.*, see note 22, supra.

43 *Wilson v. Travelers Ins. Co.*, see note 22, supra; *American Iron & Mach. Works Co. v. Insurance Co. of N. America*, see note 22, supra; *Illinois Bankers Life Assurance Co. v. Tennison*, 202 Okla. 347, 213 P.2d 848, 852 (1950).

44 *Dodson v. St. Paul Ins. Co.*, see note 22, supra; *Mid–Continent Life Ins. Co. v. Skye*, 113 Okla. 184, 240 P. 630, 632 (1925); *Sovereign Camp, W.O.W. v. Howell*, 176 Okla. 451, 56 P.2d 138–39 (1936).

However, in *Conner v. Transamerica Ins. Co.*, 496 P.2d 770, 773 (Okla.1972), this Court found coverage for the defense of an action based on groundless, false or fraudulent conduct by the insured. The *Conner* policy provided coverage for "any suit ... even if any of the allegations of the suit are groundless, false or fraudulent." A subsequent provision of the same policy eliminated coverage for "any dishonest, fraudulent, criminal or malicious act of omission of any insured, partner or employee." This Court refused to allow a later provision of the policy to eviscerate coverage clearly delineated in a prior provision—the hidden exclusion was not given effect.[45]

45 See discussion, p. 866 supra.

The stacking cases— *Scott v. Cimarron Ins. Co., Inc.*, 774 P.2d 456, 458 (Okla.1989), *Withrow v. Pickard*, 905 P.2d 800, 804–06 (Okla.1995), and *Kramer v. Allstate Ins.*, No. 83,822 (Okla.Ct.App.1995) all provide that an insured will benefit from the coverage paid for regardless of whether a policy allows stacking of uninsured motorist coverage. *Conner*, disallowing a hidden exclusion and these cases relating the payment of premiums to the coverage which may be expected despite policy language demonstrate that crafty drafting of coverage language will not defeat the reasonable expectations of policy holders in Oklahoma.[46]

46 See discussion and accompanying footnotes, pp. 866–867 supra.

***870** The reasonable expectations doctrine comports with our case law and with the rules of construction applied to insurance contracts. Oklahoma law mandates that we join the majority of jurisdictions which have considered application of the doctrine[47] and apply it to cases in which policy language is ambiguous and to situations where, although clear, the

policy contains exclusions masked by technical or obscure language or hidden exclusions.

47 See note 5 and accompanying discussion, pp. 863–866, supra.

CONCLUSION

The reasonable expectations doctrine recognizes the true origin of standardized contract provisions, frees the courts from having to write a contract for the parties, and removes the temptation to create ambiguity or invent intent to reach a result.[48] The underlying principle of the reasonable expectations doctrine—that reasonable expectations of insurance coverage should be honored—[49] has been recognized by the majority of jurisdictions which have considered the issue[50] and by a steady progression of Oklahoma law beginning in 1952 with *Homestead Fire Ins. Co. v. De Witt*, 206 Okla. 570, 245 P.2d 92, 94 (1952) and continuing through 1995 in *Withrow v. Pickard*, 905 P.2d 800, 804–06 (Okla.1995), in *Gay v. Hartford Underwriters Ins. Co.*, 904 P.2d 83 (Okla.1995) (*Gay II*), and in *Kramer v. Allstate Ins.*, No. 83,822 (Okla.Ct.App.1995). By adopting the reasonable expectations doctrine, we recognize that it is important that ambiguous clauses or carefully drafted exclusions should not be permitted to serve as traps for policy holders. Nevertheless, it is equally imperative that the provisions of insurance policies which are clearly and definitely set forth in appropriate language, and upon which the calculations of the company are based, should be maintained unimpaired by loose and ill-considered judicial interpretation.[51] Today, we hold that the doctrine of reasonable expectations may be applicable to the interpretation of insurance contracts in Oklahoma, and that the doctrine may apply to ambiguous contract language or to exclusions which are masked by technical or obscure language or which are hidden in a policy's provisions.

48 *Darner Motor Sales v. Universal Underwriters*, see note 5 at 403, 682 P.2d at 398, supra.

49 See, *Atwater Creamery v. Western Nat'l Mutual Ins.*, note 5 at 278, supra; *Hubred v. Control Data Corp.*, see note 36, supra; H. Wood, "The Insurance Fallout Following Hurricane Andrew: Whether Insurance Companies are Legally Obligated to Pay for Building Code Upgrades Despite the 'Ordinance or law' Exclusion Contained in Most Homeowners Policies," see note 2, supra.

50 See note 5, supra.

51 *Williams v. Union Central Life Ins. Co.*, 291 U.S. 170, 179, 54 S.Ct. 348, 352, 78 L.Ed. 711, 92 A.L.R. 693 (1934); *Hemel v. State Farm Mutual Auto. Ins. Co.*, 211 La. 95, 29 So.2d 483, 486 (1947). See also, *Dodson v. St. Paul Ins. Co.*, note 22, supra; *Mid–Continent Life Ins. Co. v. Skye*, note 44, supra; *Sovereign Camp, W.O.W. v. Howell*, note 44, supra.

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QUESTIONS ANSWERED

We find that under Oklahoma law, the reasonable expectations doctrine may be applied in the construction of insurance contracts and that the doctrine may apply to ambiguous contract language or to exclusions which are masked by technical or obscure language or which are hidden in a policy's provisions.

ALMA WILSON, C.J., KAUGER, V.C.J., and LAVENDER, SIMMS, HARGRAVE, SUMMERS and WATT, JJ., concur.

OPALA, J., concurs in part and dissents in part.

HODGES, J., dissents.

All Citations

912 P.2d 861, 1996 OK 28

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EXHIBIT 5

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POLICY WORDING

TPIP USA FORM No. 15

Coverage Incepting
July 1, 2019 to July 1, 2020

EXHIBIT
5

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SECTION I

GENERAL PROVISIONS

A. INSURING AGREEMENT

In consideration of the premium paid by the Named Insured to the Company, the Company agrees to insure the following per the terms and conditions herein.

B. NAMED INSURED

As shown on the Declaration page, or as listed in the Declaration Schedule Addendum attached to this policy.

Agency(ies), organization(s), enterprise(s) and/or individual(s) for whom the Named Insured is required or has agreed to provide coverage, or as so named in the "Named Insured Schedule" on file with Tribal First, as their interests may appear which now exist or which hereafter may be created or acquired and which are owned, financially controlled or actively managed by the herein named interest, all jointly, severally or in any combination of their interests, for account of whom it may concern, are covered within the limits provided to the individual Named Insured.

Lessors and other party(ies) of interest in all property of every description covered hereunder are included herein as Insured's for their respective rights and interests, it being understood that the inclusion hereunder of more than one covered party shall not serve to increase the Company's limit of liability.

Mortgagees to whom certificates of coverage have been issued are covered hereunder as Insured's in accordance with the terms and conditions of Form 438 BFU NS, CP12 18 1091, or equivalent as required by the mortgagee.

C. MAILING ADDRESS OF NAMED INSURED

AS PER DECLARATION PAGE

D. POLICY PERIOD

AS PER DECLARATION PAGE

E. LIMITS OF LIABILITY

Subject to specific exclusions, modifications, and conditions hereinafter provided, the liability of the Company in any one occurrence regardless of whether one or more of the coverages of this Policy are involved shall not exceed:

1. LIMITS OF LIABILITY

   The Specific Limits of Liability as described in the Declaration Page apply per occurrence unless indicated otherwise.

2. SUB-LIMITS OF LIABILITY

The following sub-limits of liability are provided as described in the Declaration Page and apply per occurrence unless indicated otherwise. Coverage is provided only if a sub-limit of liability is shown in the Declaration Page for that item, and do not increase the specific limits of liability. The absence of a sub-limit of liability amount in the Declaration Page means that no coverage is provided for that item.

a. Per occurrence, and in the annual aggregate as respects the peril of flood (for those Named Insured(s) that participate in this optional dedicated coverage);
b. Per occurrence, and in the annual aggregate as respects the peril of earthquake shock (for those Named Insured(s) that participate in this optional dedicated coverage);
c. Combined Business Interruption, Rental Income, Tax Interruption and Tuition income (and related fees);
d. Extra Expense;
e. Miscellaneous Unnamed locations;
f. Automatic Acquisition. As per policy provisions;
g. Unscheduled Landscaping, tees, sand traps, greens, athletic fields and artificial turf if specific values for such items have not been reported as part of the Named Insured(s) schedule of values held on file with Tribal First. This coverage extension does not apply to the peril of Earthquake in the states of California, or Alaska. If Flood coverage is purchased for scheduled locations this extension will extend to include Flood coverage for any location not situated in Flood Zones A or V;
h. Scheduled Landscaping, tees, sand traps, greens, athletic fields and artificial fields if specific values for such items have been reported as part of the Named Insured(s) schedule of values held on file with Tribal First;
i. Errors & Omissions;
j. Course of Construction and Additions;
k. Money and Securities for Fire, Wind, Hail, Explosion, Smoke, Lightning, Riot, Civil Commotion, Impact by Aircraft or Objects falling there from, Impact by Vehicles, Water Damage and Theft (other than by an employee of the Named Insured(s)
l. Prize Giveaways
m. Unscheduled Fine Arts (as more fully defined herein);
n. Accidental Contamination including owned land, land values and water owned by the Named Insured(s)
o. Unscheduled infrastructure including but not limited to tunnels, bridges, dams, catwalks (except those not for public use), roadways, highways, streets (including guardrails), sidewalks (including guardrails), culverts, channels, levees, dikes, berms, embankments, street lights, traffic signals, meters, road way or highway fencing, and all similar property unless specific values for such items have been reported as part of the Named Insured(s) schedule of values held on file in the offices of Tribal First. Unscheduled Infrastructure coverage is excluded for the peril of Earthquake and for Federal Emergency Management Agency (F.E.M.A.) and/or any State Office of Emergency Services (O.E.S.) declared disasters, providing said declaration provides funding for repairs;
p. Increased Cost of Construction due to the enforcement of building codes / ordinance or law. As per policy provisions;
q. Transit;

r. Unscheduled Animals;
s. Unscheduled Watercraft; up to 50 feet. Unscheduled watercraft over 50 feet if held for sale by the Named Insured.
t. Off premises services interruption including extra expense resulting from a covered peril at non-owned/operated location(s);
u. Separately as respects Contingent Business Interruption, Contingent Extra Expense, Contingent Rental Value, and Contingent Tuition Income;
v. Claim Preparation Expenses;
w. Expediting Expenses;
x. Separately as respects Furs, jewelry, precious metals and precious stones;
y. Personal Property outside the U.S.A.;
z. Unmanned Aircraft. As per policy provisions
aa. Mold/Fungus Resultant Damage. As per policy provisions
ab. Boiler Explosion and Machinery Breakdown (for those Named Insured(s) that participate in this optional dedicated coverage).

F. OPTIONAL COVERAGE PARTICIPATION

It is understood and agreed that certain Named Insureds participate in Optional Coverage on this Policy as set forth below.

OPTIONAL COVERAGES IDENTIFICATION:

1. Earthquake Shock
2. Licensed Vehicles – Off Premises
3. Scheduled Fine Arts
4 Flood
5. Boiler Explosion & Machinery Breakdown
6. Contractors Equipment/Unlicensed Vehicles
7. Business Interruption, Rental Income

Such participation in the optional coverage(s) by the Named Insured is indicated in the Declaration Page, and/or by endorsement to this policy.

G. DEDUCTIBLE PROVISIONS

If two or more deductible amounts provided in the Declaration Page apply for a single occurrence the total to be deducted shall not exceed the largest per occurrence deductible amount applicable.

Unless a more specific deductible is applicable for a particular loss, the "Basic Deductible" shown in the Declaration Page, shall apply per occurrence. The company will not pay for loss or damage in any one occurrence until the amount of the loss or damage exceeds the applicable deductible.

H. UNIT OF INSURANCE DEFINED

In the application of the Earthquake Shock, or specified Wind deductibles, in accordance with the provisions of this Policy, each of the following shall be considered a Separate Unit of Insurance:

1. Each Separate Building or Structure;
2. The Contents of each Building or Structure;
3. Applicable Time Element Coverage of each separate Building or Structure; and
4. Property in each Yard.

The Company shall not be liable for loss to any Unit of Insurance covered hereunder unless such loss exceeds the percentages stated in this Policy of the replacement values of such Unit of Insurance at the time when such loss shall happen, and then only for its proportion of such excess.

I. PRIORITY OF PAYMENTS

In the event of loss caused by or resulting from more than one peril or coverage, the limit of liability of the primary / underlying coverage shall apply first to the peril(s) or coverage(s) not insured by the excess layers and the remainder, if any, to the peril(s) or coverage(s) insured hereunder. Upon exhaustion of the limit of liability of the primary / underlying coverage, this Policy shall then be liable for loss uncollected from the peril(s) or coverage(s) insured hereunder, subject to the limit of liability and the other terms and conditions as specified.

SECTION II

PROPERTY DAMAGE

A. COVERAGE

Subject to the terms, conditions and exclusions hereinafter contained, this Policy insures all property of every description both real and personal (including improvements, betterments and remodeling), of the Named Insured or property of others in the care, custody or control of the Named Insured, for which the Named Insured is liable or under obligation to insure.

B. EXTENSIONS OF COVERAGE

All coverage extensions are subject to the terms, conditions and exclusions of the policy except insofar as they are explicitly providing additional coverage.

1. PERSONAL EFFECTS

This Policy is extended to cover only such personal effects and wearing apparel of any of the officials, employees, students and personal effects of the Named Insured named in this Policy for which the Named Insured may elect to assume liability while located in accordance with the coverage hereof, but loss, if any, on such property shall be adjusted with and payable to the Named Insured.

2. PROPERTY IN COURSE OF CONSTRUCTION AND ADDITIONS

It is understood and agreed that as respects course of construction projects and additions, this Policy will provide automatic coverage subject to the following conditions:

a. Project involves only real property on new or existing locations (excluding dams, roads, and bridges)

b. Value of the project at the location does not exceed USD as per Declaration Page. Projects that exceed this amount are subject to underwriting approval prior to binding. However, inadvertent failure to report projects within USD as per Declarations Page shall not void coverage of said Project.

Additional Expense Soft Cost: This coverage applies to new buildings or structures in the course of construction up to the time that the new building (s) or structure (s) is initially occupied or put to its intended use whichever occurs first.

The Company will cover the additional expenses of the Named Insured as defined below for up to 25% of the estimated completed value of the project which results from a delay in the completion of the project beyond the date it would have been completed had no loss or damage occurred. The delay must be due to direct physical loss or damage to property insured and be caused by or result from a peril not excluded by this Policy. The Company will pay covered expenses when they are incurred.

a. Additional Interest Coverage – The Company will pay the additional interest on money the Named Insured borrows to finance construction or repair.

b. Rent or Rental Value Coverage – The Company will pay the actual loss of net rental income that results from delay beyond the projected completion date.

But the Company will not pay more than the reduction in rental income less charges and expenses that do not necessarily continue.

c. Additional Real Estate Taxes or Other Assessments – The Company will pay the additional real estate taxes or other assessments the Named Insured incurs for the period of time that construction is extended beyond the completion date.

d. Additional Advertising and Promotional Expenses – The Company will pay the additional advertising and promotional expense that becomes necessary as a result of a delay in the completion of the project.

e. Additional Commissions Expense – The Company will pay the additional expenses, which result from the renegotiating of leases following an interruption in the project.

f. Additional Architectural and Engineering Fees – The Company will pay the additional architectural and engineering fees that become necessary as a result of a delay in the completion of the project.

g. Additional License and Permit Fees – The Company will pay the additional license and permit fees that become necessary as a delay in the completion of the project.

h. Legal and Accounting Fees – The Company will pay the additional legal and accounting fees the Named Insured incurs as a result of a delay in the completion of the project.

3. FIRE FIGHTING EXPENSES

It is understood and agreed that the Company shall be liable for the actual charges of fire fighting expenses including but not limited to those charged by municipal or private fire departments responding to and fighting fire in / on, and/or protecting property included in coverage provided by this Policy.

4. OFF PREMISES SERVICES INTERRUPTION

It is understood and agreed that coverage under this Policy is extended to include physical damage, business interruption loss and/or extra expense incurred and/or sustained by the Named Insured as a result of physical damage to or destruction of by the perils insured against occurring during the policy period of any suppliers furnishing heat, light, power, gas, water, telephone or similar services to an Named Insured's premises. The coverage provided by this clause is sub-limited to USD as per Declaration Page, and Section 1 (General Provisions) of this form.

5. ARCHITECTS AND ENGINEERS FEES AND LOSS ADJUSTMENT EXPENSES

This Policy also insures as a direct result of physical loss or damage insured hereunder, any of the following:

a. Architects and engineers fees

b. Loss adjustment expenses including, but not limited to, auditors, consultants and accountants. However the expenses of public adjusters are specifically excluded.

6. EXPEDITING EXPENSES

In the event of physical loss or damage insured hereunder, it is understood and agreed that coverage under this Policy includes the reasonable extra cost of temporary repair and of expediting the repair of such damaged property of the Named Insured, including overtime and the extra costs of express or other rapid means of transportation. This coverage provided by this clause is sub-limited to USD as per the Declaration Page.

7. DEBRIS REMOVAL

This Policy also covers expenses incurred in the removal of debris of the property covered hereunder from the premises of the Named Insured that may be destroyed or damaged by a covered peril(s). This debris removal coverage does not apply to the cost to extract pollutants from land or water, or to remove, restore or replace polluted land or water.

8. BUILDING LAWS

This Policy is extended to include physical damage, business interruption loss, loss of interest and/or extra expense incurred and/or sustained by the Named Insured as a result of physical damage to or destruction of property, by the perils insured against occurring during the policy period and occasioned by the enforcement of any local or state ordinance or law regulating the construction, repair or demolition of buildings or structures, which is in force at the time such a loss occurs, which necessitates the demolition of any portion of the covered building not damaged by the covered peril(s).

The Company shall also be liable for loss due to the additional period of time required for repair or reconstruction in conformity with the minimum standards of such ordinance or law of the building(s) described in this Policy damaged by a covered peril.

The Company shall not be liable under this clause for more than the limit of liability as shown elsewhere in this Policy.

9. DEMOLITION COST

In the event of physical damage to property insured by a covered peril, this policy is extended to cover the cost of demolishing any undamaged portion of the covered property including the cost of clearing the site thereof, caused by loss from any covered peril(s) under this Policy and resulting from enforcement of any local or state ordinance or law regulating the construction, repair or demolition of buildings or structures and in force at the time of loss which necessitates such demolition.

10. INCREASED COST OF CONSTRUCTION

In the event of physical damage to property insured by a covered peril this Policy is extended to cover the increased cost of repair or replacement occasioned by the enforcement of any local or state ordinance or law including written guidelines used by the department of corrections in any state regulating the construction, repair or demolition of buildings or structures, which is in force at the time such a loss occurs

or which comes into force within 6 months after such a loss occurs, which necessitates in repairing or replacing the building covered hereunder which has suffered damage or destruction by the covered peril(s) or which has undergone demolition, limited, however, to the minimum requirements of such ordinance or law.

11. ERRORS & OMISSIONS

No unintentional errors or unintentional omissions in description, location of property or valuation of property will prejudice the Named Insured's right of recovery but will be reported to the Company as soon as practicable when discovered. The coverage provided by this clause is sub-limited to USD as per Declaration Page, and Section 1 (General Provisions) Clause E of this form. This extension does not increase any more specific limit stated elsewhere in this policy or Declarations.

12. ANIMALS

This policy is extended to cover retraining expenses associated with the loss of specially trained animals. Re-training expenses are included within the sub-limit provided, unless otherwise scheduled.

13. VALUABLE PAPERS

This policy is extended to cover Valuable Papers or the cost to reconstruct valuable papers (including but not limited to research, redrawing or duplicating) physically lost or damaged by a peril insured against during the term of this Policy.

14. TRANSIT

This policy is extended to cover Personal Property of the Named Insured or property held by the Named Insured in trust or on commission or on consignment for which the Named Insured may be held legally liable while in due course of transit, worldwide, against all risks of Direct Physical Loss or Damage not excluded by this Policy to the property insured occurring during the period of this Policy.

The coverage provided by this clause is sub-limited to USD as per Declaration Page, and Section 1 (General Provisions) Clause E of this form.

15. ASBESTOS CLEAN UP AND REMOVAL

This policy specifically excludes asbestos materials clean-up or removal, unless asbestos is itself damaged by a peril covered by this policy, then asbestos clean up or removal within the damaged area, and applicable time element coverages, will be covered by this policy.

In no event will coverage be extended to cover undamaged asbestos, including undamaged asbestos in any portion of the building mandated by any governmental direction or request declaring that asbestos material present in any undamaged portion of the Named Insured's property must be removed or modified, or;

any loss or expense including investigation or defense costs, caused by, resulting from, or arising out of asbestos, exposure to asbestos, or any product containing asbestos, or;

any loss or expense normally provided by demolition, increased cost or building ordinance.

The Named Insured must report to Underwriters the existence of the damage as soon as practicable after the loss. However, this Policy does not insure any such damage first reported to the Underwriters more than 36 (thirty six) months after the expiration, or termination, of this policy.

16. PROTECTION AND PRESERVATION OF PROPERTY

In the event of loss likely to be covered by this Policy, the Named Insured shall endeavor to protect covered property from further damage and shall separate the damaged and undamaged personal property and store in the best possible order, and shall furnish a complete inventory of the destroyed, damaged and undamaged property to the Insurer.

In case of actual or imminent physical loss or damage of the type insured against by this Policy, the expenses incurred by the Named Insured in taking reasonable and necessary actions for the temporary protection and preservation of property insured hereunder shall be added to the total physical loss or damage otherwise recoverable under the Policy and be subject to the applicable deductible and without increase in the limit provisions contained in this Policy.

17. LEASEHOLD INTEREST

In the event of physical loss or damage of the type insured against by this Policy to real property of the type insured this Policy, which is leased by the Named Insured, this Policy is extended to cover:

(1) If as a result of such loss or damage the property becomes wholly untenantable or unusable and the lease agreement requires continuation of the rent, the Company shall indemnify the Named Insured for the actual rent payable for the unexpired term of the lease; or

(2) If as a result of such loss or damage the property becomes partially untenantable or unusable and the lease agreement requires continuation of the rent, the Company shall indemnify the Named Insured for the proportion of the rent applicable thereto; or

(3) If as a result of such loss or damage the lease is cancelled by the lessor pursuant to the lease agreement or by operation of law, the Company shall indemnify the Named Insured for its Lease Interest for the first three months following such loss or damage and for its Net Lease Interest for the remaining unexpired term of the lease;

provided, however, that the Company shall not be liable for any increase in the amount recoverable hereunder resulting from the suspension, lapse or cancellation of any license, or from the Named Insured exercising an option to cancel the lease; or from any act or omission of the Named Insured which constitutes a default under the lease; and provided further that the Named Insured shall use any suitable property or service owned or controlled by the Named Insured or obtainable from another source to reduce the loss hereunder.

The following definitions shall apply to this coverage:

(1) Lease Interest means the excess rent paid for the same or similar replacement property over actual rent payable plus cash bonuses or advance rent paid

(including any maintenance or operating charges) for each month during the unexpired term of the Named Insured's lease.

(2) Net Lease Interest means that sum which placed at 8% interest compounded annually would equal the Lease Interest (less any amounts otherwise payable hereunder).

18. AUTOMATIC ACQUISITION AND REPORTING CONDITIONS

This Policy is automatically extended to insure additional property and/or interests as described in this Policy, which may be acquired or otherwise become at the risk of the Named Insured during the Policy Term, within the United States of America, subject to the values of such additional property and/or interests not exceeding USD25,000,000 or Named Insured's Policy Limit of Liability if less than USD25,000,000 any one acquisition. Additionally a sub-limit of $2,500,000 applies to Tier 1 Wind counties, parishes and independent cities for 60 days for the states of Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Louisiana, Texas and/or situated anywhere within the states of Florida and Hawaii.

If Flood coverage is purchased for all scheduled locations, this extension will extend to include Flood coverage for any location not situated in Flood Zones A or V. In the event that coverage for Flood for any location situated in Flood Zones A or V is required, it is to be agreed by the Company prior to attachment hereunder.

This coverage extension does not apply to the peril of Earthquake Shock in the States of California, or Alaska except as follows:

(1) At Policy annual inception, for those Named Insureds that purchase the earthquake shock peril only, per the sub-limit that appears on the Declaration Page, automatic coverage applies for the peril of earthquake shock for a period of 30 days from date of contractual requirement by any bond, certificate of participation or any similar investment, for any new locations where there is such a contractual requirement to provide earthquake shock coverage. Otherwise there is no Automatic Coverage for Earthquake Shock for any other new locations in California or Alaska.

In the event of coverage being required for additional property and/or interest where the value exceeds USD25,000,000 or Named Insured's Policy Limit of Liability if less than USD25,000,000 any one acquisition details of said property and/or interest are to be provided to the Company for its agreement not later than one hundred twenty (120) days from the date of the said additional property and/or interest have become at the risk of the Named Insured, this Policy providing coverage automatically for such period of time up to a maximum limit of USD40,000,000 for combustible construction (USD50,000,000 for non-combustible construction).

After the reporting of a location added under automatic acquisition, the Company retains the right to determine acceptability of all such property(ies). Additional premium will be calculated from the date of acquisition, if values are in excess of USD25,000,000.

In the event that the Named Insured fails to comply with the above reporting provision, then coverage hereunder is sub-limited to USD25,000,000 any one occurrence.

Additional, or return premium due for endorsements issued during the policy term,

such as those for additions or deletions of values within or greater than as that which is provided in any "Automatic Acquisition sub-limit" (including those for existing Named Insureds or new Named Insureds to the Tribal program) will be processed on a quarterly basis. Issuance of the endorsements and calculation of pro-rata or return premium, for these changes will be processed as of, and at the time of the transaction.

19. MISCELLANEOUS UNNAMED LOCATIONS

Coverage is extended to include property at locations (including buildings, or structures, owned, occupied or which the Named Insured is obligated to maintain insurance) located within the territorial limitations set by this Policy. Coverage provided by this clause is limited to any sub-limit noted on the Declaration Page attached to this form, and by terms and conditions of this policy form. This coverage extension does not apply to the peril of Earthquake in the states of California or Alaska. If Flood coverage is purchased for scheduled locations, this extension will extend to include Flood coverage for any location not situated in Flood Zones A or V.

20. ACCIDENTAL CONTAMINATION

This Policy is hereby extended to cover Business Interruption and Property Damage loss as a result of accidental contamination, discharge or dispersal from any source to Covered Property, including expenses necessarily incurred to clean up, remove and dispose of contaminated substances so as to restore the Covered Property to the same condition as existed prior to loss. The coverage provided is sub-limited to USD as per Declaration Page.

If such contamination or dispersal is itself caused by fire, lightning, impact from aircraft, explosion, riot, civil commotion, smoke, collapse, vehicles, windstorm, hail, vandalism, malicious mischief or leakage and accidental discharge from automatic fire protective systems whereupon this extension shall provide coverage up to full limit of liability provided by this Policy.

For the purposes of this Accidental Contamination clause only, the term "Covered Property", as covered by this Policy, is held to include Land (and Land Values) on which Covered Property is located, whether or not the same are excluded by this Policy.

It is further understood and agreed that this coverage clause shall not override anything contained in Asbestos Clean Up and Removal in this Policy.

C. PROPERTY NOT COVERED

Except as for that which may be provided as an Extension of Coverage, this policy does not cover:

1. Aircraft, vehicles, watercraft over 50 feet in length (other than watercraft held for sale by the Named Insured), and rolling stock, except scheduled watercraft, and rolling stock, light rail vehicles, subway trains and related track maintenance vehicles for light rail and subway lines.

2. Standing timber, bodies of water, growing crops.

3. Land, (including land on which covered property is located), and land values (except athletic fields, landscaping, artificial turf, sand traps, tees and greens).

4. Property in due course of ocean marine transit.

5. Shipment by mail after delivery into the custody of the United States Post Office.

6. Power transmission lines, feeder lines and more than 1,000 feet from the premises of the Named Insured unless scheduled and specifically approved by the Company.

7. Underground pipes more than 1,000 feet from the premises of the Named Insured unless scheduled and specifically approved by the Company.

8. Offshore property, oilrigs, underground mines, caverns and their contents. Railroad track is excluded unless values have been reported by the Named Insured.

D. LOSS PAYMENT BASIS / VALUATION

In case of loss to property of a Named Insured covered hereunder, the basis of adjustment shall be as of the time and place of loss as follows:

1. On all real and personal property, including property of others in the care or control of the Named Insured at the replacement cost (as defined below) at the time of the loss without deduction for depreciation. If property is not replaced within a reasonable period of time, then the actual cash value shall apply.

2. On improvements and betterments at the replacement cost at time of loss without deduction for depreciation. If property is not repaired or replaced within a reasonable period of time, then the actual cash value shall apply. If replaced or repaired by others for the use of the Named Insured, there shall be no liability hereunder. The Company agrees to accept and consider the Named Insured as sole and unconditional owner of all improvements and betterments, any contract or lease the Named Insured may have made to the contrary notwithstanding.

3. On manuscripts, mechanical drawings, patterns, electronic data processing media, books of accounting and other valuable papers, the full replacement cost of the property at the time of loss (including expenses incurred to recreate the information lost, damaged or destroyed, except as may be limited by any separate policy provision) or what it would then cost to repair, replace or reconstruct the property with other of like kind and quality. If not repaired, replaced or reconstructed within a reasonable period of time, then not to exceed the cost of blank or unexposed material.

4. On antique, restored or historical buildings, the cost of acquisition, relocation to the site and renovation or reconstruction. In the event of a partial loss, replacement cost for antique, restored or historical buildings shall mean the cost of repairing, replacing, constructing or reconstructing (whichever is less) the property on the same site using materials of like kind and quality necessary to preserve or maintain a buildings' historical significance without deduction for depreciation.

5. On property of others for which the Named Insured is liable under contract or lease agreement the Company's liability in the event of loss is limited to the Named Insured's obligation as defined in said contract or lease agreement but not to exceed the replacement cost.

6. On library contents, at replacement cost, or as follows, whichever is greater:

Category	Value (per item)	
Juvenile Materials	USD	49.62
Pamphlets	USD	6.38
Magazines	USD	12.87
Fiction	USD	24.00
Non-Fiction	USD	86.40
Dictionary	USD	125.75
Encyclopedia	USD	300.96
Thesaurus	USD	46.42
Reference (other)	USD	120.77
Abstracts	USD	295.74
Textbook	USD	109.40
Art Books	USD	65.16
Film	USD	290.15
Book/Diskette	USD	109.54
Vinyl Records	USD	87.50
DVD/VHS	USD	58.03
Audio Cassette	USD	31.91
Compact Discs	USD	25.47
CD ROM	USD	41.21
Audio Books	USD	78.05
Medical Atlas	USD	186.47
Technical Law	USD	158.24
Nanotechnology	USD	182.73
Biotechnology	USD	172.90

The above valuation is predicated on the values provided by the Library of Congress Dewey Decimal system and adjusted for inflation.

The figures above do not include the "shelving cost" of each book. Therefore, the formula for adjusting a library contents loss is:

"Number of items in a category that are replaced multiplied by the valuation figure plus associated shelving costs".

The actual cost per item in the final adjustment is to be computed as of the time and place of loss or damage.

7. Animals: The stated value as per schedule on file with the Named Insured.

8. Landscaping, artificial turf, sand traps, tees, putting greens and athletic fields; the actual replacement cost of sod, shrubs, sand, plants and trees; however the Company's liability for replacement of trees, plants and shrubs will be limited to the actual size of the destroyed plant, tree or shrub at the time of the loss up to a maximum size of 25 gallons per item but not to exceed USD 25,000 per item.

   For the purpose of determining coverage under this policy landscaping, trees, plants and shrubs are only insured if their position and planting was undertaken by human agency for cosmetic effect.

The aforementioned valuations shall also be used for the purpose of any minimum earned premium and/or quarterly adjustments incurred.

Wherever the term "actual cash value" is used as respects real property or improvements and betterment's in this clause, or elsewhere herein, it shall mean replacement cost less depreciation.

"Replacement Cost" shall mean the cost of repairing, replacing, constructing or reconstructing (whichever is the least) the property on the same site, using new materials of like kind and quality and for like occupancy without deduction for depreciation, subject to the following:

(i) Until the property is actually repaired, replaced or reconstructed, the maximum amount recoverable shall be the actual cash value of the lost or damaged property;

(ii) Replacement shall be effected by the Named Insured with due diligence and dispatch;

(iii) Replacement need not be on same site, or of same or similar construction or occupancy provided that the Company shall not be liable for any additional costs that are directly attributable to the inclusion of this provision.

(iv.) For historical buildings as more specifically defined in this Section.

(v.) In no event shall the Company's liability exceed the amount actually and necessarily expended in repairing or replacing (whichever is less) Covered Property or any part thereof.

It is understood and agreed that as respects replacement cost, the Named Insured shall have the option of replacement with electrical and mechanical equipment having technological advantages and/or representing an improvement in function and/or forming part of a program of system enhancement provided that such replacement can be accomplished without increasing the Company's liability. The Company shall be allowed to dispose of, as salvage, any non-proprietary property deemed unusable by the Named Insured.

In the event the Named Insured should fail to comply with any of the foregoing provisions settlement shall be made as if this Replacement Cost provision had not been in effect.

SECTION III

BUSINESS INTERRUPTION, EXTRA EXPENSE & RENTAL INCOME

Subject to the terms, conditions and exclusions stated elsewhere herein, this Policy provides coverage for:

A. COVERAGE

1. BUSINESS INTERRUPTION

Against loss resulting directly from interruption of business, services or rental value caused by direct physical loss or damage, as covered by this Policy to real and/or personal property insured by this Policy, occurring during the term of this Policy.

In the event of such loss or damage the Company shall be liable for the actual loss sustained by the Named Insured for gross earnings as defined herein and rental value as defined herein resulting from such interruption of business, services, or rental value; less all charges and expenses which do not necessarily continue during the period of restoration. Due consideration shall be given to the continuation of normal charges and expenses including ordinary payroll expenses to the extent necessary to resume operations of the Named Insured with the same quality of service which existed immediately preceding the loss.

Ordinary payroll means payroll expenses for the Named Insured's employees EXCEPT: officers, executives, department managers, employees under contract, or additional exemptions such as specific job classes or specific employees. Ordinary payroll expenses does include payroll, employee benefits (if directly related to payroll), FICA (employers portion), union dues, and workers' compensation premiums.

With respect to business interruption for power generation facilities, the coverage provided hereunder is sub-limited to USD as per Declaration Page.

2. EXTRA EXPENSE

This Policy is extended to cover the necessary and reasonable extra expenses occurring during the term of this Policy at any location as hereinafter defined, incurred by the Named Insured in order to continue as nearly as practicable the normal operation of the Named Insured's business following damage to or destruction of covered property by a covered peril which is on premises owned, leased or occupied by the Named Insured. In the event of such damage or destruction, the Company shall be liable for such necessary extra expense incurred for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such part of the property as has been damaged or destroyed commencing with the date of damage or destruction and not limited by the date of expiration of this Policy (hereinafter referred to as the period of restoration).

B. EXTENSIONS OF COVERAGE

1. INGRESS / EGRESS

This Policy is extended to insure the actual loss sustained during the period of time not exceeding 30 days, when as a direct result of physical loss or damage caused by a covered peril(s) specified by this Policy and occurring at property located within a 10 mile radius of covered property, ingress to or egress from the covered property covered by this Policy is prevented. Coverage under this extension is subject to a 24-hour waiting period.

2. INTERRUPTION BY CIVIL AUTHORITY

This Policy is extended to include the actual loss sustained by the Named Insured, as covered hereunder during the length of time, not exceeding 30 days, when as a direct result of damage to or destruction of property by a covered peril(s) occurring at a property located within a 10 mile radius of covered property, access to the covered property is specifically prohibited by order of a civil authority. Coverage under this extension is subject to a 24-hour waiting period.

3. DEMOLITION AND INCREASED TIME TO REBUILD

The Company shall, in the case of loss covered under this Policy, be liable also for loss to the interest covered by the Policy, occasioned by the enforcement of any local or state ordinance or law regulating the construction, repair or demolition of buildings or structures and in force at the time such loss occurs, which necessitates the demolition of any portion of the described building(s) not damaged by the covered peril(s). The Company shall also be liable for loss due to the additional period of time required for repair or reconstruction in conformity with the minimum standards of such ordinance or law of the building(s) described in this Policy damaged by a covered peril.

THE COMPANY SHALL NOT BE LIABLE UNDER THIS CLAUSE FOR:

a. More than the limit of liability as shown elsewhere in this Policy.

b. Any greater proportion of any loss to the interest covered by this Policy than the amount covered under this Policy on said interest bears to the total insurance and coverage on said interest, whether all such insurance contains this clause or not

4. CONTINGENT TIME ELEMENT COVERAGE

Business interruption, rental income, and extra expense coverage provided by this Policy is extended to cover loss directly resulting from physical damage to property of the type not otherwise excluded by this Policy at direct supplier or direct customer locations that prevents a supplier of goods and/or services to the Named Insured from supplying such goods and/or services, or that prevents a recipient of goods and/or services from the Named Insured from accepting such goods and/or services. The coverage provided by this clause separately as respects each of these coverage's is sub-limited to USD as per Declaration Page.

5. TAX REVENUE INTERRUPTION

Except as hereinafter or heretofore excluded, this Policy insures against loss resulting directly from necessary interruption of sales, property or other tax revenue including, but not limited to Tribal Incremental Municipal Services Payments collected by or due the Named Insured caused by damage, or destruction by a peril not excluded from this Policy to property which is not operated by the Named Insured and which wholly or partially prevents the generation of revenue for the account of the Named Insured.

The Company shall be liable for the actual loss sustained for only the length of time as would be required with exercise of due diligence and dispatch to rebuild, replace or repair the contributing property commencing with the date of damage to the contributing property, but not limited by the expiration date of this Policy.

If the Named Insured has reported Tax Revenue Interruption values for which premium has been charged, such loss recovery after deductible shall be limited to whichever is the least of:

1. The sub-limit USD3,000,000 insured on the Policy;
2. The actual loss sustained.
3. The difference in amount between 97.5% of the anticipated revenue and the actual total revenue after the loss.

If the Named Insured has not reported Tax Revenue Interruption values, such loss recovery after deductible shall be limited to whichever is the least of:

1. The actual loss sustained;
2. USD100,000 per occurrence.

DEDUCTIBLE: Each loss or series of losses arising out of one event at each location shall be adjusted separately and from the aggregate amount of all such losses 2.50% of the annual revenue value shall be deducted.

6. EXTENDED PERIOD OF INDEMNITY

Business interruption including rental income, tax interruption, tuition income and extra expense coverage provided by this Policy is extended for the additional length of time required to restore the business of the Named Insured to the condition that would have existed had no loss occurred commencing on either;

a. the date on which the Company's liability would otherwise terminate or;

b. the date on which rebuilding, repairing or replacement of such property as has been lost, damaged or destroyed is actually completed, whichever is later.

The Company's liability shall terminate no later than **180 (one hundred and eighty) days** from the commencement date set forth above, unless a different time period is agreed to by the Company through an endorsement to this policy.

7. EXPENSES TO REDUCE LOSS

This Policy also covers such expenses as are necessarily incurred for the purpose of reducing loss under this section (except incurred to extinguish a fire); but in no event to exceed the amount by which loss is thereby reduced.

C. EXCLUSIONS

1. The Company shall not be liable for any increase of loss which may be occasioned by the suspension, lapse, or cancellation of any lease or license, contract or order, unless such suspension, lapse, or cancellation results directly from the interruption of business caused by direct physical loss or damage covered by this policy and, then the Company shall only be liable for such loss as affects the Named Insured's earnings during and limited to, the period of indemnity covered under this Policy.

2. With respect to loss resulting from damage to or destruction of media for, or programming records pertaining to, electronic data processing or electronically controlled equipment, including data thereon, by the perils insured against, the length of time for which the Company shall be liable hereunder shall not exceed:

   i. Thirty (30) consecutive calendar days or the time required with exercise of due diligence and dispatch to reproduce the data thereon from duplicates or from originals of the previous generation, whichever is less; or,

   ii. the length of time that would be required to rebuild, repair or replace such other property herein described as has been damaged or destroyed, but not exceeding eighteen (18) calendar months, whichever is the greater length of time.

D. CONDITIONS APPLICABLE TO THIS SECTION

If the Named Insured could reduce the loss resulting from the interruption of business:

1. by complete or partial resumption of operation of the property whether or not such property be lost or damaged, or;
2. by making use of merchandise or other property at the Named Insured's location or elsewhere;

such reduction shall be taken into account in arriving at the amount of the loss hereunder.

E. DEFINITIONS

1. GROSS EARNINGS

"Gross Earnings" is defined as the sum of:

a. total net sales and;

b. other earnings derived from the operation of the business

less the cost of;

c. merchandise sold including packaging materials and;

d. materials and supplies consumed directly in supplying the service(s) sold by the Named Insured, and;

e. service(s) purchased from outside (not employees of the Named Insured) for resale that does not continue under contract.

No other cost shall be deducted in determining gross earnings.

In determining gross earnings, due consideration shall be given to the experience of the business before the date of loss or damage and the probable experience thereafter, had no loss occurred.

In the event that Real and/or Personal Property that does not normally produce an income sustain damage covered under this policy, the actual recovery under this policy shall be the continuing fixed charges and expenses directly attributable to such non-productive property.

2. MERCHANDISE

Shall be understood to mean, goods kept for sale by the Named Insured, which are not the products of manufacturing operations conducted by the Named Insured.

3. EXTRA EXPENSE

The term "extra expense", whenever used in this Policy, is defined as the excess (if any) of the total cost incurred during the period of restoration chargeable to the operation of the Named Insured's business over and above the total cost that would normally have been incurred to conduct the business during the same period had no damage or destruction occurred. Any salvage value of property obtained for temporary use during the period of restoration, which remains after the resumption of normal operations, shall be taken into consideration in the adjustment of any loss hereunder.

4. RENTAL VALUE

The term "rental value" is defined as the sum of:

a. the total anticipated gross rental income from tenant occupancy as furnished and equipped by the Named Insured, and;

b. the amount of all charges which are the legal obligation of the tenant(s) and which would otherwise be obligations of the Named Insured, and;

c. the fair rental value of any portion of said property which is occupied by the Named Insured, and;

d. any amount in excess of a., b. and c. (above) which an obligation due under the terms and conditions of any revenue bond, certificate of participation or other financial instrument.

In determining rental value, due consideration shall be given to the experience before the date of loss or damage and the probable experience thereafter had no loss occurred.

5. PERIOD OF RESTORATION

The period during which business interruption and or rental interruption applies will begin on the date direct physical loss occurs and interrupts normal business operations and ends on the date that the damaged property should have been repaired, rebuilt or replaced with due diligence and dispatch, but not limited by the expiration of this policy.

SECTION IV
GENERAL CONDITIONS

A. PERILS COVERED

Subject to the terms, conditions and exclusions stated elsewhere herein, this Policy provides insurance against all risk of direct physical loss or damage occurring during the period of this Policy.

B. EXCLUSIONS

This Policy does not insure against any of the following:

1. Loss or damage caused by or resulting from moths, vermin, termites, or other insects, inherent vice, latent defect, faulty materials, error in design, faulty workmanship, wear, tear or gradual deterioration, rust, corrosion, wet or dry rot, unless physical loss or damage not otherwise excluded herein ensues and then only for such ensuing loss, or damage.

2. Physical loss or damage by normal settling, shrinkage or expansion in building or foundation.

3. Delay or loss of markets (this exclusion shall be inapplicable to the extent inconsistent with any time element coverage provided elsewhere herein).

4. Breakdown or derangement of machinery and/or steam boiler explosion, unless physical loss or damage not otherwise excluded herein ensues and then only for such ensuing loss.

5. Loss or damage caused by or resulting from misappropriation, conversion, inventory shortage, unexplained disappearance, infidelity or any dishonest act on the part of the Named Insured, it's employees or agents or others to whom the property may be entrusted (bailees and carriers for hire excepted) or other party of interest.

6. Loss or damage caused by or resulting from electrical injury or disturbance from artificial causes to electrical appliances, devices of any kind or wiring, unless physical loss or damage not otherwise excluded herein ensues and then only for such ensuing loss. This exclusion does not apply to data processing equipment or media.

7. Loss or damage to personal property resulting from shrinkage, evaporation, loss of weight, leakage, breakage of fragile articles, marring, scratching, exposure to light or change in color, texture or flavor, unless such loss is caused directly by fire or the combating thereof, lightning, windstorm, hail, explosion, strike, riot, or civil commotion, aircraft, vehicles, breakage of pipes or apparatus, sprinkler leakage, vandalism and malicious mischief, theft, attempted theft, flood or earthquake shock. (Earthquake Shock, and Flood, in the states of Alaska or California shall only apply to locations that are scheduled for Earthquake Shock and Flood).

8. Loss or damage caused by rain, sleet or snow to personal property in the open (except in the custody of carriers or bailees for hire).

9. Loss caused directly or indirectly, by:

   a. War, hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack

      i. by any government or sovereign power (de jure or de facto), or by any Authority maintaining or using military, naval or air forces; or
      ii. by military, naval or air forces; or
      iii. by an agent of any such government, power, authority or forces;

   b. any weapon of war employing atomic fission or radioactive force whether in time of peace or war;

   c. insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental Authority or hindering, combating or defending against such an occurrence, seizure or destruction under quarantine or customs regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade.

10. Nuclear reaction or nuclear radiation or radioactive contamination from any cause, all whether direct or indirect, controlled or uncontrolled, proximate or remote, or is contributed to or aggravated by a Covered Cause of Loss. However:

   a. If fire not otherwise excluded results, the Company shall be liable for the direct physical loss or damage by such resulting fire, but not including, any loss or damage due to nuclear reaction, nuclear radiation, or radioactive contamination, and

   b. This Policy does insure against physical loss or damage caused by sudden and accidental radioactive contamination, including resultant radiation damage, from material used or stored or from processes conducted on the Named Insured premises, provided that, at the time of such loss or damage, there is neither a nuclear reactor nor any new or used nuclear fuel on the Named Insured premises

11. As respects course of construction, the following exclusions shall apply:

   a. The cost of making good: faulty or defective workmanship, materials, construction and/or design, but this exclusion shall not apply to damage by a peril not excluded resulting from such faulty or defective workmanship, materials, construction and/or design.

   b. The cost of non-compliance of, or delay in completion of contract.

   c. The cost of non-compliance with contract conditions.

   d. Contractors' equipment or tools not a part of or destined to become a part of the installation.

12. Loss or damage caused by Earthquake Shock unless a limit is shown on the Declarations for Earthquake Shock this exclusion will apply.

13. Loss or damage caused by Flood unless a limit is shown on the Declarations for Flood this exclusion will apply.

14. Loss, damage, cost, claim or expense, whether preventative, remedial or otherwise, directly or indirectly arising out of or relating to:

    a) the recognition, interpretation, calculation, comparison, differentiation, sequencing or processing of data involving one or more dates or times, by any computer system, hardware, program or software, or any microchip, integrated circuit or similar device in computer equipment or non-computer equipment, whether the property of the Named Insured or not; or

    b) any change, alteration, correction or modification involving one or more dates or times, to any such computer system, hardware, program or software, or any microchip, integrated circuit or similar device in computer equipment or non-computer equipment, whether the property of the Named Insured or not.

    Except as provided in the next paragraph, this Electronic Date Recognition Clause shall apply regardless of any other cause or event that contributes concurrently or in any sequence to the loss, damage, cost, claim or expense.

    If direct physical loss or damage not otherwise excluded by this Policy results, then subject to all its terms and conditions, this Policy shall be liable only for such resulting loss or damage. Such resulting loss or damage shall not include physical loss or damage to data resulting directly from a) or b) above, nor the cost, claim or expense, whether preventative, remedial, or otherwise, arising out of or relating to any change, alteration, correction or modification relating to the ability of any damaged computer system, hardware, program or software, or any microchip, integrated circuit or similar device in computer equipment or non-computer equipment to recognize, interpret, calculate, compare, differentiate sequence or process any data involving one or more dates or times.

15. Loss or damage in the form of, caused by, arising out of, contributed to, or resulting from fungus, mold(s), mildew or yeast; or any spores or toxins created or produced by or emanating from such fungus, mold(s), mildew or yeast;

    a) fungus includes, but is not limited to, any of the plants or organisms belonging to the major group fungi, lacking chlorophyll, and including mold(s), rusts, mildews, smuts and mushrooms;

    b) mold(s) includes, but is not limited to, any superficial growth produced on damp or decaying organic matter or on living organisms, and fungi that produce mold(s);

    c) spores means any dormant or reproductive body produced by or arising or emanating out of any fungus, mold(s), mildew, plants, organisms or microorganisms,

regardless of any other cause or event that contributes concurrently or in any sequence to such loss.

This exclusion shall not apply to any loss or damage in the form of, caused by, contributed to or resulting from fungus, mold(s), mildew or yeast, or any spores or toxins created or produced by or emanating from such fungus, mold(s), mildew or yeast which the Insured establishes is a direct result of a Covered Loss not otherwise excluded by the Policy, provided that such fungus, mold(s), mildew or yeast loss or damage is reported to the Company within twelve months from the expiration date of the Policy. Notwithstanding Section IV, Item R., Other Insurance, coverage provided under this paragraph shall apply as primary. Nothing herein contained shall be held to waive, vary, alter or extend any condition or provision of the policy other than as above stated.

16. Loss, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with the actual or threatened malicious use of pathogenic or poisonous biological or chemical materials regardless of any other cause or event contributing concurrently or in any other sequence thereto.

17. The following additional exclusions apply to animals covered under this Policy:

    a. Death of any animal(s) from natural causes.

    b. Death of any animal(s) that dies from an unknown cause unless:

        i. upon the death of such animal a post-mortem examination conducted on the animal by a licensed veterinarian, and if
        ii. the veterinarian's post-mortem report shows the cause of death to clearly fall within the coverages of this Policy.

    c. Death of any animal(s) as a result of surgical operation, including inoculation, unless the necessity for same arises from a loss otherwise covered by this Policy.

    d. The death or destruction of any animal(s) caused by, resulting from, or made necessary by physical injury caused by or resulting from the activities of the injured animal or other animals unless such death or destruction is the result of a loss otherwise covered by this Policy.

    e. The death of any animal(s) caused directly or indirectly by the neglect or abuse of the Named Insured, his agent, employees or bailees (carriers for hire excepted) unless such death is a result of a loss otherwise covered by this Policy.

    f. The loss by death of any animal(s) as a result of parturition or abortion.

    g. Loss resulting from depreciation in value caused by any animal(s) covered hereunder becoming unfit for or incapable of filling the function or duties for which it is kept, employed or intended unless such depreciation is a result of a loss otherwise covered by this Policy.

    h. Loss by destruction of any animal(s) on the order of the federal or any state government, or otherwise as a result of having contracted or been exposed to any contagious or communicable disease.

i. The removal or disposal of the remains of any animal(s) or the expense thereof unless such removal or disposal is the result of a loss otherwise covered by this Policy.

j. The loss of any animal(s) that has been unnerved (the term "unnerved" to be considered as meaning the operation of neurotomy for lameness.)

k. Any claim consequent upon delay, deterioration, or loss of use or loss of market arising from an event covered by this Policy.

18. Loss, damage, costs or expenses in connection with any kind or description of seepage and/or pollution and/or contamination, direct or indirect, arising from any cause whatsoever. Except as provided in Section II Property Damage, B. Extension of Coverage, 21. Accidental Contamination.

Nevertheless if fire is not excluded from this Policy and a fire arises directly or indirectly from seepage and/or pollution and/or contamination, any loss or damage covered under this Policy arising directly from that fire shall, (subject to the terms, conditions and limitations of the Policy) be covered.

However, if the covered property is the subject of direct physical loss or damage for which the Company has paid or agreed to pay, then this Policy (subject to its terms, conditions and limitations) insures against direct physical loss or damage to the property covered hereunder caused by resulting seepage and/or pollution and/or contamination.

The Named Insured shall give notice to the Company of intent to claim **NO LATER THAN TWELVE (12) MONTHS AFTER THE DATE OF THE ORIGINAL PHYSICAL LOSS OR DAMAGE.**

Notwithstanding the provisions of the preceding exclusions or any provision respecting seepage and/or pollution and/or contamination, and/or debris removal and/or cost of clean up in the Policy, in the event of direct physical loss or damage to the property covered hereunder, this Policy (subject otherwise to its terms, conditions and limitations, including but not limited to any applicable deductible) also insures, within the sum covered:

(a) expenses reasonably incurred in removal of debris of the property hereunder destroyed or damaged from the premises of the Named Insured; and/or;
(b) cost of clean up at the premises of the Named Insured made necessary as a result of such direct physical loss or damage;

PROVIDED that this Policy does not insure against the costs of decontamination or removal of water, soil or any other substance on or under such premises.

19. **AUTHORITIES EXCLUSION**

Fines, penalties or cost incurred or sustained by the Named Insured or imposed on the Named Insured at the order of any Government Agency, Court or other Authority, in connection with any kind or description of environmental impairment including seepage or pollution or contamination from any cause.

20. The following exclusion applies to Terrorism:

Any act of terrorism. An act of terrorism means an act, including but not limited to the use of the force or violence and/or the threat thereof, of any person or group(s) of persons, whether acting alone or on behalf of or in connection with any organization(s) or government(s), committed for political, religious, ideological or similar purpose including the intention to influence any government and/or to put the public, or any section of the public, in fear.

This Policy also excludes loss, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with any action taken in controlling, preventing, suppressing or in any way relating to the paragraph above.

C. STATUTES

If any of the articles of this Policy conflict with the laws or statutes of any jurisdictions in which this Policy applies this Policy is amended to conform to such laws or statutes.

D. TERRITORIAL LIMITS

This Policy insures Real and Personal Property within the United States of America. Personal Property is extended to Worldwide coverage. The coverage provided by this clause for Personal Property is sub-limited to USD as per Declaration Page.

E. REINSTATEMENT

Any reduction in the amount insured hereunder due to payment of any loss or losses shall be automatically reinstated for the balance of the term of this contract except as respects to the perils of Earthquake Shock and Flood.

F. FREE ON BOARD (F.O.B.) SHIPMENTS

The Company shall be liable for the interest of the Named Insured at sole option of the Named Insured, the interest of the consignee in merchandise, which has been sold by the Named Insured under terms of F.O.B. point of origin or other terms usually regarded as terminating shippers' responsibility short of point of delivery.

G. BREACH OF CONDITIONS

If any breach of a clause, condition or warranty of this Policy shall occur prior to a loss affected thereby under this Policy, such breach shall not void the Policy nor avail the Company to avoid liability unless such breach shall exist at the time of such loss under this contract or Policy, and be a contributing factor to the loss for which claim is presented hereunder, it being understood that such breach of clause or condition is applicable only to the property affected thereby. Notwithstanding the foregoing, if the Named Insured establishes that the breach, whether contributory or not, occurred without its knowledge or permission or beyond its control, such breach shall not prevent the Named Insured from recovering under this Policy.

H. PERMITS AND PRIVILEGES

Anything in the printed conditions of this Policy to the contrary notwithstanding, permission is hereby granted:

1. to maintain present hazards and hazards which are consistent with the current operation of insured facilities;
2. to make additions, alterations, extensions, improvements and repairs, to delete, demolish, construct and reconstruct, and also to include all materials, equipment and supplies incidental to the foregoing operations of the property covered hereunder, while in, on and/or about the premises or adjacent thereto;
3. for such use of the premises as usual and/or incidental to the business as conducted therein and to keep and use all articles and materials usual and/or incidental to said business in such quantities as the exigencies of the business require;

This Policy shall not be prejudiced by:

1. any error in stating the name, number, street, or location of any building(s) and contents covered hereunder, or any error or omission involving the name or title of the Named Insured;
2. any act or neglect of the owner of the building, if the Named Insured hereunder is not the owner, or of any occupant of the within described premises other than the Named Insured, when such act or neglect is not within the control of the Named Insured, named herein; or
3. by failure of the Named Insured to comply with any of the warranties or conditions endorsed hereon in any portion of the premises over which the Named Insured has no control.

I. PROTECTIVE SAFEGUARDS

The Named Insured shall exercise due diligence in maintaining in complete working order all protective safeguard equipment and services.

J. NOTICE OF LOSS

In the event of loss or damage insured against under this Policy, the Named Insured shall give notice thereof to Tribal First, P.O. Box 609015, San Diego, CA 92160, Phone: 858-505-4022, Fax: 619-699-0929, of such loss. Such notice is to be made as soon practicable upon knowledge within the risk management or finance division of the insured that a loss has occurred.

K. ARBITRATION OF VALUE

In case the Named Insured and the Company shall fail to agree as to the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraisers selected. The appraiser shall first select a competent and disinterested umpire, and failing to agree upon such umpire, then, on request of the Named Insured or the Company such umpire shall be selected by judge of a court of record in the state in which the property covered is located.

The appraisers shall as soon as practicable, appraise the loss stating separately the loss of each item and failing to agree, shall submit their differences only to the umpire. An award in writing so itemized, of any two appraisers when filed with the Company shall determine the amount of loss. The party selecting him shall pay each appraiser and the expenses of appraisal and umpire shall be paid by the parties equally.

L. PROOF OF LOSS

The Named Insured shall render a signed and sworn proof of loss as soon as practical after the occurrence of a loss, stating the time, place and cause of loss, the interest of the Named Insured and of all others in the property, the value thereof and the amount of loss or damage thereto.

M. SUBROGATION

In the event of any loss payment under this Policy, the Company, shall be subrogated to all the Named Insured's rights of recovery thereof against any person or organization and the Named Insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights.

As respects subrogation it is agreed that, after expenses incurred in subrogation are deducted, the Named Insured and the Company shall share proportionately to the extent of their respective interests as determined by the amount of their net loss. Any amount thus found to be due to either party from the other shall be paid promptly.

Notwithstanding the above wording, the Named Insured has the right to enter into an agreement that releases or waives the Named Insured's right to recovery against third parties responsible for the loss if made before the loss occurred.

N. CANCELLATION

This Policy may be cancelled by the Named Insured at any time by written notice or surrender of this Policy. This Policy may also be cancelled by or on behalf of the Company by delivering to the Named Insured or by mailing to the Named Insured, by registered, certified or other first class mail at the Named Insured's address as shown in this Policy, written notice, not less than ninety (90) days prior to the effective date of cancellation. The mailing of such notice as aforesaid shall be sufficient proof and this Policy and shall terminate at the date and hour specified in such notice. Notwithstanding what has been stated above, however, should this Policy be cancelled for non-payment of assessment, the Company shall only be required to give the Named Insured ten (10) days notice.

If this insurance in total shall be cancelled by the Named Insured, the Company shall retain the customary short rate proportion of the premium hereon. If the Company elects to cancel coverage mid-term, then such cancellation shall be handled on a pro-rata basis without short rate penalty.

In the event of cancellation the aggregate retention and specific limit amount shall be applied pro rata with the balance, if any, to be paid to the Named Insured.

Payment or tender of any unearned premium by the Company shall not be condition precedent to the effectiveness of cancellation but such payment shall be made forthwith.

Cancellation shall not affect coverage on any shipment in transit on date of cancellation. Coverage will continue in full force until such property is safely delivered and accepted at place of final destination.

It is understood and agreed that if the Named Insured cancels this Policy, the Policy is subject to 25% minimum earned premium regardless of the length of time coverage is in force.

O. ABANDONMENT

There shall be no abandonment to the Company of any property.

P. ASSIGNMENT

Assignment or transfer of this Policy shall not be valid except with the written consent of the Company.

Q. SALVAGE

When, in connection with any loss hereunder, any salvage is received prior or subsequent to the payment of such loss, the loss shall be figured on the basis on which it would have been settled had the amount of salvage been known at the time the loss was originally determined. The salvage value will be deducted from the claim or returned to the Company.

R. OTHER INSURANCE

Permission is hereby granted to the Named Insured to carry more specific insurance on any property covered under this Policy. This Policy shall not attach or become insurance upon any property which at the time of loss is more specifically described and covered under any other policy form until the liability of such other insurance has first been exhausted and shall then cover only the excess of value of such property over and above the amount payable under such other insurance, whether collectible or not. This Policy, subject to its conditions and limitations, shall attach and become insurance upon such property as respects any peril not covered by such other insurance and not otherwise excluded herein.

In the event of a loss that is covered by other insurance, wherein this Policy is excess of any amount paid by such other insurer, the other insurance shall be applied to the deductible amount stated elsewhere. Should the amount paid by such other insurance exceed these deductibles, no further deductibles shall be applied under this Policy.

S. EXCESS INSURANCE

Permission is granted for the Named Insured to maintain excess insurance over the limit of liability set forth in this Policy without prejudice to this Policy and the existence of such insurance, if any, shall not reduce any liability under this Policy. Also it is understood and agreed as respects earthquake shock or flood, that in the event of reduction or exhaustion of the aggregate limits of liability under the underlying Policy(s) by reason of loss(es) hereunder, this Policy shall:

1. in the event of reduction, pay out excess of the reduced underlying limit and
2. in the event of exhaustion, continue in force as the underlying Policy.

T. RIGHT TO REVIEW RECORDS FOLLOWING AN INSURED LOSS

The Named Insured as often as may be reasonably required, shall submit and so far as within their power, cause all other persons interested in the property or employees to submit to examination under oath by any person named by the Company relative to any and all matters in connection with a claim, and produce for examination all books of account, bills, invoices and other vouchers or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by the Company or their representatives and shall permit extracts and copies thereof to be made.

U. CONCEALMENT AND FRAUD

This entire Policy shall be void, if whether before or after a loss, the Named Insured has willfully concealed or misrepresented any material facts or circumstance concerning this Policy of the subject thereof, or the interest of the Named Insured therein, or in case of any fraud or false swearing by the Named Insured relating thereto.

V. FULL WAIVER

The terms and conditions of this form and any approved endorsements, supersede any policy jacket that may be attached hereto.

W. SUIT AGAINST COMPANY

No suit, action or proceeding for the recovery of any claim under this Policy shall be sustainable in any court of law or equity unless the Named Insured shall have complied with all the requirements of this Policy, nor unless the suit is commenced within twelve (12) months after the date that the Company has made its final offer of settlement or denial of the loss. However, that if under the laws of the jurisdiction in which the property is located such limitation is invalid, then any such claims shall be void unless such action, suit or proceedings be commenced within the shortest limit of time permitted by the laws of such jurisdiction.

X. JOINT LOSS ADJUSTMENT – BOILER & MACHINERY

In the event of damage to or destruction of property, at a location designated in this Policy and also designated in a boiler and machinery insurance policy, and there is a disagreement between the Company and the Named Insured with respect to:

(1) Whether such damage or destruction was caused by a peril covered against by this Policy or by an accident covered against by such boiler and machinery insurance policy(ies) or

(2) The extent of participation of this Policy and of such boiler and machinery insurance policy in a loss that is covered against, partially or wholly, by one or all of said policy(ies).

The Company shall, upon written request of the Named Insured, pay to the Named Insured one-half of the amount of the loss which is in disagreement, but in no event more than the Company would have paid if there had been no boiler and machinery insurance policy(ies) in effect, subject to the following conditions:

(1) The amount of loss which is in disagreement after making provisions for any undisputed claims payable under the said policy(ies) and after the amount of the loss is agreed by the Named Insured and the Boiler and Machinery Insurer and the Company is limited to the minimum amount remaining payable under either the boiler and machinery insurance policy(ies).

(2) The boiler and machinery insurer(s) shall simultaneously pay to the Named Insured, one-half of the said amount, which is in disagreement.

(3) The payments by the Company and acceptance of the same by the Named Insured signify the agreement of the Company to submit to and proceed with arbitration within ninety (90) days of such payments:

The arbitrators shall be three (3) in number, one of whom shall be appointed by the boiler insurer(s) and one of whom shall be appointed by the Company hereon and the third appointed by consent of the other two, and the decision by the arbitrators shall be binding on the insurer(s) and the Named Insured and that judgment upon such award may be entered in any court of competent jurisdiction.

(4) The Named Insured agrees to cooperate in connection with such arbitration but not to intervene therein.

(5) This agreement shall be null and void unless the Policy of the boiler and machinery Insurer is similarly endorsed.

In no event shall an Insurer be obligated to pay more than their total single limit.

Y. JOINT LOSS ADJUSTMENT – EXCESS PROPERTY

In the event of damage to or destruction of property at a location designated in this Policy and also designated in an excess insurance policy(ies) and if there is disagreement between the insurers with respect to:

(1) whether such damage or destruction was caused by a single event or by multiple events or;

(2) the extent of participation of this Policy and any excess insurance policy in a loss covered against partially or wholly, by one of said Policy or policy(ies).

The Company shall, upon written request of the Named Insured, pay to the Named Insured one-half of the amount of the loss which is in disagreement, but in no event more than the Company would have paid if there had been no excess insurance or policy(ies) in effect, subject to the following conditions:

(1) the amount of loss which is in disagreement after making provisions for any undisputed claims payable under the said policy(ies) and after the amount of the loss is agreed by the Named Insured and the Company is limited to the minimum amount remaining payable under either the primary insurance policy or excess insurance policy(ies);

(2) the excess insurers shall simultaneously pay to the Named Insured one-half of the said amount which is in disagreement; and,

(3) the payments by the Company hereunder and acceptance of the same by the Named Insured signify the agreement of the Company to submit to and proceed with arbitration within ninety (90) days of such payments.

The arbitrators shall be three (3) in number, one of whom shall be appointed by the excess insurer(s) and one of whom shall be appointed by the Company and the third appointed by consent of the other two, and the decision by the arbitrators shall be binding on the Company and the Named Insured, and that judgment upon such award may be entered in any court of competent jurisdiction.

(4) The Named Insured agrees to cooperate in connection with such arbitration but not to intervene therein.

Z. LENDER'S LOSS PAYABLE

The following provisions (or equivalent) apply as required by "mortgages" and "lenders" to whom certificates of coverage have been issued.

1. Loss or damage, if any, under this policy, shall be paid to the Payee named on the first page of this policy, its successors and assigns, hereinafter referred to as "the Lender," in whatever form or capacity its interests may appear and whether said interest be vested in said Lender in its individual or in its disclosed or undisclosed fiduciary or representative capacity, or otherwise, or vested in a nominee or trustee of said Lender.

2. The insurance under this policy, or any rider or endorsement attached thereto, as to the interest only of the Lender, its successors and assigns, shall not be invalidated nor suspended: (a) by any error, omission, or change respecting the ownership, description, possession, or location of the subject of the insurance or the interest therein, or the title thereto; (b) by the commencement of foreclosure proceedings or the giving of notice of sale of any of the property covered by this policy by virtue of any mortgage or trust deed; (c) by any breach of warranty, act, omission, neglect, or non-compliance with any of the provisions of this policy, including any and all riders now or hereafter attached thereto, by the Named Insured, the borrower, mortgagor, trustor, vendee, owner, tenant, warehouseman, custodian, occupant, or by the agents of either or any of them or by the happening of any event permitted by them or either of them, or their agents, or which they failed to prevent, whether occurring before or after the attachment of this endorsement, or whether before or after a loss, which under the provisions of this policy of insurance or of any rider or endorsement attached thereto would invalidate or suspend the insurance as to the Named Insured, excluding here from, however, any acts or omissions of the Lender while exercising active control and management of the property.

3. In the event of failure of the Named Insured to pay any premium or additional premium which shall be or become due under the terms of this policy or on account of any change in occupancy or increase in hazard not permitted by this policy, the Company agrees to give written notice to the Lender of such non-payment of premium after sixty (60) days from and within one hundred and twenty (120) days after due date of such premium and it is a condition of the continuance of the rights of the Lender hereunder that the Lender when so notified in writing by this Company of the failure of the Named Insured to pay such premium shall pay or cause to be paid the premium due within ten (10) days following receipt of the Company's demand in writing therefore. If the Lender shall decline to pay said premium or additional premium, the rights of the Lender under this Lender's Loss Payable Endorsement shall not be terminated before ten (10) days after receipt of said written notice by the Lender.

4. Whenever the Company shall pay to the Lender any sum for loss or damage under this policy and shall claim that as to the Named Insured no liability therefore exists, the Company, at its option, may pay to the Lender the whole principal sum and interest and other indebtedness due or to become due from the Named Insured, whether secured or unsecured, (with refund of all interest not accrued), and the Company, to the extent of such payment, shall thereupon receive a full assignment and transfer, without recourse, of the debt and all rights and securities held as collateral thereto.

5. If there be any other insurance upon the within described property, the Company shall be liable under this policy as to the Lender for the proportion of such loss or damage that the sum hereby insured bears to the entire insurance of similar character on said property under policies held by, payable to and expressly consented to by the Lender. Any Contribution Clause included in any Fallen Building Clause Waiver or any Extended Coverage Endorsement attached to this contract of insurance is hereby nullified, and also any Contribution Clause in any other endorsement or rider attached to this contract of insurance is hereby nullified except Contribution Clauses for the compliance with which the Named Insured has received reduction in the rate charged or has received extension of the coverage to include hazards other than fire and compliance with such Contribution Clause is made a part of the consideration for insuring such other hazards. The Lender upon the payment to it of the full amount of its claim, will subrogate the Company (pro rata with all other insurers contributing to said payment) to all of the Lender's rights of contribution under said other insurance.

6. The Company reserves the right to cancel this policy at any time, as provided by its terms, but in such case this policy shall continue in force for the benefit of the Lender for ten (10) days after written notice of such cancellation is received by the Lender and shall then cease.

7. This policy shall remain in full force and effect as to the interest of the Lender for a period of ten (10) days after its expiration unless an acceptable policy in renewal thereof with loss there under payable to the Lender in accordance with the terms of this Lender's Loss Payable Endorsement, shall have been issued by some insurance company and accepted by the Lender.

8. Should legal title to and beneficial ownership of any of the property covered under this policy become vested in the Lender or its agents, insurance under this policy shall continue for the term thereof for the benefit of the Lender but, in such event, any privileges granted by this Lender's Loss Payable Endorsement which are not also granted the Named Insured under the terms and conditions of this policy and/or under other riders or endorsements attached thereto shall not apply to the insurance hereunder as respects such property.

9. All notices herein provided to be given by the Company to the Lender in connection with this policy and this Lender's Loss Payable Endorsement shall be mailed to or delivered to the Lender at its office or branch described on the first page of the policy.

Approved:
Board of Fire Underwriters of the Pacific;
California Bankers' Association – Committee on Insurance

AA. SEVERAL LIABILITY NOTICE

The subscribing insurers' obligations under contracts of insurance to which they subscribe are several, not joint and are limited solely to the extent of their individual subscriptions. The subscribing insurers are not responsible for the subscription of any co-subscribing insurer who for any reason does not satisfy all or part of its obligations.

AB. LOSS PAYABLE PROVISIONS

A. LOSS PAYABLE

For covered property in which both insured and a Loss Payee shown in the Schedule or in the Declaration Page have an insurable interest, the Company will:

1. Adjust losses with the Named Insured; and

2. Pay any claim for loss or damage jointly to the Named Insured and the Loss Payee, as interests may appear.

B. LENDER'S LOSS PAYABLE

1. The Loss Payee shown in the Schedule or in the Declaration Page is a creditor, including a mortgage holder or trustee, whose interest in Covered Property is established by such written instruments as:

   a. Warehouse receipts;
   b. A contract for deed;
   c. Bills of lading;
   d. Financing statements; or
   e. Mortgages, deeds of trust or security agreements.

2. For Covered Property in which both the Named Insured and a Loss Payee have an insurable interest:

   a. We will pay for covered loss or damage to each Loss Payee in their order of precedence, as interests may appear.
   b. The Loss Payee has the right to receive loss payment even if the Loss Payee has started foreclosure or similar action on the Covered Property.
   c. If the Company deny the Named Insured claim because of the insured act or because the Named Insured have failed to comply with the terms of the Coverage Part, the Loss Payee will still have the right to receive loss payment if the Loss Payee:

      (1) Pays any premium due under this Coverage Part at our request if the Named Insured have failed to do so;
      (2) Submits a signed, sworn proof of loss within 90 days after receiving notice from us of the Named Insured failure to do so; and
      (3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the Loss Payee.

   All of the terms of this Coverage Part will then apply directly to the Loss Payee.

   d. If the Company pays the Loss Payee for any loss or damage and deny payment to the Named Insured because of the Named Insured acts or because the Named Insured have failed to comply with the terms of this Coverage Part:

      (1) The Loss Payee's rights will be transferred to us to the extent of the amount the Company pays; and
      (2) The Loss Payee's rights to recover the full amount of the Loss Payee's claim will not be impaired.

At our option, the Company may pay to the Loss Payee the whole principal on the debt plus any accrued interest. In this event, the Named Insured will pay the insured remaining debt to us.

3. If the Company cancels this policy, the Company will give written notice to the Loss Payee at least:

   a. Ten (10) days before the effective date of cancellation if the Company cancels for the insured non-payment of premium; or
   b. Thirty (30) days before the effective date of cancellation if the Company cancels for any other reason.

4. If the Company elects not to renew this policy, the Company will give written notice to the Loss Payee at least ten (10) days before the expiration date of this policy.

C. CONTRACT OF SALE

1. The Loss Payee shown in the Schedule or in the Declaration Page is a person or organization the Named Insured have entered a contract with for the sale of Covered Property.

2. For Covered Property in which both the Named Insured and the Loss Payee have an insurable interest the Company will:

   a. Adjust losses with the Named Insured; and

   b. Pay any claim for loss or damage jointly to the Named Insured and the Loss Payee, as interests may appear:

3. The following is added to the OTHER INSURANCE Condition:

   For Covered Property that is the subject of a contract of sale, the word "the Named Insured" includes the Loss Payee.

AC. ELECTRONIC DATA

1. Electronic Data Exclusion

Notwithstanding any provision to the contrary within the Policy or any endorsement thereto, it is understood and agreed as follows:

a) This Policy does not insure, loss, damage, destruction, distortion, erasure, corruption or alteration of ELECTRONIC DATA from any cause whatsoever (including but not limited to COMPUTER VIRUS) or loss of use, reduction in functionality, cost, expense of whatsoever nature resulting therefrom, regardless of any other cause or event contributing concurrently or in any other sequence to the loss.

   ELECTRONIC DATA means facts, concepts and information converted to a form useable for communications, interpretation or processing by electronic and electromechanical data processing or electronically controlled equipment and includes program, software, and other coded instructions for the processing and manipulation of data or the direction and manipulation of such equipment.

   COMPUTER VIRUS means a set of corrupting, harmful or otherwise unauthorized instructions or code including a set of maliciously introduced

unauthorized instructions or code, programmatic or otherwise, that propagate themselves through a computer system or network of whatsoever nature. COMPUTER VIRUS includes but is not limited to 'Trojan Horses', 'worms' and 'time or logic bombs'.

b) However, in the event that a peril listed below results from any of the matters described in paragraph a) above, this Policy, subject to all its terms, conditions and exclusions will cover physical damage occurring during the Policy period to property insured by this Policy directly caused by such listed peril.

Listed Perils
Fire
Explosion

2. Electronic Data Processing Media Valuation

Notwithstanding any provision to the contrary within the Policy or any endorsement thereto, it is understood and agreed as follows:

Should electronic data processing media insured by this Policy suffer physical loss or damage insured by this Policy, then the basis of valuation shall be the cost to repair, replace or restore such media to the condition that existed immediately prior to such loss or damage, including the cost of reproducing any ELECTRONIC DATA contained thereon, providing such media is repaired, replaced or restored. Such cost of reproduction shall include all reasonable and necessary amounts, not to exceed USD10,000,000 any one loss, incurred by the Named Insured in recreating, gathering and assembling such ELECTRONIC DATA. If the media is not repaired, replaced or restored the basis of valuation shall be the cost of the blank media. However this Policy does not insure any amount pertaining to the value of such ELECTRONIC DATA to the Named Insured or any other party, even if such ELECTRONIC DATA cannot be recreated, gathered or assembled.

AD. LOSS ADJUSTMENT SERVICES

Crawford & Company, 3050 Saturn Street #200, Brea, California, 92821, is hereby authorized to represent the Company in the investigation and adjustment of any loss or damage under this Policy at the expense of the Company and without regard to the amount of loss or damage and/or applicable deductible if any.

However, the Company reserves the right to utilize other adjusting firms if and when they feel it necessary.

AE. SERVICE OF SUIT (U.S.A.)

It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Named Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States. Nothing in this Clause constitutes or should be understood to constitute a waiver of Underwriters' rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States. It is further agreed that service of process in such suit may be made upon:

FLWA Service Corp, c/o Foley and Lardner LLP, 555 California Street, Suite 1700, San Francisco, CA 94104-1520 (applicable to all markets except as noted below) and that in any

suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

The above-named are authorized and directed to accept service of process on behalf of Underwriters in any such suit and/or upon the request of the Named Insured (or Reinsured) to give a written undertaking to the Named Insured (or Reinsured) that they will enter a general appearance upon Underwriters' behalf in the event such a suit shall be instituted.

Further, pursuant to any statute of any state, territory or district of the United States which makes provision therefore, Underwriters hereon hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the Named Insured (or Reinsured) or any beneficiary hereunder arising out of this contract of insurance (or reinsurance), and hereby designate the above-named as the person to whom the said officer is authorized to mail such process or a true copy thereof.

AF. DEFINITIONS:

1. OCCURRENCE

Each occurrence is defined as a loss, incident or series of losses or incidents not otherwise excluded by this Policy and arising out of a single event or originating cause and includes all resultant or concomitant insured losses. When the term applies to loss or losses from earthquake shock, flood and/or windstorm, the following provisions shall apply:

a. Windstorm

Each loss by windstorm shall constitute a single claim hereunder; provided, if more than one windstorm shall occur within any period of seventy-two (72) hours during the term of this Policy, such windstorm shall be deemed to be a single windstorm within the meaning thereof. The Named Insured may elect the moment from which each of the aforesaid periods of seventy-two (72) hours shall be deemed to have commenced but no two such seventy-two (72) hour periods shall overlap. The Company shall not be liable for any loss occurring before the effective date and time of the Policy. The Company will be liable for any losses occurring for a period of up to seventy-two (72) hours after the expiration of this Policy provided that the first windstorm loss or damage within that seventy-two (72) hours occurs prior to the date and time of expiration of this Policy.

In the event of there being a difference of opinion between the Named Insured and the Company as to whether or not all windstorm losses sustained by the Named Insured during an elected period of seventy-two (72) hours arose out of, or was caused by a single atmospheric disturbance, the stated opinion of the United States Weather Bureau or comparable Authority in any other country or locality shall govern as to whether or not a single atmospheric disturbance continued throughout the period at the location(s) involved.

b. Flood

Each loss by flood shall constitute a single loss hereunder.

1. If any flood occurs within a period of the continued rising or overflow of any river(s) or stream(s) and the subsidence of same within the banks of such river(s) or stream(s); or

2. If any flood results from any tidal wave or series of tidal waves caused by any one disturbance;

such flood shall be deemed to be a single occurrence within the meaning of this Policy.

Should any time period referred to above extend beyond the expiration date of this Policy and commence prior to expiration, the Company shall pay all such flood losses occurring during such period as if such period fell entirely within the term of this Policy.

The Company shall not be liable, however, for any loss caused by any flood occurring before the effective date and time of this Policy or commencing after the expiration date and time of this Policy.

Flood shall mean a general condition of partial or complete inundation of normally dry land area from:

1. overflow of inland or tidal water;

2. unusual and rapid accumulation or run off of surface waters from any natural source.

Flood shall also mean mudslide or mudflow, which is a river or flow of liquid mud caused by flooding as defined in 1. or 2. above.

The definition of flood does not include ensuing loss or damage by fire, explosion or sprinkler leakage.

c. **Flood Zone A and V**

Flood zones A and V as referenced in this policy is defined by FEMA as being inclusive of all 100 year high risk flood areas. A one-hundred-year flood is a flood event that has a 1% probability of occurring in any given year..

d. Earthquake Shock

With respect to the peril of earthquake shock, any and all losses from this cause within a one hundred sixty-eight (168) hour period shall be deemed to be one loss. The Named Insured may elect the moment from which each of the aforesaid periods of one hundred sixty eight (168) hours shall be deemed to have commenced but no two such one hundred sixty eight (168) hour periods shall overlap.

The Company shall not be liable for any loss caused by an earthquake shock occurring before the effective date and time of this Policy. The Company will be liable for any losses occurring for a period of up to one hundred sixty eight (168) hours after the expiration of this Policy provided that the first earthquake shock loss or damage within that one hundred sixty eight (168) hours occurs prior to the date and time of the expiration of this Policy.

In the event of there being a difference of opinion between the Named Insured and the Company as to whether or not all earthquake shock losses sustained by

the Named Insured during an elected period of one hundred sixty eight (168) hours arose out of, or were caused by a single earthquake shock, the stated opinion of the National Earthquake Shock Information Service of the United States Department of the Interior or comparable Authority in any other country or locality shall govern as to whether or not a single earthquake shock continued throughout the period at the locations involved.

The term earthquake shock is defined as: earth movement meaning natural faulting of land masses, but not including subsidence, landslide, rock slide, earth rising, earth sinking, earth shifting or settling unless as a direct result of such earth movement. The definition of earthquake shock does not include ensuing loss or damage by fire, explosion or sprinkler leakage. Further Earthquake Sprinkler Leakage is covered outside of the "Earthquake Shock" definition and subject to the basic peril deductible.

2. PERSONAL PROPERTY OF OTHERS

Means, any property (other than real property) belonging to others for which a Named Insured has assumed liability. This includes but is not limited to:

- Articles of Clothing
- Jewelry
- Sound Equipment
- Fine Arts (up to the sub-limit of unscheduled fine arts)
- EDP Media & Hardware
- Valuable Papers
- Portable Electronic Equipment
- Employee Tools

3. IMPROVEMENTS AND BETTERMENTS

Means, additions or changes made by a Named Insured / lessee at their own expense to a building they are occupying that enhance the building's value.

4. VALUABLE PAPERS AND RECORDS

Means, all inscribed, printed, or written; documents, manuscripts or records; including but not limited to abstracts, books, deeds, drawing, films, maps, or mortgages. Valuable Papers are not money, securities, stamps or converted data program or instructions used in the Named Insured's data processing operations including the materials on which data is recorded.

5. TIER I WINDSTORM COUNTIES

State	Tier I Counties, Parishes or Independent Cities
Alabama	Baldwin, Mobile
Florida	Entire State, All Counties
Georgia	Bryan, Camden, Chatham, Glynn, Liberty, McIntosh,
Hawaii	Entire State, All Counties
Louisiana	Assumption, Calcasieu, Cameron, Iberia, Jefferson, Lafourche, Livingston, Orleans, Plaquemines, St. Bernard, St. Charles, St. James, St. John the Baptist, St. Mary, St. Tammany, Tangipahoa, Terrebonne, Vermilion
Mississippi	Hancock, Harrison, Jackson
North Carolina	Beaufort, Bertie, Brunswick, Camden, Carteret, Chowan, Columbus, Craven, Currituck, Dare, Hyde, Jones, New Hanover, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Tyrell, Washington
South Carolina	Beaufort, Berkley, Charleston, Colleton, Georgetown, Horry, Jasper
Texas	Aransas, Brazoria, Calhoun, Cameron, Chambers, Galveston, Harris (entire County), Jackson, Jefferson, Kenedy, Kleberg, Liberty, Matagorda, Newton, Nueces, Orange, Refugio, San Patricio, Victoria, Willacy
Virginia	Accomack, Charles City, Chesapeake City, Gloucester, Hampton City, Isle of Wight, James City, Lancaster, Mathews, Middlesex, New Kent, Newport News, Norfolk City, Northampton, Northumberland, Poquoson City, Portsmouth City, Prince George, Suffolk City, Sussex, Surry, Virginia Beach City, Westmoreland, Williamsburg City, York

6. RESIDENTIAL/HABITATIONAL

The term residential/habitational with respects to deductibles is defined as: single family dwellings, duplexes, four-plexes, apartment buildings, or any other structure that is currently being used as the aforementioned occupancies. However, single family dwellings, duplexes, four-plexes, and apartment buildings that are not currently being used primarily as a residence will not be considered residential/habitational. Additionally, nursing homes, battered family shelters, youth centers, dormitories, and other occupancies that are business related will not be considered residential/habitational.

AG. ADDITIONAL INSURED'S / LOSS PAYEES

It is hereby understood and agreed that the interest of Additional Insured's and/or Loss Payees is automatically included, as per schedule held on file with Tribal First.

SECTION V

FINE ARTS FLOATER

A. COVERAGE

This policy insures against all risks of physical loss of or damage except as hereafter excluded occurring during the policy period to fine arts, which are the property of the Named Insured or the property of others in the custody or control of the Named Insured while on exhibition or otherwise within the limits of the United States.

If any of the property covered by this Section is also covered under any other provisions of the Policy of which this Section is made a part, those provisions are hereby amended to exclude such property, the intent being that the coverage under this Section is the sole coverage on such property.

1. PROPERTY COVERED

Objects of art of every kind and description, and property incidental thereto, which are the property of the Named Insured, or the property of others in the custody and control of the Named Insured, or in transit at the Named Insured's risk, and property in which the Named Insured shall have a fractional ownership interest which are owned by or have been leased, loaned, rented or otherwise made available to the Named Insured. "Property" shall mean paintings, drawings, etchings, prints, rare books, manuscripts, rugs, tapestries, furniture, pictures, bronzes, potteries, porcelains, marbles statuary and all other bonafide works of art and other objects of rarity, historic value, cultural interest or artistic merit, which are part of the collections of the Named Insured, or in the care, custody or control of the Named Insured, and their frames, glazing and shadow boxes.

2. "WALL TO WALL" ("NAIL TO NAIL") COVERAGE

This Section covers the Named Insured's property on a "Wall to Wall" ("Nail to Nail") basis, or domicile to domicile basis, as applicable, from the time said property is removed from its normal repository incidental to shipment until returned thereto or other point designated by the owner or owner's agent prior to return shipment, including while in transit to or from points of consolidation or deconsolidation, packing, repacking or unpacking, while at such locations during such processes or awaiting shipment.

Coverage shall terminate upon arrival of the covered property at the final destination designated by the owner or owner's agent, or upon expiration of this Policy, whichever may occur first, except that expiration of this Policy shall not prejudice coverage of any risk then in transit.

B. EXCLUSIONS

1. Loss or damage occasioned by: wear and tear, gradual deterioration, insects, vermin, inherent vice or damage sustained due to and resulting from any repairing, restoration or retouching process;

2. Loss or damage caused by or resulting from:

a. War, hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack;

i. by any government or sovereign power (de jure or de facto), or by any authority maintaining or using military, naval or air forces; or
ii. by military, naval or air forces; or
iii. by an agent of any such government, power, authority or forces;

b. Any weapon of war employing atomic fission or radioactive force whether in time of peace or war;

c. Insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence, seizure or destruction under quarantine or customs regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade.

3. Nuclear reaction or nuclear radiation or radioactive contamination from any cause, all whether direct or indirect, controlled or uncontrolled, proximate or remote, or is contributed to or aggravated by a Covered Cause of Loss. However:

a. If fire not otherwise excluded results, the Company shall be liable for the direct physical loss or damage by such resulting fire, but not including, any loss or damage due to nuclear reaction, nuclear radiation, or radioactive contamination, and

b. This Policy does insure against physical loss or damage caused by sudden and accidental radioactive contamination, including resultant radiation damage, from material used or stored or from processes conducted on the Insured premises, provided that, at the time of such loss or damage, there is neither a nuclear reactor nor any new or used nuclear fuel on the Named Insured premises.

4. Any dishonest, fraudulent or criminal act by the Named Insured, a partner therein or an officer, director, employee or trustee thereof, whether acting alone or in collusion with others.

For the purpose of this exclusion an act of vandalism or malicious damage by an employee shall not constitute a dishonest, fraudulent or criminal act.

C. LOSS PAYMENT BASIS / VALUATION

The valuation of each article of property covered by this Section shall be determined as follows:

a. Property of the Named Insured shall be covered for and valued at the current fair market value of each article indicated on the books and records of the Named Insured prior to loss, according to the Named Insured's valuation of each object covered.

b. Property of others loaned to the Named Insured and for which the Named Insured may be legally liable, or which the Named Insured has been instructed to insure, shall be covered for and valued at the amount agreed upon for each article by the Named Insured and owner(s) as recorded on the books and records of the Named Insured prior to loss.

c. Otherwise, in the absence of recorded current fair market values or agreed values for each article covered, the Company shall not be liable beyond the fair market value of the property at the time any loss or damage occurs. Said value shall be ascertained by the Named Insured and the Company or, if they differ, then the amount of value or loss shall be determined as provided in the following appraisal clause.

D. SPECIAL CONDITIONS

1. Misrepresentation and Fraud: This entire Section shall be void if, whether before or after a loss, the Named Insured has concealed or misrepresented any material fact or circumstance concerning this Policy or the subject thereof, or the interest of the Named Insured therein, or in case of any fraud or false swearing by the Named Insured relating thereto.

2. Notice of Loss: The Named Insured shall as soon as practicable report in writing to the Company or its agent every loss, damage or occurrence which may give rise to a claim under this Section and shall also file with the Company or its agent within ninety (90) days from the date of discovery of such loss, damage or occurrence, a detailed sworn proof of loss.

3. Examination under Oath: The Named Insured, as often as may be reasonably required, shall exhibit to any person designated by the Company all that remains of any property herein described, and shall submit, and insofar as is within its power cause its employees, Named Insured and others to submit to examination under oath by any person named by the Company and subscribe the same; and, as often as may be reasonably required, shall produce for examination all writings, books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by the Company or its representative and shall permit extracts and copies thereof to be made. No such examination under oath or examination of books or documents, nor any act of the Named Insured or any of its employees or representatives in connection with the investigation of any loss or claim hereunder, shall be deemed a waiver of any defense which the Named Insured might otherwise have with respect to any loss or claim, but all such examinations and acts shall be deemed to have been made or done without prejudice to the Company's liability.

4. Settlement of Loss: All adjusted claims shall be paid or made good to the Named Insured within sixty (60) days after presentation and acceptance of satisfactory proof of interest and loss at the office of the Company. No loss shall be paid or made good if the Named Insured has collected the same from others.

5. No Benefit to Bailee: This Section shall in no way inure directly or indirectly to the benefit of any carrier or other bailee.

6. Subrogation or Loan: If in the event of loss or damage the Named Insured shall acquire any right of action against any individual, firm or corporation for loss of, or damage to, property covered hereunder, the Named Insured will, if requested by the Company, assign and transfer such claim or right of action to the Company or, at the Company's option, execute and deliver to the Company the customary form of loan receipt upon receiving an advance of funds in respect of the loss or damage; and will subrogate the Company to, or will hold in trust for the Company, all such rights of action to the extent of the amount paid or advanced, and will permit suit to be brought in the Named Insured's name under the direction of and at the expense of the Company.

7. Loss Clause: Any loss hereunder shall not reduce the amount of this Section, except in the event of payment of claim for total loss of an item specifically scheduled hereon.

8. Protection and Preservation of Property: In case of actual or imminent physical loss or damage of the type insured against by this Policy, the expenses incurred by the Named Insured in taking reasonable and necessary actions for the temporary protection and preservation of property insured hereunder shall be added to the total physical loss or damage otherwise recoverable under the Policy and be subject to the applicable deductible and without increase in the limit provisions contained in this Policy.

9. Appraisal: If the Named Insured and the Company fail to agree as to the amount of loss, each shall on the written demand of other, made within sixty (60) days after receipt of proof of loss by the Company, select a competent and disinterested appraiser, and the appraisal shall be made at a reasonable time and place. The appraisers shall first select a competent and disinterested umpire, and failing for fifteen (15) days to agree upon such umpire, then on the request of the Named Insured or the Company, such umpire shall be selected by a judge of a court of record in the state in which such appraisal is pending. The appraisers shall then appraise the loss, stating separately the fair market value at the time of loss and the amount of loss, and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. The Named Insured and the Company shall each pay their chosen appraiser and shall bear equally the other expenses of the appraisal and umpire. The Named Insured shall not be held to have waived any of its rights by any act relating to appraisal.

10. Civil Authority: Property covered under this Section against the peril of fire is also covered against the risk of damage or destruction by Civil authority during a conflagration and for the purpose of retarding the same; provided that neither such conflagration nor such damage or destruction is caused or contributed to by a peril otherwise excluded herein.

11. Changes: Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this Section or stop the Named Insured from asserting any right under the terms of this Section, nor shall the terms of this Section be waived or changed except by endorsement issued to form a part of this Section.

12. Additional Covered Party(ies): Corporations, associations, firms, institutions, museums, persons and others who own or control collections, objects or articles who make them available to the Named Insured, and temporary borrowers or custodians (but not carriers, packers or shippers) of property covered, are additional Insured(s) hereunder, but only as respects coverage afforded to said Named Insured's property.

13. Packing: It is agreed by the Named Insured that the property covered hereunder be packed and unpacked by competent packers.

14. Other Insurance: This fine arts floater Section is excess coverage over any other valid and collectible insurance which may apply to any objects of art for which coverage would apply under this Policy.

15. Pair And Set: In the event of the total loss of any article or articles which are a part of a set, the Company agrees to pay the Named Insured the full amount of the value of such set and the Named Insured agrees to surrender the remaining article or articles of the set to the Company.

SECTION VI

MOBILE / CONTRACTORS EQUIPMENT

A. COVERAGE

This Policy insures only contractor's equipment, whether self propelled or not, including equipment thereof while attached thereto or located thereon, such as bulldozers, drag lines, power shovels, derricks, drills, concrete mixers and other machinery of a similar nature and not subject to motor vehicle registration.

If any of the property covered by this Section is also covered under any other provisions of the Policy of which this Section is made a part, those provisions are hereby amended to exclude such property, the intent being that the coverage under this Section is the sole coverage on such property.

B. PERILS EXCLUDED

This Section insures against all risks of direct physical loss or damage occurring during the policy period to the above described property from any external cause except as provided below.

1. Loss or damage due to wear, tear, rust, corrosion, latent defect, mechanical breakage or improper assemblage.

2. Loss or damage due to the weight of the load imposed on the machine exceeding the capacity for which such machine was designed.

3. Loss or damage to crane or derrick boom(s) and jib(s) of lattice construction while being operated unless directly caused by fire, lightning, hail, windstorm, earthquake shock, explosion, riot, riot attending a strike, civil commotion, actual physical contact with an aircraft or airborne missile including objects falling therefrom, collision with other vehicles or other contractors equipment whether or not such other equipment is covered hereunder, landslide, or upset of the unit of which it is a part (but only when and to the same extent that such other perils are covered by the Policy).

4. Loss or damage due to explosion arising from within steam boilers.

5. Loss or damage to dynamos, exciters, lamps, switches, motors or other electrical appliances or devices, including wiring, caused by lightning or other electrical currents (artificial or natural) unless fire ensues and then for the loss by fire only.

6. Loss or damage due to dishonesty of Named Insured's employees or persons to whom the Named Insured's property is entrusted.

7. Loss or damage caused by or contributed to failure of the Named Insured to keep and maintain the property in a thorough state of repair.

8. Loss or damage caused by or resulting from:

   a. War, hostile or warlike action in time of peace or, including action in hindering, combating or defending against an actual, impending or expected attack,

      i. by any government or sovereign power (de jure or de facto) or by any authority maintaining using military, naval or air forces; or
      ii. any military, naval or air forces; or
      iii. by an agent of any such government, power, authority or forces;

   b. any weapon of war employing atomic fission or radioactive force whether in time of peace or war;

   c. insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence, seizure or destruction under quarantine or customs regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade;

9. Loss by nuclear reaction or nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, and whether such loss be direct or indirect, proximate or remote, or be in whole or in part caused by, contributed to, or aggravated by the peril(s) covered against in this endorsement; however, subject to the foregoing and all provisions of this Policy, direct loss by fire resulting from nuclear reaction or nuclear radiation or radioactive contamination is covered against by this Policy.

C. PROPERTY EXCLUDED

1. Automobiles, motorcycles, motor trucks, or parts thereof.

2. Buildings

3. Machinery or equipment or building materials to be installed in any building for the purpose of becoming a part thereof; nor on any property which has become a permanent part of any structure.

4. Property that is located underground.

5. Property while waterborne except while being transported on any regular ferry.

6. The storage risk of property not owned or required to be insured by the Named Insured at premises controlled or leased by the Named Insured, except where incidental to the regular or frequent use of the equipment or property.

7. Plans, blue prints, designs or specifications.

D. LOSS PAYMENT BASIS / VALUATION

On Contractors Equipment (whether self propelled or not), on or off premises, where Replacement Cost (New) values are specified, loss or damage shall be based on 100% of the Replacement Cost (New) at the time of loss. Partial losses shall be based on the cost of repairing or replacing the damaged portion, up to the fair market value of the Contractors Equipment. However, should these costs exceed the fair market value then recovery shall be based upon the Replacement Cost (New).

If the values, provided by the Named Insured, provides a valuation based on replacement cost, then recovery will be on the same basis, if replaced. If not replaced, the basis of recovery shall be actual cash value.

E. SPECIAL CONDITIONS

This section covers property only within the limits of the United States of America.

It is a condition of this Policy that all articles covered hereunder are in sound condition at the time of attachment of this Policy.

SECTION VII

ACCOUNTS RECEIVABLE

A. COVERAGE

This Policy covers the loss of or damage resulting from insured perils to the Named Insured's records of accounts receivable as defined below, occurring during the Policy period.

B. EXCLUSIONS

In addition to the exclusions in the General Conditions, this coverage does not apply:

1. To loss due to any fraudulent, dishonest or criminal act by the Named Insured, a partner therein, or an officer, director, employee or trustee thereof, while working or otherwise and whether acting alone or in collusion with others.

   For the purpose of this exclusion an act of vandalism or malicious damage by an employee shall not constitute a dishonest, fraudulent or criminal act.

2. To loss due to bookkeeping, accounting or billing errors or omissions.

3. To loss, the proof of which as to factual existence, is dependent upon an audit of records or an inventory computation; but this shall not preclude the use of such procedures in support if claim for loss which the Named Insured can prove through evidence wholly apart therefrom, is due solely to a risk of loss to records of accounts receivable not otherwise excluded hereunder.

4. To loss due to alteration, falsification, manipulation, concealment, destruction or disposal of records of accounts receivable committed to conceal the wrongful giving, taking, obtaining or withholding of money, securities or other property, but only to the extent of such wrongful giving, taking, obtaining or withholding.

C. LOSS PAYMENT BASIS / VALUATION

When there is proof that a loss covered by this Policy has occurred but the Named Insured cannot accurately establish the total amount of accounts receivable outstanding as of the date of such loss, such amount shall be based on the Named Insured's monthly statements and shall be computed as follows:

a. Determine the amount of all outstanding accounts receivable at the end of the same fiscal month in the year immediately proceeding the year in which the loss occurs;

b. Calculate the percentage of increase or decrease in the average monthly total of accounts receivable for the twelve (12) months immediately preceding the month in which the loss occurs as compared with such average for the months of the preceding year;

c. The amount determined under (a) above, increased or decreased by the percentage calculated under (b) above, shall be the agreed total amount of accounts receivable as of the last day of the fiscal month in which said loss occurs;

d. The amount determined under (c) above shall be increased or decreased in conformity with the normal fluctuations in the amount of accounts receivable during the fiscal month involved, due consideration being given to the experience of the business since the last day of the last fiscal month for which statement has been rendered.

There shall be deducted from the total amount of accounts receivable, however established, the amount of such accounts evidenced by records not lost or damaged or otherwise established or collected by the Named Insured, and an amount to allow for probable bad debts which would normally have been uncollectible by the Named Insured. All unearned interest and service charges shall be deducted.

D. DEFINITIONS:

ACCOUNTS RECEIVABLE:

a. All sums due the Named Insured from customers provided the Named Insured is unable to effect collection thereof as the direct result of loss or damage to records of accounts receivable.

b. Interest charges on any loan to offset impaired collections pending repayment of such sums made uncollectible by such loss or damage.

c. Collection expense in excess of normal collection cost and made necessary because of such loss or damage.

d. Other expenses, when reasonably incurred by the Named Insured, in re-establishing records of accounts receivable following such loss or damage.

SECTION VIII

UNMANNED AIRCRAFT

A. COVERAGE

This Policy insures only **Unmanned Aircraft,** that are usual to your business that you own or are required to insure, to pay for any physical damage loss sustained while not **In Flight** or **In Motion** and which are not the result of fire or explosion following crash or collision while the **Unmanned Aircraft** was **In Flight** or **In Motion** that are:

(1) Listed on the schedule which is a part of this policy or which is on file with us;

(2) Unscheduled but for an amount not to exceed the limit shown on the Declarations

If any of the property covered by this Section is also covered under any other provisions of the Policy of which this Section is made a part, those provisions are hereby amended to exclude such property, the intent being that the coverage under this Section is the sole coverage on such property.

B. PERILS EXCLUDED

This Section insures against all risks of direct physical loss or damage occurring during the policy period to **Unmanned Aircraft** from any external cause except as provided below.

1. Loss or damage due to the **Unmanned Aircraft** being **In Flight** or **In Motion** including during propulsion system startup or any time the propulsion system is operating.

2. Loss or damage due to wear, tear, rust, corrosion, latent defect, mechanical breakage, freezing or improper assemblage.

3. Loss or damage due to the weight of the load imposed on the **Unmanned Aircraft** exceeding the capacity for which such **Unmanned Aircraft** was designed.

4. Loss or damage to tires except where such loss or damage is caused by fire, theft, windstorm or vandalism or is the direct result of physical damage covered by this policy.

5. Loss or damage to **Unmanned Aircraft** while being worked upon except for direct loss or damage caused by resulting fire or explosion.

6. Loss or damage to dynamos, exciters, lamps, switches, motors or other electrical appliances or devices, including wiring, caused by lightning or other electrical currents (artificial or natural) unless fire ensues and then for the loss by fire only.

7. Loss or damage due to conversion, embezzlement or secretion by any person or organization with legal right to possession of such **Unmanned Aircraft** under bailment, lease, conditional sale, purchase agreement, mortgage or other legal agreement that governs the use, sale or lease of the **Unmanned Aircraft**, nor for any loss or damage during or resulting therefrom.

8. Loss or damage due to dishonesty of Named Insured's employees or persons to whom the Named Insured's property is entrusted.

9. Loss or damage caused by or contributed to failure of the Named Insured to keep and maintain the property in a thorough state of repair.

10. Loss or damage caused by or resulting from:

    a. War, hostile or warlike action in time of peace or, including action in hindering, combating or defending against an actual, impending or expected attack,

        i. by any government or sovereign power (de jure or de facto) or by any authority maintaining using military, naval or air forces; or
        ii. any military, naval or air forces; or
        iii. by an agent of any such government, power, authority or forces;

    b. any weapon of war employing atomic fission or radioactive force whether in time of peace or war;

    c. insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence, seizure or destruction under quarantine or customs regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade;

11. Loss by nuclear reaction or nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, and whether such loss be direct or indirect, proximate or remote, or be in whole or in part caused by, contributed to, or aggravated by the peril(s) covered against in this endorsement; however, subject to the foregoing and all provisions of this Policy, direct loss by fire resulting from nuclear reaction or nuclear radiation or radioactive contamination is covered against by this Policy.

C. PROPERTY EXCLUDED

1. **Unmanned Aircraft** that are located in underground mines, caverns or underground storage facilities.

2. **Unmanned Aircraft** while waterborne except while being transported on any regular ferry.

3. The storage risk of **Unmanned Aircraft** not owned or required to be insured by the Named Insured at premises controlled or leased by the Named Insured, except where incidental to the regular or frequent use of the equipment or property.

D. LOSS PAYMENT BASIS / VALUATION

On **Unmanned Aircraft**, on or off premises, where Replacement Cost (New) values are specified, loss or damage shall be based on 100% of the Replacement Cost(New) at the time of loss. Partial losses shall be based on the cost of repairing or replacing the damaged portion, up to the fair market value of the **Unmanned Aircraft**. However, should these costs exceed the fair market value then recovery shall be based upon the Replacement Cost (New).

If the values, provided by the Named Insured, provides a valuation based on replacement cost, then recovery will be on the same basis, if replaced. If not replaced, the basis of recovery shall be actual cash value.

E. SPECIAL CONDITIONS

This section covers property only within the limits of the United States of America.

It is a condition of this Policy that all articles covered hereunder are in sound condition at the time of attachment of this Policy.

F. DEFINITIONS

1. UNMANNED AIRCRAFT

Means a powered aerial vehicle that does not carry a human operator, uses aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely, is recoverable and in some cases can carry a non-lethal payload including the propulsion system and equipment usually installed in the vehicle (1) while installed in the vehicle, (2) while temporarily removed from the vehicle and (3) while removed from the aircraft for replacement until such time as replacement by a similar item has commenced; also tools and equipment which are specially designed for the aircraft and which are ordinarily carried therein.

2. IN FLIGHT

Means, with respect to fixed wing **Unmanned Aircraft,** the time commencing with the actual take-off run or launch and continuing thereafter until it has completed its landing run; or capture; and if the **Unmanned Aircraft** is a rotorcraft, from the time the rotors start to revolve under power for the purpose of flight until they subsequently cease to revolve after landing; and if the **Unmanned Aircraft** is a balloon, while it is inflated or being inflated or deflated.

3. IN MOTION

Means while the **Unmanned Aircraft** is moving under its own power or the momentum generated therefrom or while it is **In Flight** and, if the **Unmanned Aircraft** is a rotorcraft, any time the rotors are rotating or while it is **In Flight** and, if the **Unmanned Aircraft** is a glider or balloon, any time it is being transported, towed or while it is **In Flight.**

SECTION IX

BOILER AND MACHINERY BREAKDOWN EXTENSION

1. PERILS INSURED

In consideration of the premium paid and subject to the terms, General Conditions and General Exclusions of the policy to which this Extension is attached, and to the following terms and conditions, this Insurance is extended to cover direct damage to Covered Property caused by a Covered Cause of Loss.

2. ADDITIONAL COVERAGE

(a) Hazardous Substance:

The additional expense incurred for cleanup, repair or replacement or disposal of damaged, contaminated or polluted property as a result of an Accident, which causes property to become damaged, contaminated or polluted by a substance declared hazardous to health by an authorized governmental agency. The coverage provided by this clause is sub-limited to USD as per Declaration Page. For the purpose of this coverage "Additional expense" means any expense that would not have incurred, if no substance hazardous to health had been involved in the accident

(b) Ammonia Contamination:

The loss, including salvage expense, incurred with respect to damage by ammonia contacting or permeating property under refrigeration or in process requiring refrigeration, as a result of any one Accident to one or more Objects. The coverage provided by this clause is sub-limited to USD as per Declaration Page.

(c) Water Damage:

The loss, including salvage expense, with respect to property damaged by water, resulting from any one Accident. The coverage provided by this clause is sub-limited to USD as per Declaration Page.

(d) Media Coverage:

The loss to all forms of electronic, magnetic and optical tapes and discs used in any electronic computer or electronic data processing equipment directly damaged by an Accident to an Object. The coverage provided by this clause is sub-limited to USD as per Declaration Page. For the purpose of this coverage, the valuation basis for "Media" is as follows:

i. For "Media" that are mass-produced and commercially available, at the replacement cost.
ii. For all other "Media," at the cost of blank material for reproducing the records.

(e) "Consequential Damage"

The "Consequential Damage" to refrigerated and frozen goods of the Named Insured or for which the Named Insured is legally liable or under the Named Insured's care, custody or control caused solely by an Accident to an Object. For the purpose of this coverage, "Consequential Damage" is defined as loss due to spoilage from lack of power, light, heat, steam or refrigeration, resulting from Accident. The coverage provided by this clause is sub-limited to USD as per Declaration Page.

(f) Utility Interruption

The loss caused by an Accident to an Object that is owned, operated or controlled by a public or private entity that the Named Insured has contracted with to furnish them with electrical utility service including all direct electrical suppliers. The coverage provided by this clause is sub-limited to USD as per Declaration Page.

(g) CFC Refrigerants and Halon

The replacement of any CFC (chlorofluorocarbon) refrigerant used in refrigeration or air conditioning equipment or Halon used in a fire suppression system due to an "Accident" to an Object.

(h) Ordinance or Law

If an Accident to an Object at the Named Insured's location damages a building that is "Covered Property," the Company will pay for

i. Loss to the Undamaged Portion of the Building, meaning loss to the undamaged portion of the building caused by enforcement of any ordinance or law that:

   a. Requires the demolition of parts of the same building not damaged by the Accident to an Object; or
   b. Regulates the construction or repair of buildings, or establishes zoning or land use requirements at the location of the building.

ii. Demolition Cost meaning the cost to demolish and clear the site of undamaged parts of the building, caused by the enforcement of building, zoning, or land ordinance or use.

iii. Increased Cost of Construction, meaning the increased cost to:

   a. Repair or reconstruct damaged portions of the building; and
   b. Reconstruct or remodel undamaged portions of the building whether or not demolition is required;

when the increased cost is a consequence of enforcement of building, zoning or land use ordinance or law. But the Company will only pay for this increased cost if the building is repaired, reconstructed or remodeled. Also, if the building is repaired, reconstructed or remodeled, it must be intended for similar occupancy as the current building, unless such occupancy is not permitted by zoning or land use ordinance or law.

Insurance under this section only applies with respect to ordinance or law that is in force at the time of the Accident to an Object. Insurance under this section does not apply to:

a. Costs associated with the enforcement of any ordinance or law which requires any Named Insured or others to test for, monitor, clean up, remove, contain, treat, detoxify, or neutralize, or in any way respond to, or assess the effects of substances declared to be hazardous to health by a governmental agency; or

b. Loss due to any ordinance or law that:

   i. The Named Insured was required to comply with before the Accident to an Object even if the building was undamaged; and
   ii. The Named Insured failed to comply with.

The coverage provided by this clause is sub-limited to USD as per Declaration Page.

3. DEFINITION OF ACCIDENT

Accident shall mean a sudden and accidental breakdown of the Object, or a part thereof, which manifests itself at the time of it occurrence by physical damage to the Object that necessitates repair or replacement of the Object or part thereof; but Accident shall not mean:

a. depletion, deterioration, corrosion , or erosion of material;
b. wear and tear;
c. leakage at any valve, fitting, shaft seal, gland packing, joint or connection;
d. the breakdown of any vacuum tube, gas tube or brush;
e. the breakdown of any structure or foundation supporting the Object or any part thereof;
f. the functioning of any safety device or protective device.

4. DEFINITION OF OBJECT

Except as otherwise specifically designated herein, Object as described below shall mean any equipment or apparatus which is owned by, leased by or operated under the control of the Named Insured subject to the Exclusions and Special Provisions specified herein:

a. Any boiler, any fired vessel, any unfired vessel subject to vacuum or internal pressure other than static pressure of contents, any refrigerating and air conditioning vessels, or any piping and its accessory equipment, but such Object shall not include:

   1. Any boiler setting, any insulating or refractory material,

   2. Any sewer piping, any underground gas piping, any piping forming a part of a sprinkler system or any water piping other than

      (a) Feed water piping between any boiler and its feed pumps or injectors
      (b) Boiler condensate returning piping

b. Any mechanical or electrical machine or electrical apparatus used for the generation, transmission or utilization of mechanical or electrical power, but Object shall not include

1. Any structure or foundation other than a bedplate of a machine,

2. Any vehicle, elevator, crane, hoist, power shovel or drag line, but not excluding any electrical equipment used with said machine or apparatus,

3. Any refractory material, or

4. Any penstock or draft tube.

5. COVERED CAUSE OF LOSS

A Covered Cause of Loss is an Accident to an Object insured hereon. An Object must be in use or connected ready for use at the time of the Accident.

6. COVERED PROPERTY

Covered Property, as used in this Extension, means any property that:

a. The Named Insured owns; or
b. Is in the Named Insured's' care, custody or control and for which they are legally liable

7. SPECIAL PROVISIONS

a. As respects any boiler, fired or unfired vessel, refrigerating system or piping, the Company shall not be liable for loss from an Accident while said Object is undergoing a hydrostatic, pneumatic or gas pressure test that exceeds manufacturers recommended limits.

b. As respects any boiler of fired vessel, the Company shall not be liable for loss from an explosion of gas or unconsumed fuel within the furnace of such Object or within the passages from the furnace to the atmosphere, whether or not such explosion (a) is contributed to or aggravated by an Accident to any part of said Object that contains steam or water, or (b) is caused in whole or in part, directly or indirectly, by any Accident to any Object, or part thereof, nor shall the Company be liable for any loss from an Accident caused directly or indirectly by such explosion.

c. As respects any unfired vessel which is used for the storage of gas or liquid and which is periodically filled, moved, emptied and refilled in the course of its normal service, such vessel shall be considered as "connected ready for use" within the terms of this Extension of the Policy.

d. As respects any Object or part of an Object that is being dismantled, reassembled or is in storage, will be considered as "connected ready for use" within the terms of this Extension of the Policy.

e. As respects any gas turbine of the internal combustion type, (a) the combustor or such Object shall not be considered to be a "furnace" as the word is used in the Definition of Accident or in Special Provision 2 above and (b) the Definition of Accident shall not mean the cracking of any part of the Turbine exposed to the production of combustion.

f. As respects new turbine generator units, coverage shall not apply until the unit has been contractually accepted by the Named Insured, that all tests required by the

contractor have been performed and satisfied and the unit has been placed in commercial operation.

8. VALUATION

a. The Company will pay the Named Insured the amount the Named Insured spends to repair or replace the property directly damaged by an Accident. The Company payment will be the smallest of:

1) The Limit of Insurance;

2) The cost at the time of the Accident to repair the damaged property with property of like kind, capacity, size and quality;

3) The cost at the time of the Accident to replace the damaged property on the same site with other property:

a) Of like kind, capacity, size and quality; and
b) Used for the same purpose

4) The amount the Named Insured actually spends that is necessary to repair or replace the damaged property.

b. As respects any Object if the cost of repairing or replacing only a part of the Object is greater than:

1) the cost of repairing the Object; or
2) the cost of replacing the entire Object on the same site;

The Company will pay only the smaller of (1) or (2). The repair parts or replacement Object must be:

1) of like kind, capacity, size and quality; and
2) used for the same purpose.

c. The Company will not pay:

1) if the loss or damage is to property that is obsolete or useless to the Named Insured; or
2) for any extra cost if the Named Insured decides to repair or replace the damaged property with property of a better kind or quality or of larger capacity,

d. If the Named Insured does not repair or replace the damaged property within 18 months after the date of the Accident then the Company will pay on the smaller of the:

1) cost it would have taken to repair; or
2) actual cash value;

at the time of the "accident."

Paragraph (d) does not apply to any time period beyond the 18 months that the Company agrees to in writing.

e. As respects CFC (chlorofluorocarbon) refrigerant or Halon, the following valuation basis is applicable:

1) If the CFC refrigerant or Halon is replaceable, the Named Insured may, at their option, elect to:

a) Repair or replace the damaged refrigeration equipment, air conditioning equipment or fire suppression system and replace the lost CFC refrigerant or Halon subject to it being of like kind, capacity, size and quality and used for the same purpose; or

b) Change the refrigeration equipment, air conditioning equipment or fire suppression system, through modification or replacement, to:

i. Refrigeration or air conditioning equipment that uses an approved non-CFC refrigerant; or
ii. A fire suppression system that uses an approved non – Halon agent.

But this option is available only if the change to the equipment or system is made within 18 months after the date of the Accident or within any extended time period that the Company agrees to in writing.

If Option 1) b) above is elected, the Company will not pay more than the least of the following amounts:

a) The Limit of Insurance;

b) The cost at the time of the Accident to repair the damaged refrigeration equipment, air conditioning equipment or fire suppression system, retrofit the equipment or system to accept non – CFC refrigerant or non – Halon fire suppressant, and charge the equipment or system with that refrigerant or fire suppressant;

c) The cost at the time of the Accident to replace the damaged refrigeration equipment, air conditioning equipment or fire suppression system with equipment or a system that is functionally equivalent and uses an approved non – CFC refrigerant or non – Halon fire suppressant;

d) The amount that the Named Insured actually spend that is necessary to change the refrigeration equipment, air conditioning equipment or fire suppression system, through modification or replacement, to equipment or a system that uses an approved non – CFC refrigerant or non – Halon fire suppressant; or

e) One hundred twenty-five percent (125%) of the amount the Company otherwise would have paid for loss to the refrigeration equipment, air conditioning equipment or fire suppression system.

f. If the CFC refrigerant or Halon is not replaceable and:

(1) The Named Insured repairs or replaces the damaged equipment within 18 months after the date of the Accident or within any extended time that the Company agrees to in writing, the Company will pay the least of the following amounts:

(a) The Limit of Insurance;

(b) The cost at the time of the Accident to repair the damaged refrigeration equipment, air conditioning equipment or fire suppression system,

retrofit the equipment or system to accept non – CFC refrigerant or non – Halon fire suppressant, and charge the equipment or system with that refrigerant or fire suppressant;

(c) The cost at the time of the Accident to replace the damaged refrigeration equipment, air conditioning equipment or fire suppression system with equipment or a system that is functionally equivalent and uses an approved non – CFC refrigerant or non – Halon fire suppressant;

(d) The amount that the Named Insured actually spend that is necessary to change the refrigeration equipment, air conditioning equipment or fire suppression system, through modification or replacement, to equipment or a system that uses an approved non – CFC refrigerant or non – Halon fire suppressant.

(2) If the Named Insured does not replace the damaged equipment within 18 months after the date of the Accident or within the extended time period that the Company agrees to in writing, the Company will not pay more than the lesser of:

(a) The amount that the Company would have paid if repair or replacement of the damaged equipment had been made as determined in F 1 above; or

(b) The actual cash value of the damaged equipment at the time of the Accident.

g. As respects Insurance under Ordinance and Law, the most the Company will pay as a result of any one Accident for:

a) Loss to the Undamaged portion of the building is included in the Limit of Insurance that otherwise applies to the damaged building. But in no event will the amount the Company pay for loss to the building, including the loss in value of the undamaged portion of the building due to enforcement of an ordinance or law to which this coverage applies, exceed:

i. The amount that the Named Insured actually spend to repair, rebuild or replace the building, but not more than the amount it would cost to restore the building on the same premises and to the same height, floor area, style and comparable quality of the original property insured; or

ii. The actual cash value of the building at the time of loss if the building is not repaired or replaced.

b) Demolition and Increased Cost of Construction is USD as per Declaration Page, subject to the following:

i. With respect to the coverage provided for Demolition Cost, the Company will not pay more than the amount the Named Insured actually spend to demolish and clear the site of the undamaged parts of the building;

ii. With respect to the coverage provided for Increased Cost of Construction:

(a) We will not pay for the Increased Cost of Construction:

Until the building is actually repaired or replaced at the same or another premises; and

Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage, not to exceed 18 months. We may extend this period in writing during the 18 months.

(b) If the building is repaired or replaced at the same location, or if the Named Insured elect to rebuild at another location, the most the Company will pay for the increased cost of construction is the increased cost of construction at the same location.

(c) If the ordinance or law requires relocation to another location, the most the Company will pay for the increased cost of construction is the increased cost of construction at the new location.

h. If a claim or "suit" is brought against the Named Insured alleging that the Named Insured is liable for damage to property of another that was caused by an Accident to an Object, the Company will either:

1. Settle the claim or "suit", or
2. Defend the Named Insured against the "suit" but reserve the right for themselves to settle at any point.

9. EXCLUSIONS

a. To loss:

1) From explosion of an Object other than:

a) Any steam boiler, steam piping, steam turbine, gas turbine, steam engine, or
b) Any machine when such loss is caused by centrifugal force or mechanical breakdown,

b. Nuclear reaction or radiation or radioactive contamination however caused, however this exclusion shall not apply to nuclear medicine at covered hospitals,

c. From fire concomitant with or following an Accident.

d. From an Accident caused directly or indirectly by fire

e. From a combustion explosion outside the Object concomitant with or following an Accident,

f. From an Accident caused directly or indirectly by a combustion explosion outside an Object,

10. CONDITIONS

a. Inspection

The Company shall be permitted but not obligated to inspect the Named Insured's property and operations at any reasonable time. Neither the right to make inspections nor the making thereof nor any advice or report resulting therefrom shall constitute an undertaking, on behalf of or for the benefit of the Named Insured or others, to determine or warrant that such property or operations are safe or healthful, or are in compliance with any law, rule or regulation.

b. Suspension

Upon the discovery of a dangerous condition with respect to any Object, Alliant Insurance Services, Inc., may immediately suspend the insurance, with respect to an Accident to said Object, by written notice mailed or delivered to the Named Insured at the address of the Named Insured stated in the Declaration Page, or at the location of the Object, as stated for it in a schedule or endorsement. The insurance so suspended may be reinstated by the Company but only by an endorsement issued to form a part of this Policy. The Named Insured shall be allowed the unearned portion of the premium paid for such suspended insurance, pro rata for the period of suspension.

c. Notice of Accident and Adjustments

When an Accident occurs, written notice shall be given to the Company as soon as practicable. The Company shall be given like notice of any claim made on account of such Accident. The Company or their representative shall have reasonable time and opportunity to examine the property, and the Named Insured's Location of Risk, before repairs are undertaken or physical evidence of the Accident is removed, except for protection or salvage. Proof of loss shall be made in such form as the Company may require. If suit is brought against the Named Insured for loss to which this Section of the Policy is applicable, any summons or other process served upon the Named Insured shall be forwarded immediately to the Company.

d. Deductible

In the event of an Accident to an Object as insured under this Extension that is concomitant with or followed by physical loss or damage incurred under the All Risks policy that this Extension attaches to, the deductible to be applied to the total loss shall be the applicable Boiler & Machinery deductible.

SECTION X

ENDORSEMENTS

1. VACANT OR UNOCCUPIED LOCATIONS ENDORSEMENT

This endorsement modifies insurance provided under the following:

All Coverage Parts

Permission is given for a scheduled location to be vacant or unoccupied for a period of sixty (60) consecutive days from the date of its acquisition or the inception date of this policy, which ever date is later. Thereafter, coverage will apply subject to the following conditions and limitations:

A. The Named Insured must provide written notification to the Company of any and all vacant or unoccupied location(s) and properly designate the vacant/unoccupied status of each on the Statement of Values on file with the Company, prior to any loss or damage; and

B. The Named Insured must maintain all utilities and the same degree of fire protection, and watch and alarm service; and

If conditions A and B above are met, the liability of the Company for covered loss, damage or expense shall be limited to the lesser of the actual replacement cost, the actual cash value if the property is not replaced, or the individually stated value for the scheduled location which sustained the loss as shown in Statement of Value on file with the Company prior to the loss, but in no event shall the liability of the Company exceed USD2,000,000 in any one occurrence. Any exception to this USD2,000,000 limitation on recovery must be agreed to by the Company, in writing and by endorsement, prior to any loss or damage.

If conditions A and B above are not met, the Company will:

1. Not pay for loss, damage or expense caused by or resulting from: vandalism, sprinkler leakage, breakage of building glass, freezing, water damage, theft, attempted theft, any loss covered under any extension of coverage, all regardless of the cause of loss, and

2. Value all loss, damage or expense caused by a covered peril, not otherwise excluded above, at actual cash value or the actual repair/replacement cost, not to exceed USD500,000 in any one occurrence.

Any loss, damage or expense which occurs at an unscheduled location that is vacant or unoccupied at the time of loss, whether unnamed or newly acquired, will be valued at the lesser of the actual cash value, the actual replacement cost or the purchase price of the location, but in no event shall the liability of the Company exceed USD500,000 in any one occurrence. The purchase price value as discussed herein will only be considered in the case of newly acquired properties. Any exception to this limitation on recovery must be agreed to by the company, in writing and by endorsement, prior to any loss or damage.

As used in this Vacancy or Unoccupied Location Endorsement, a building is "vacant" or "unoccupied" when:

a. 70% or more of its total square footage is "vacant" or "unoccupied"; or

b. When it does not contain enough business personal property to conduct customary operations, or, it does not contain enough business personal property pertaining to activities customary to the occupancy of the building.

There is no coverage afforded under the Errors and Omissions provision of this policy for loss, damage or expense at "vacant" or "unoccupied" properties as defined above.

ENDORSEMENT 2

CANCELLATION CLAUSE AMENDMENT
DUE TO FINANCIAL STRENGTH DOWNGRADE ENDORSEMENT

It is hereby understood and agreed that Section IV, General Conditions, Clause N, Cancellation of this policy is amended.

This endorsement modifies insurance provided by the policy:

The Cancellation Provision, Cancellation Condition, or Cancellation Clause, whichever is applicable, is amended by adding the following paragraph to the end thereof:

> Notwithstanding any other terms or conditions of this policy to the contrary, in the event that the financial strength rating of the **Company** is downgraded to: (1) below A- by A.M. Best Co., or (2) below BBB by Standard & Poor's Ratings Services (hereinafter, the **Credit Rating Downgrade**), this policy may be canceled by the **FIRST NAMED INSURED** by mailing prior written notice to the Company or by surrender of this policy to the **Company**.
>
> If this policy is canceled by the **First Named Insured** due to such **Credit Rating Downgrade**, then the **Company** shall return the unearned pro rata proportion of the premium as of the effective date of cancellation and shall waive any minimum earned premium requirement specified herein.
>
> The following definitions apply to this endorsement:
>
> 1. **Company** means any Insurer participating on this Policy.
>
> 2. **First Named Insured** means the first Named Insured as shown on the Declarations page of this policy.

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS REMAIN UNCHANGED.

ENDORSEMENT 3

ECONOMIC SANCTIONS ENDORSEMENT

This endorsement modifies insurance provided by this Policy.

The Insurer shall not be deemed to provide cover and the Insurer shall not be liable to pay any claim or provide any benefit hereunder to the extent that the provision of such cover, payment of such claim or provision of such benefit would expose the Insurer, its parent company or its ultimate controlling entity to any sanction, prohibition or restriction under United Nations resolutions or the trade or economic sanctions, laws or regulations of the European Union or the United States of America.

All other terms and conditions of the policy remain the same.

PR4225 (07/13)

ENDORSEMENT 4

WAR AND TERRORISM EXCLUSION ENDORSEMENT
(applies to locations outside the USA, its territories and possessions)

Notwithstanding any provision to the contrary within this insurance or any endorsement thereto it is agreed that this insurance excludes loss, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with any of the following regardless of any other cause or event contributing concurrently or in any other sequence to the loss;

(1) war, invasion, acts of foreign enemies, hostilities or warlike operations (whether war be declared or not), civil war, rebellion, revolution, insurrection, civil commotion assuming the proportions of or amounting to an uprising, military or usurped power; or

(2) any act of terrorism.

For the purpose of this endorsement an act of terrorism means an act, including but not limited to the use of force or violence and/or the threat thereof, of any person or group(s) of persons, whether acting alone or on behalf of or in connection with any organization(s) or government(s), committed for political, religious, ideological or similar purposes including the intention to influence any government and/or to put the public, or any section of the public, in fear.

This endorsement also excludes loss, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with any action taken in controlling, preventing, suppressing or in any way relating to (1) and/or (2) above.

If the Underwriters allege that by reason of this exclusion, any loss, damage, cost or expense is not covered by this insurance the burden of proving the contrary shall be upon the Assured.
In the event any portion of this endorsement is found to be invalid or unenforceable, the remainder shall remain in full force and effect.

NMA2918
08/10/2001

EXHIBIT 6

457 P.3d 997
Supreme Court of Oklahoma.

OKLAHOMA SCHOOLS RISK MANAGEMENT TRUST, Plaintiff/Appellee,
v.
MCALESTER PUBLIC SCHOOLS, Defendant/Appellant.

No. 114,553
|
FILED 01/29/2019
|
REHEARING DENIED 04/29/2019

Synopsis

Background: Interlocal cooperative for insuring school property brought action against insured school district for declaratory judgment that loss caused by water line rupture below school was excluded. District counterclaimed for declaratory judgment and a breach of contract. The District Court, Pittsburg County, Timothy Mills, J., granted summary in favor of cooperative and denied district's motion. District appealed. The Court of Civil Appeals affirmed. District's certiorari petition was granted.

Holdings: The Supreme Court, Edmondson, J., held that:

earth movement exclusion was ambiguous and did not bar coverage, and

water exclusion was ambiguous and did not bar coverage.

Reversed and remanded.

Wyrick, V.C.J., dissented and filed opinion joined by Winchester, J.

Kauger, and Combs, JJ., dissented.

Procedural Posture(s): Petition for Writ of Certiorari; Motion for Summary Judgment.

***998 CERTIORARI TO THE OKLAHOMA COURT OF CIVIL APPEALS, DIVISION NO. 4**

¶ 0 Plaintiff brought a declaratory judgment action in Oklahoma County which was subsequently transferred to the District Court of Pittsburg County. Plaintiff sought a declaration it was not liable for losses sustained by McAlester Public Schools resulting from a ruptured water pipe in one of its schools. McAlester Public Schools answered, alleged breach of contract by plaintiff, and sought indemnification for its losses. The Honorable Timothy Mills, Associate District Judge, granted summary judgment for Oklahoma Schools Risk Management Trust on its request for declaratory relief and against McAlester Public Schools on its indemnity claim. McAlester Public Schools appealed the judgment. The Oklahoma Court of Civil Appeals, Division 4, affirmed the District Court's judgment, and McAlester Public Schools sought certiorari in the Supreme Court. We hold exclusionary clauses in an insurance policy on the issue of man-made or caused events were ambiguous based upon (1) the lack of specificity in the particular clause when a similar specificity was used in other

EXHIBIT 6

exclusionary clauses in the policy, and (2) the issue of man-made causation as applied to the particular exclusion had historically been treated by courts as ambiguous when man-made causation or a form of universal causation were not specified in the policy. We agree with McAlester Schools that OSRMT failed to show a policy-based exclusion to coverage for the event based upon earth movement and flow of water exclusions.

CERTIORARI PREVIOUSLY GRANTED; OPINION OF THE COURT OF CIVIL APPEALS VACATED; JUDGMENT OF THE DISTRICT COURT REVERSED; CAUSE REMANDED FOR FURTHER PROCEEDINGS

Attorneys and Law Firms

John C. Lennon, D. Lynn Babb, Pierce Counch Hendrickson Baysinger & Green, L.L.P., Oklahoma City, Oklahoma, for Plaintiff/Appellee.

Rex Travis, Oklahoma City, Oklahoma, for Defendant/Appellant.

Joe Ervin, Ervin & Ervin, McAlester, Oklahoma, for Defendant/Appellant.

Opinion

EDMONDSON, J.

***999** ¶ 1 The controversy presented by the parties is whether an insurance policy covers the damage to a school caused by the rupture of a water pipe beneath the school. We agree with McAlester Public Schools that the policy covers the event.

¶ 2 The Oklahoma Schools Risk Management Trust is an interlocal cooperative composed of public schools and alternative education cooperatives for the purpose of pooling their property casualty risks by a member-funded self-insurance program. The Oklahoma Schools Risk Management Trust (OSRMT) issued a Plan of Coverage to McAlester Public Schools (McAlester Schools) for the period August 15, 2012 to August 15, 2013. On August 13, 2013 a water pipe underneath one of the McAlester Schools, Parker Middle School, broke causing damage to the school.

¶ 3 The OSRMT brought a declaratory judgment action in District Court and sought an adjudication holding the Plan of Coverage for McAlester Schools did not cover the damage from the broken water pipe. McAlester Schools answered and alleged counterclaims for declaratory judgment and a breach of contract by OSRMT, and for indemnification for losses resulting from the damage allegedly covered by the Plan of Coverage. McAlester Schools sought damages "in an amount in excess of $75,000.00."[1]

1 Record on Accelerated Appeal, Tab 8, Defendant's [McAlester Schools'] Answer and Counterclaims, prayer for relief, p. 6.

¶ 4 The OSRMT filed a motion for summary judgment on its declaratory judgment cause of action. OSRMT stated the loss suffered from earth movement, or water under the ground, or "wear and tear" was excluded by the parties' agreement. OSRMT argued these policy exclusions were unambiguous.

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¶ 5 McAlester Schools filed a response to the OSRMT's motion combined with a cross-motion for summary judgment. The text of the motion states McAlester Schools is entitled to a summary judgment.

¶ 6 McAlester Schools' response stated a water supply line ruptured under the school and caused "the slab to heave under a jet of high pressure water." The response stated the rupture was a "sudden event," when the water flow was turned off to the school the slab subsided, and "there is no evidence or earth movement." McAlester Schools argued "there is no evidence of any earth movement (naturally occurring, or otherwise) was *any* cause of the damage." It also argued the earth movement exclusion did not apply because the damage was caused by "jetting water" and not natural earth movement.

¶ 7 McAlester Schools' also argued the policy's water exclusion language did not apply. The response argued the language in the policy did not address "the majority rule" where an exclusion clause for damage or loss resulting from water is understood as applied to naturally occurring water movement and ***1000** not to water movement caused or resulting from the acts of people.

¶ 8 The OSRMT responded to McAlester Schools' cross-motion for summary judgment. It argued the temporal nature of the loss-creating event as either sudden or gradual has nothing to do with the coverage exclusions at issue. The OSRMT stated "there is indeed, evidence of "earth movement" as the term is used in the Plan of Coverage, and argued the earth movement exclusion "specifically includes within its ambit: '... the action of water under the ground surface.' " The OSRMT argued the earth movement exclusion clause contained an anti-concurrent causation clause, and must be read with other language indicating "the movement of earth caused by 'the action of water under the ground surface' is still movement of the earth."

¶ 9 McAlester Schools replied and argued the only issue is "whether the earth movement exclusion (and, to some extent, the water exclusion) apply when the cause of the 'movement' (or 'water') is man-made as opposed to naturally occurring."

¶ 10 The trial court granted OSRMT's motion for summary judgment. The trial court found "pursuant to the majority teachings of *Broom*, this Court finds the relevant portions of the plan of coverage are not ambiguous [and] therefore, Plaintiff's Motion for Summary Judgment is granted."[2] McAlester Schools' motion for summary judgment was denied. McAlester Schools appealed and then sought certiorari review in this Court after the Court of Civil Appeals affirmed the trial court's judgment.

2 Journal Entry of Judgment referencing *Broom v. Wilson Paving & Excavating, Inc.*, 2015 OK 19, 356 P.3d 617.

I. Procedural Issue

¶ 11 We must first address what appears to have been decided by the trial court, what appears to have not been decided, and the effect on this Court's review of the summary judgment. OSRMT's motion for summary

judgment argued for application of more than one exclusionary clause in the policy. The exclusionary clauses invoked were (1) "earth movement," (2) "water," including "water under the ground" and (3) "wear and tear" which included as a subcategory "rust or corrosion." *Broom* relied on *Powell v. Liberty Mut. Fire Ins. Co.*,[3] where a water pipe had broken, and we discussed the relationship of this event to an earth movement exclusion in an insurance policy.[4] *Broom* did not address movement of water, or wear and tear, or rust or corrosion as separate exclusions. We did not address what factors make, or do not make, ambiguous policy exclusions other than the particular earth movement exclusion that was before the court. The trial court's journal entry granting summary judgment and expressly relying on *Broom* appears to grant judgment solely on the earth movement exclusion.

3 127 Nev. 156, 252 P.3d 668 (2011).

4 *Broom*, 2015 OK 19, ¶ 38, 356 P.3d at 631.

¶ 12 The Court of Civil Appeals stated McAlester Schools' property loss was caused by two factors, water movement and earth movement, and that both were excluded risks in the policy. The appellate court determined "a discussion of the earth movement exclusion is unnecessary" because "attention must be given to the water exclusion provision of the policy." McAlester Schools sought certiorari and argued the earth movement exclusion rationale in *Broom* applied to a water movement exclusion. OSRMT responded on certiorari and argued the trial court correctly determined that the earth movement exclusion applied. OSRMT also argued the appellate court correctly concluded a water exclusion barred any recovery by McAlester Schools. OSRMT did not raise on certiorari the application of a wear and tear exclusion, or application of the rust or corrosion language which OSRMT did raise in the trial court.

¶ 13 Generally, an appellate court will not make first instance determinations of disputed law or fact issues, and will not affirm a summary judgment based upon facts and legal issues unadjudicated by the trial court when it granted summary judgment.[5] Although a decree in equity is affirmed if it is sustainable on any rational theory when the ***1001** ultimate conclusion by the trial court is correct, a party's legal argument on appeal which is not supported with authority *supplied by counsel* will be *deemed waived* when a decree is reviewed on appeal.[6] Fundamental fairness cannot be afforded except within a framework of orderly procedure, and that fairness includes giving notice of certain judicial events altering legally cognizable rights.[7] If parties invoke a rule or principle of appellate procedure for an appellate court to determine an entire cause of action with its affirmative defenses and compulsory counterclaims *on all of the theories raised before the trial court*, then the parties must actually present those claims and theories to the appellate court in a judicially cognizable form with supporting authority where all opposing parties possess an opportunity to address them before the court. We decline to hold policy exclusions raised by OSRMT in the trial court are waived due to OSRMT failing to raise them on certiorari with supporting authority supplied by counsel.

5 *Evers v. FSF Overlake Associates*, 2003 OK 53, ¶¶ 18-19, 77 P.3d 581, 587.

6 *Matter of Estate of Vose*, 2017 OK 3, n. 1 & ¶ 10, 390 P.3d 238, 242.
Due to our disposition of the procedural issue we need not determine the underlying nature of the declaratory judgment action which became merged into the judgment which was appealed. *Cf. Osage Nation v. Board of Commissioners of Osage County*, 2017 OK 34, ¶ 55, 394 P.3d 1224, 1243 (declaratory judgment is neither strictly legal nor equitable and assumes the character of the nature of the controversy).

7 *Andrew v. Depani-Sparkes*, 2017 OK 42, ¶ 38, 396 P.3d 210, 224.

¶ 14 When parties submit a case on agreed facts an appellate court may apply the law to those facts as a court of first instance and direct judgment.[8] However, this procedure is less than ideal for parties if (1) their causes of action were not presented for a *complete and final* adjudication before either the trial court or the appellate court due to a decision-making procedure used by the trial court or the actions by the parties, or (2) the parties' legal arguments before the trial court are truncated before the appellate court due to either appellate procedure or the actions by the parties. One approach taken herein appears to be that as long as parties agree on facts, but not necessarily consequences flowing from those facts, if a trial court grants a final judgment on one legal theory of recovery, then all legal theories raised in the trial court may be decided by the appellate court regardless of the supporting authority supplied on certiorari or on appeal. McAlester Schools' Answer and Counterclaim sought damages in excess of $ 75,000.00, and its motion for summary judgment in the trial court does not seek a judgment for any money damages, specific or otherwise. A motion for summary judgment is a motion for a judgment on the merits, and a judgment on a party's motion for summary judgment must be based upon the record in support for a judgment for that party's motion and not deficiencies in the opposing party's motion.[9] The petition in error and certiorari petition do not assign as error the trial court's denial of summary judgment to McAlester Schools. We need not reach the issue of the sufficiency of McAlester Schools' motion for judgment on breach of contract, indemnity, and declaratory judgment causes of action.[10] The issue of McAlester School's quest for summary judgment relief like OSRMT's ***1002** claims for policy exclusion unresolved by our opinion herein must be decided by the trial court upon remand.[11]

8 *Rist v. Westhoma Oil Co.*, 1963 OK 126, 385 P.2d 791, 792; *Landy v. First National Bank & Trust Co. of Tulsa*, 1962 OK 12, 368 P.2d 987, 989.

9 *Osage Nation v. Board of Commissioners of Osage County*, 2017 OK 34, n. 87, 394 P.3d 1224, 1246 (an adjudication in the form of summary judgment is on the merits of a controversy); *Spirgis v. Circle K Stores, Inc.*, 1987 OK CIV APP 45, 743 P.2d 682 (approved for publication by

Supreme Court) (motion for summary judgment must be based upon the record in support for a judgment on the merits for that motion). *See, e.g.*, *Christian Heritage Acad. v. Okla. Secondary Sch. Activities Ass'n*, 483 F.3d 1025, 1030 (10th Cir. 2007) (cross motions for summary judgment are to be treated separately; the denial of one does not require the grant of another) quoting *Buell Cabinet Co. v. Sudduth*, 608 F.2d 431, 433 (10th Cir. 1979).

10 This appeal was prosecuted pursuant to Rule 1.36 which provides for the trial court filings to serve as the appellate briefs and the assignments of error on appeal are those listed in an appellant's petition in error which are supported by argument and authority. *Gaasch Estate of Gaasch v. St. Paul Fire and Marine Insurance Company*, 2018 OK 12, n. 4, 412 P.3d 1151. *See also Matter of Termination of Parental Rights*, 1993 OK 10, 847 P.2d 768, 770 (review of an opinion by the Court of Appeals is limited to those issues before us on certiorari).

11 *Parker v. Elam*, 1992 OK 32, 829 P.2d 677, 682 (a judgment, reversed and remanded, stands as if no trial has been held on remand from a reversed judgment; and the parties are entitled to introduce additional evidence, supplement the pleadings, expand issues, unless expressly or specifically limited by the appellate proceedings in error).

¶ 15 Due to the nature of the trial court's decision and the arguments raised on certiorari with supporting authority supplied by the parties, we address on certiorari the earth movement exclusion and the flow of water exclusion in the policy.

II. Analysis

¶ 16 Generally, most property insurance is often classified as (1) An "all-risk" policy covering a loss when caused by any fortuitous peril not specifically excluded by the policy; or (2) A "named-perils" policy covering only losses suffered from a peril enumerated in the policy.[12] Once an insured under an all-risk policy shows the loss is a covered loss, then the insurer has a burden to show the loss is excluded by the policy.[13]

12 *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 41 (2d Cir. 2006); *Opera Boats, Inc. v. La Reunion Francaise*, 893 F.2d 103, 105 (5th Cir.1990).

13 *Texas Eastern Transmission Corp. v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 564 (10th Cir. 1978); *Garvey v. State Farm Fire & Casualty Co.*, 48 Cal. 3d 395, 257 Cal.Rptr. 292, 770 P.2d 704, 711 (1989); *North American Foreign Trading Corp. v. Mitsui Sumitomo Ins. USA, Inc.*, 413 F.Supp.2d 295, 300-301 (S.D.N.Y. 2006).

¶ 17 We first note the coverage issue discussed by the parties. OSRMT's motion for summary judgment referenced that part of the agreement identifying "covered property" where "property not covered" includes "underground pipes, flues, or drains."[14] McAlester Schools responded and stated: "The facts are not in dispute. An underground main line water pipe beneath Parker Middle School burst, due to rust or corrosion on the outside of the buried pipe."[15] McAlester Schools recognized a cause of the damage was the rupture of an underground pipe. Concerning the "Covered Property" provision of the agreement, McAlester Schools also stated: "This provision clearly excludes reimbursement for the cost to replace property not covered — here the pipe itself."[16] OSRMT states that "all are in agreement that the underground pipe itself is not covered and there is no indemnity obligation for the pipe." Further: " 'underground pipes, flues or drains' are explicitly *defined* out of the term 'Covered Property' in the Plan of Coverage."[17] McAlester Schools' Cross-Motion for Summary Judgment did not seek reimbursement for the underground pipe: "Further, though the underground pipe itself may not be covered by the Plan of Coverage, nothing in the contract prevents coverage to other items damaged by the pipe's failure."[18]

14 Plaintiff's [OSRMT's] Motion for Summary Judgment, p. 3.

15 Defendant's [McAlester Public Schools'] Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment, at p. 5.

16 Defendant's [McAlester Public Schools'] Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment, at p. 16.

17 Plaintiff's [OSRMT's] Response to Defendant's Cross-Motion for Summary Judgment, at pp. 2-3.

18 Defendant's [McAlester Public Schools'] Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment, at p. 17.

¶ 18 The parties also discuss the nature of the agreement. McAlester Schools states the agreement is an "all-risks policy."[19] OSRMT states that it is "undisputed that this coverage structure is colloquially referred to by many as an 'All-Risks' form, although the Plan of Coverage never uses this term."[20] OSRMT states although the Plan of Coverage has the nature of all-risks nature, such characterization has no impact on the controversy.[21] Once McAlester Schools' under an all-risk policy shows loss is ***1003** a covered loss, then OSRMT has a burden to show the loss is excluded by the policy.[22] OSRMT has the burden to show the loss to covered property is excluded by the policy.

19 Defendant's [McAlester Public Schools'] Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment, at pp. 2, 4.

20 Plaintiff's [OSRMT's] Response to Defendant's Cross-Motion for Summary Judgment, at p. 2.

21 Plaintiff's [OSRMT's] Response to Defendant's Cross-Motion for Summary Judgment, at p. 2.

22 See authority cited in note 13, *supra*.

¶ 19 OSRMT argues the exclusions in the agreement apply to both naturally occurring and man-made phenomena. McAlester Schools argue the exclusions apply to only naturally occurring events and not the man-made ruptured water pipe. In *Broom v. Wilson Paving & Excavating, Inc.*, we stated the following.

> Earth movement exclusions in insurance policies "generally refer to and have historically related to catastrophic and extraordinary calamities such as earthquakes and landslides." *Peters Twp. Sch. Dist. v. Hartford Accident and Indem. Co.*, 833 F.2d 32, 35 (3d Cir.1987). Such exclusionary provisions were included in insurance policies to protect insurance companies from having to pay out on policies when catastrophic events, such as earthquakes or floods, caused damage to numerous policyholders. *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 252 P.3d 668, 672–673 (2011). "[T]he reason for the insertion of the exclusionary clause ... in all risk insurance policies is to relieve the insurer from occasional major disasters which are almost impossible to predict and thus to insure against." *Wyatt v. Nw. Mut. Ins. Co.*, 304 F.Supp. 781, 783 (D.Minn.1969).

Broom, 2015 OK 19, ¶ 33, 356 P.3d at 629.

We observed that other jurisdictions have found similar earth movement exclusions ambiguous when they typically list naturally occurring events describing earth movement but do not include unnatural events as well.[23]

23 *Broom*, 2015 OK 19, ¶ 38, 356 P.3d at 631.

¶ 20 We noted that in *Powell v. Liberty Mut. Fire Ins. Co.*, *supra*, a water pipe exploded in the Plaintiff's house, flooding the basement and causing a shift in the foundation and extensive cracking and separation in the walls and ceiling.[24] The insurance company denied coverage under the earth movement exclusion, which excluded coverage for "[e]arth movement, meaning earthquake including land shock waves or tremors before, during or after a volcanic eruption; landslide, mine subsidence; mudflow; earth sinking, rising or shifting."[25] The Nevada court reversed summary judgment in favor of the insurance company, finding that because the policy "does not include clear and unambiguous language, subject to only one interpretation, that clearly excludes the damage here, [the insurance company] is unable to deny coverage of the claim if the district court determines that the claim stems from damage caused by soil movement as a direct result of the ruptured pipe."[26]

24 *Broom*, 2015 OK 19, ¶ 38, 356 P.3d at 631.

25 *Broom*, 2015 OK 19, ¶ 38, 356 P.3d at 631, quoting *Powell v. Liberty Mut. Fire Ins. Co.*, 252 P.3d at 670.

26 *Broom*, 2015 OK 19, ¶ 38, 356 P.3d at 631, quoting [1] *Powell v. Liberty Mut. Fire Ins. Co.*, 252 P.3d at 674.

¶ 21 OSRMT asks the Court to read the agreement [or policy] as a whole and view the exclusions as referring to both naturally occurring and man-made events, which according to the OSRMT distinguish the present controversy from our opinion in *Broom v. Wilson Paving & Excavating, Inc.*, *supra*. The language relied on by OSRMT to show the loss was excluded states the following.

> B. Exclusions
>
> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> a. Ordinance Or Law ...
>
> b. Earth Movement
>
> (1) Earthquake, including any earth sinking, rising or shifting related to such event;
>
> (2) Landslide, including any earth sinking, rising or shifting related to such event;
>
> (3) Mine subsidence, meaning subsidence of a man-made mine, whether or not mining activity has ceased;
>
> (4) Earth sinking (other than sinkhole collapse), rising or shift including soil conditions which cause settling, cracking ***1004** or other disarrangement of foundations or other parts of realty. Soil conditions include contraction, expansion, freezing, thawing, erosion, improperly compacted soil and the action of water under the ground surface.
>
> But if earth movement, as described in b. (1) through (4) above, results in fire or explosion, we will pay for the loss or damage caused by that fire or explosion.
>
> (5) Volcanic eruption, explosion or effusion. ....
>
> c. Governmental Action
>
> Seizure or destruction of property by order of governmental authority. ...
>
> d. Nuclear Hazard
>
> Nuclear reaction or radiation, or radioactive contamination, however caused, ...
>
> e. Utility Services
>
> The failure of power, communication, water or other utility service supplied to the described premises, however caused, ...
>
> f. War And Military Action
>
> War, including undeclared or civil war ...
>
> g. Water
>
> (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;

(2) Mudslide or mudflow;

(3) Water that backs up or overflows from a sewer, drain, or sump; or

(4) Water under the ground surface pressing on, or flowing or seeping through;

(a) Foundations, walls, floors or paved surfaces;

(b) Basements, whether paved or not; or

(c) Doors, windows or other openings.

But if water, as described in g.(1) through g.(4) above, results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage.

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

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

a. Artificially generated electrical, magnetic or electromagnetic energy that damages, disturbs, disrupts, or otherwise interferes with any [electrical systems, devices, appliances, etc.] ...

b. Delay, loss of use or loss of market.

c. Smoke, vapor or gas from agricultural smudging nor industrial operations

d. (1) Wear and tear;

(2) Rust or corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;

(3) Smog;

(4) Settling, cracking, shrinking or expansion;

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

(6) Mechanical Breakdown, including rupture or bursting caused by centrifugal force. ...

(7) The following causes of loss to personal property: (a) Dampness or dryness of atmosphere;

(b) Changes in extremes of temperature; or

(c) Marring or scratching. ...

e. Explosion of steam boilers, steam pipes, steam engines or steam turbines owned or leased by you, or operated under your control ....

f. Continuous or repeated seepage or leakage of water, or the presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more.

OSRMT argues the language in the agreement stating "underground pipes, flues or drains" are not covered property should be read together with the exclusionary clause language, and

when so read shows that the exclusions are not ambiguous when referring to "water under the ground surface pressing on, or flowing or seeping through," and "settling, cracking, shrinking or expansion," and "earth sinking (other than sinkhole collapse), rising or shift including soil conditions which cause settling, cracking or other disarrangement ***1005** of foundations or other parts of realty [and] ... and the action of water under the ground surface." OSRMT states the exclusions in the agreement include both naturally occurring and man-made events. Further, it states "What is at issue here is the applicability of unambiguous coverage exclusionary language."

¶ 22 The parties' agreement is read as a whole giving the language its ordinary and plain meaning to carry out the parties' intentions.[27] If the language used in an insurance policy is susceptible to two interpretations from the standpoint of a reasonably prudent layperson, then the language is ambiguous.[28] The interpretation of an insurance contract and whether it is ambiguous is determined by the court as a matter of law.[29]

27 *BP America, Inc. v. State Auto Property and Casualty Ins. Co.*, 2005 OK 65, ¶ 6, 148 P.3d 832, 835.

28 *Haworth v. Jantzen*, 2006 OK 35, ¶ 13, 172 P.3d 193, 196. *See also Hensley v. State Farm Fire and Casualty Company*, 2017 OK 57, ¶ 36, 398 P.3d 11, 23 (a patent ambiguity is that which appears on the face of the instrument, and arises from the defective, obscure, or insensible language used).

29 *Max True Plastering Co. v. U.S.F. & G. Co.*, 1996 OK 28, 912 P.2d 861, 869.

¶ 23 In the policy before us, "earth movement" is referenced to "earthquake," "landslide," "mine subsidence," and "earth sinking," all similar to the language noted in *Powell v. Liberty Mut. Fire Ins. Co.*, *supra*, which was held to be ambiguous as to the event of a ruptured pipe. In *Broom* we noted the ambiguous nature of an earth movement exclusion in a policy as applied to a man-made event when earth movement exclusions are referenced in a policy to naturally occurring events. It is not a complete failure to reference man-made events in the policy which created the ambiguity in *Broom*, but the failure to expressly state man-made events are included in the earth movement exclusion.

¶ 24 We uphold "clear and unambiguous" exclusionary clauses when shown by an insurer, but a lack of specificity in the language may make an exclusion ambiguous when applied to a particular event.[30] This lack of specificity as to an event that is man-made or caused as such relates to earth movement is an issue in this controversy. The earth movement refers to mine subsidence but not expressly to ruptured water pipes. We note that other exclusions in the agreement use language attempting to include events regardless of the identified cause, *e.g.*, "nuclear reaction or radiation, or radioactive contamination, *however caused*," and "failure of power, communication, water or other utility service supplied to the described premises, *however caused*." A layperson

reading these exclusionary clauses would understand a universal causation is specified in some but not all of the exclusions, with language of universal causation being intentionally omitted from the earth movement exclusion. Generally, when an insurer creates specificity in one clause of a policy and then omits it *in a similar context*, the omission is considered purposeful and should be given meaning.[31] OSRMT's omission of language referencing universal causation occurs in an exclusionary clause which has historically been understood as referring to naturally caused events.

30 *BP America, Inc. v. State Auto Property and Casualty Ins. Co.*, 2005 OK 65, ¶ 11, 148 P.3d 832, 838 (insurer showing a clear and unambiguous exclusion clause will be judicially enforced); *Zurich American Insurance Company v. ACE American Insurance Company*, 165 A.D.3d 558, 86 N.Y.S.3d 468, 469 (2018) citing *Neuwirth v. Blue Cross & Blue Shield of Greater N.Y., Blue Cross Assn.*, 62 N.Y.2d 718, 719, 476 N.Y.S.2d 814, 465 N.E.2d 353 (1984) (the burden of establishing that a claim falls within a policy's exclusionary provisions rests with the insurer); *Clark v. Prudential Property and Cas. Ins. Co.*, 138 Idaho 538, 541, 66 P.3d 242, 245 (2003), (burden is on the insurer to use clear and precise language if it wishes to restrict the scope of coverage and exclusions not stated with specificity will not be presumed or inferred).

31 *See, e.g., O'Connell v. Liberty Mutual Fire Ins. Co.*, 43 F.Supp.3d 1093, n. 3, 1097 (D. Mont. 2014) (it is a general rule of contract interpretation that if a contract includes a level of specificity in one context and then omits that specificity in a similar context, such an omission is purposeful and should be given meaning); *Dixon v. State Mut. Ins. Co.*, 1912 OK 594, 34 Okla. 624, 126 P. 794 (maxim *expressio unius est exclusio alterius*, mention of one thing implies exclusion of another, is applied to construction of insurance policy).

***1006** ¶ 25 The "water exclusion" clause references water under the ground surface pressing on, or flowing or seeping through foundations, walls, floors or paved surfaces; or basements, whether paved or not; or doors, windows or other openings. Like the earth movement exclusion, the language is not specific as to natural causes, man-made causes, or to use the language found elsewhere in the policy, "however caused." Similar to the earth movement exclusion, some courts have determined a water movement exclusion applies to flow based upon natural causes when the policy is ambiguous.[32]

32 *See, e.g., Cantanucci v. Reliance Ins. Co.*, 43 A.D.2d 622, 349 N.Y.S.2d 187, 190-191 (1973) (by construing the exclusion to apply only to water below the surface due to natural causes, effect is given to the well-settled principle that provisions of an insurance policy are to be harmonized

and that ambiguities must be resolved in favor of the insured).

¶ 26 OSRMT states the policy should be read as a whole and an underground water pipe is not covered property and damages caused from the rupture of a non-covered property should be excluded pursuant to the exclusionary clause. Reading the policy as a whole does not allow us to conflate the policy-defined category of what is covered property with the exclusion. The policy-defined event defining an exclusion is based upon the type or nature of the event and in this agreement the exclusion is not defined based upon, or with reference to, the description of the non-covered property. This Court will not undertake to rewrite the insurance agreement or make for either party a better contract than the one which was executed. [33]

33 *Hensley v. State Farm Fire and Casualty Company*, 2017 OK 57, ¶ 32, 398 P.3d 11, 22.

¶ 27 We hold exclusionary clauses in an insurance policy on the issue of man-made or caused events were ambiguous based upon (1) the lack of specificity in the particular clause when a similar specificity was used in other exclusionary clauses in the policy, and (2) the issue of man-made causation as applied to the particular exclusion had historically been treated by courts as ambiguous when man-made causation or a form of universal causation were not specified in the policy. We agree with McAlester Schools that OSRMT failed to show a policy-based exclusion to coverage for the event based upon earth movement and flow of water exclusions.

III. Conclusion

¶ 28 The standard for appellate review of a summary judgment is *de novo* and an appellate court makes an independent and nondeferential review testing the legal sufficiency of the evidential materials used in support and against the motion for summary judgment. [34] The summary judgment for Oklahoma Schools Risk Management Trust is reversed and the controversy is remanded to the District Court for additional proceedings consistent with this opinion.

34 *Boyle v. ASAP Energy, Inc.*, 2017 OK 82, ¶ 7, 408 P.3d 183, 187-188; *Nelson v. Enid Medical Associates*, 2016 OK 69, 376 P.3d 212, 216.

¶ 29 GURICH, C.J.; EDMONDSON, COLBERT, REIF, and DARBY, JJ., concur.

¶ 30 WYRICK, V.C.J. (by separate writing); KAUGER, WINCHESTER, and COMBS, JJ., dissent.

Wyrick, V.C.J., with whom Winchester, J., joins, dissenting:

¶ 1 This case is about whether an insurance contract covers a particular incident—not whether the contract *ought* to cover it, but whether it actually does. In my view, it doesn't. So I respectfully dissent.

¶ 2 The event at issue is damage to a school that was caused when a water main buried under the school ruptured, causing water to be released at

high pressure. That water pressed up against the ground under the foundation of the school and extensively damaged the school's foundation and walls.

¶ 3 The insurance policy at issue excludes from coverage "loss or damage caused directly or indirectly by ... [w]ater under the ground surface pressing on, or flowing or seeping through ... [f]oundations, walls, floors, or paved surfaces."[1] This is so "regardless *1007 of any other cause or event that contributes concurrently or in any sequence to the loss."[2]

1 ROA, Doc. 3, Pl.'s 1st Am. Pet. for Declaratory Relief, at Ex. 1: "Plan of Coverage No. CPO-0071579-03," Form CP-11: "Div. 1 — Causes of Loss — Special Form" § B(1)(g)(4), at 2.

2 *Id.* § B(1), at 1.

¶ 4 The plain text of the contract thus excludes from coverage the event that damaged the school. The only way around this is to declare that the exclusion is ambiguous; so that is what the majority does. While it gives scant attention to the water exclusion—focusing instead almost entirely on the earth-movement exception—the majority quite conclusorily states that "some courts have determined a water movement exclusion applies to flow based upon natural causes when the policy is ambiguous."[3] But what about the exclusion is ambiguous? As best I can tell, the majority is lumping the water exclusion in with the earth-movement exclusion and concluding that the exclusion is ambiguous because it does not specify whether it applies to only natural events or both natural and man-made events.

3 Majority Op. ¶ 25.

¶ 5 But lack of specificity doesn't signal ambiguity; it signals breadth. A mother who tells her child to eat his vegetables isn't likely to be sympathetic when the child eats his carrots but leaves his broccoli untouched because "Mom, you didn't say that I had to eat my carrots *and* my broccoli." This is so because we understand a term to include everything that naturally falls within the term's plain meaning, unless otherwise specified or unless context dictates otherwise. Even if that weren't so, the water exclusion's statement that it applies "regardless of any other cause" strengthens the conclusion that the exclusion applies to all losses caused by underground water pressing up against foundations, regardless of whether that water came from a pipe or an aquifer.

¶ 6 To be clear, I don't fault McAlester Public Schools for thinking that this event ought to be covered—I, for one, would want insurance that protects my property from bursting water mains. Unfortunately, the school district bought insurance that does not, and courts are not (or at least they shouldn't be) in the business of re-writing contracts, even if a court's view of the equities tilts in the insured's favor. On that point, it's worth remembering that the insurer is the Oklahoma Schools Risk Management Trust, which is managed by Oklahoma public school officials and whose members are self-insuring Oklahoma school districts like the McAlester Public Schools.[4] The Trust didn't deny the claim in bad faith; it denied it because the loss is plainly excluded. The district court agreed, and so did the Court of Civil Appeals. The plain language of the exclusion plainly

barred this claim then, and it continues to do so now.

4 Oklahoma Schools Risk Management Trust, https://www.osrmt.org (last visited Jan. 28, 2019).

¶ 7 The judgment below should be affirmed.

All Citations

457 P.3d 997, 374 Ed. Law Rep. 756, 2019 OK 3

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EXHIBIT 7

KeyCite Yellow Flag - Negative Treatment
Distinguished by Dworkin v. Hustler Magazine, Inc., D.Wyo., November 18, 1986

579 F.2d 561
United States Court of Appeals,
Tenth Circuit.

TEXAS EASTERN TRANSMISSION CORPORATION, Plaintiff-Appellee,
v.
MARINE OFFICE-APPLETON & COX CORPORATION, Defendant,
and
Kansas City Fire & Marine Insurance Company, Defendant-Appellant,
Fenix & Scisson, Inc.,
Intervenor-Appellee.

No. 76-1885.
|
June 23, 1978.
|
Rehearing Denied Aug. 4, 1978.

Synopsis

Insured brought action against insurer to recover under all-risks policy for damage to underground storage cavern resulting from collapse, and contractor intervened. The United States District Court for the Western District of Oklahoma, Ralph G. Thompson, J., entered judgment for insured, and insurer appealed. The Court of Appeals, Logan, Circuit Judge, held that: (1) evidence sustained finding that the parties to insurance contract intended to insure against collapse of cavern under circumstances which occurred, and that collapse was not excluded by the "deficiency in design" clause of the policy; (2) trial court adequately instructed on definition of fortuity and on the affirmative defenses and properly informed jury of its responsibilities; (3) trial court did not abuse its discretion in admitting evidence concerning labor violence on the project as one of several possible causes for the collapse; (4) insured's counsel's reference in closing argument to defendant insurer as a company from New York trying to get away without paying legitimate claim in Oklahoma did not constitute prejudicial error, and (5) trial court did not abuse its discretion in refusing insurer's motion to transfer to Illinois where collapse occurred.

Affirmed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

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EXHIBIT 7

Before SETH, Chief Judge, and LEWIS and LOGAN, Circuit Judges.

Opinion

LOGAN, Circuit Judge.

This is a diversity case involving coverage under an insurance contract in a dispute between the insureds, Texas Eastern Transmission Corporation (Texas Eastern or ***563** plaintiff) and Fenix & Scisson, Inc. (Fenix & Scisson or intervenor) on the one hand and Kansas City Fire & Marine Insurance Company (Kansas City Fire & Marine or defendant), the insuror. Damages were stipulated, and the issue of liability under the policy was tried to a jury which found for Texas Eastern and Fenix & Scisson against Kansas City Fire & Marine, which has appealed to this Court.

A considerable amount is in controversy, as the judgments totalled $1,655,425.69. Issues on appeal include questions of interpretation of the insurance contract, burden of proof, jury instructions, allegedly prejudicial evidence, counsel's argument to the jury, venue, and whether post-judgment interest was improperly awarded on prejudgment interest.

Briefly the action involves the collapse of an underground storage cavern being constructed to hold approximately 200,000 barrels of liquified petroleum gas, at a time when construction was about 97% Completed. The cavern was being built near Lick Creek, Illinois, by Fenix & Scisson for Texas Eastern. The parties had acquired an "all risks" insurance policy from Kansas City Fire & Marine. The policy defines the property covered as:

> LPG underground cavern consisting of shaft and mined cavern and all labor and completed work or work in progress, including any and all materials, equipment, machinery and appurtenances in which the Insured has an interest or for which the Insured may be liable or assumed liability prior to loss or damage, to be used in or incidental to the installation or completion of: 200,000 barrel cavern at Texas Eastern Transmission Corporation's Terminal near Lick Creek, Illinois.

Under the heading "perils insured" it states:

> This policy insures against all risks of direct physical loss of or damage to the property covered, except as provided elsewhere in this policy.

Under the heading "perils not insured," as relevant here, it provides:

This policy does not insure against:
1. Loss, damage or expense caused by or resulting from error, omission, or deficiency

in design, specifications, workmanship, or materials . . .

7. Loss, damage or expense caused by or resulting from dryness or dampness of atmosphere; . . .

The cavern collapsed in the middle of the night, at a time when no one was in it and the only persons known to be on the job site were two night security guards at the surface. There was no obvious earthquake, explosive sound or other unusual phenomenon except popping and cracking of the tin shaft construction building and settling of the earth. After the collapse it was impossible to enter the cavern, and the shafts were so full of rock that not even a TV camera could be lowered to a point where it could provide a meaningful look at the damage.

When plaintiff and intervenor sought payment under the insurance policy they merely listed the origin and cause of the loss as "collapse" of the cavern. The defendant refused to pay in a letter asserting "there is no indication that this loss was caused by a fortuitous occurrence but on the contrary the indications up to this point are that the loss falls within the exclusions set out in the policy."

At trial plaintiff and intervenor showed that Fenix & Scisson was the pioneer in the construction of LPG underground storage caverns, having built approximately 70 of them, about 90% Of all such facilities in the noncommunist countries of the world. This was the fourteenth cavern it had constructed for Texas Eastern.

They presented evidence that a feasibility study and plans and specifications had been prepared and presented to Kansas City Fire & Marine at the time of application for the insurance policy, prior to commencement of construction. This was the 11th successive cavern Fenix & Scisson had insured with Kansas City Fire & Marine under similar policies. No objections to the plans were ***564** made by the insuror, and no inspections or complaints were made during construction prior to the collapse.

Evidence at the trial by plaintiff and intervenor was to the effect that the design of the Lick Creek cavern was similar to that of 31 caverns previously built in shale by Fenix & Scisson which were completed and placed in operation without any problems. Much evidence was introduced as to the room and pillar method of construction used here and in the other caverns, and testimony was presented by various witnesses, some qualified as experts, to the effect that this was by all appearances a good cavern which should not have collapsed. Some of the witnesses had made inspections within a few days of the collapse. One exhibit was a drawing containing dimensions of spaces and pillars made from a survey completed less than ten days prior to the collapse. Various theories were advanced by different witnesses, but they did not agree as to the probable cause of the collapse.

Defendant's evidence concentrated generally upon showing that the cavern was in poor condition throughout much of the construction period, with water present, and much slabbing and sluffing off of the pillars. Its evidence tended to show pillar failure as the cause of the cave-in, with the pillars too small to

support the weight of the overburden. It also presented testimony that an earthquake, even if one occurred, would be unlikely to cause the collapse, and that sabotage was virtually impossible as a potential cause of the loss.

I

The most important issue here is the proper interpretation of the insurance policy in the context of the facts of this case. The policy is admitted to be "all risks," a standard type of insurance of increasing popularity.

> A policy of insurance insuring against "all risks" is to be considered as creating a special type of insurance extending to risks not usually contemplated, and recovery under the policy will generally be allowed, at least for all losses of a fortuitous nature, in the absence of fraud or other intentional misconduct of the insured, unless the policy contains a specific provision expressly excluding the loss from coverage. No case has been found denying the above proposition, . . . (footnotes omitted).

Annot., 88 A.L.R.2d 1122, 1125 (1963).

The general rule, in accordance with the trial court's instructions to the jury in the instant case, is that the burden is upon the insured to prove that a loss occurred and that it was due to some fortuitous event or circumstance. See British and Foreign Marine Ins. Co., Ltd., v. Gaunt, (1921) 2 A.C. 41;British and Foreign Marine Ins. Co., Ltd., v. Gaunt, (1921) 2 A.C. 41; Atlantic Lines Ltd. v. American Motorists Ins. Co., 547 F.2d 11 (2d Cir. 1976). Then the burden shifts to the defendant to show that the loss was one excluded by some language set out in the policy.

The Restatement of Contracts s 291, comment a (1932) defines fortuitous event in terms of the parties' expectations:

> A fortuitous event . . . is an event which so far as the parties to the contract are aware, is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event, as the loss of a vessel, provided that the fact is unknown to the parties.

Acknowledging as authority such cases as British and Foreign Marine Ins. Co., Ltd., which hold that the insured need not prove the cause of loss, defendant here asserts that as a practical matter proof of cause of the loss is necessary in order to establish that the loss was by a fortuity. Defendant's theory is that the collapse was caused by a deficiency in the design of the underground cavern, that the evidence supports only that conclusion, but that the insured parties also must lose because they

failed to establish an "external" cause of the collapse.

Defendant's contentions are similar to those made in *565 Plaza Equities Corp. v. Aetna Casualty and Surety Co., 372 F.Supp. 1325 (S.D.N.Y.1974) where a 7,000 pound sculpture was attached to the roof of a shopping center, without supporting columns being added to the roof. The loss was found to be within the deficiency in design exclusion when the sculpture fell through the roof because the underlying structures would not support it.

The problem in the context of this case is that it is difficult to see what risks the insurance company was insuring against if the defendant's position is upheld. Its own expert testified that most earthquakes would not cause the cavern to collapse if it was properly constructed, and that it would be very difficult for saboteurs to set charges which would make a pillar collapse. No danger of fire, windstorm or the like would exist in this underground cavern.

Fenix & Scisson is the principal contractor in the entire world with respect to this type of structure. It had built approximately 70 underground storage caverns before undertaking this one, of which 31 were in shale formations which it believed were substantially similar to the substructures here. Those 31 were successfully completed and functioning at the time of the contract and later trial. Feasibility studies Fenix & Scisson made indicated no essential differences between the underlying geology involved here and the other shale caverns it had built. The plans and specifications, which it submitted along with its feasibility study to the insurance company prior to the entering into the insurance contract, were for a design similar to the other shale caverns, calling for room and pillar construction of the same type and using supporting columns of the same size as before.

In the context of the instant case we believe the facts support a finding that the parties intended to insure against collapse of the cavern under the circumstances which occurred here. When past experience indicated that this particular design would be satisfactory, and it was not for some reason which is uncertain, a fortuitous event occurred within the loss provisions of the contract, not excluded by the "deficiency in design" clause.

Texas Eastern and Fenix & Scisson met their burden of proof by showing the feasibility study, plans and specifications, their submission to the insurance company as a basis for the issuance of the policy, and the similarity to the previously constructed caverns which were satisfactorily completed. They presented evidence of several experts that this was a good cavern, to all appearances, shortly before the event and one which should not have collapsed.

There was testimony that the cavern as constructed deviated somewhat from the precise dimensions of the columns and spacings in the plan, caused either by modification required when an unexpected fault was encountered, or workmen's error. Negligence of the employees of the contractor is not an excluded peril under the contract, as defendant admits. See Equitable Fire and Marine Insurance Co. v. Allied Steel Construction Co., 421 F.2d 512 (10th Cir. 1970). And the cases hold that if there is a concurrence of negligence and an excluded peril such as an inherent defect, then coverage

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applies under an "all risks" policy. E. g., General American Transportation Corp. v. Sun Insurance Office, Ltd., 369 F.2d 906 (6th Cir. 1966).

To a great extent the cases in this area are Sui generis because they turn upon the peculiar facts involved which are different in each situation. There are several cases which we believe are analogous, however.

In General American Transportation Corp. v. Sun Insurance Office, Ltd., supra, the project involved erection of an underground silo as a part of a propulsion engine altitude test facility. During the time fresh concrete was being poured to complete the cap of the structure, a temporary shoring platform collapsed under the weight of the concrete and the entire temporary steel falsework and the fresh concrete fell 250 feet to the bottom of the silo, killing four people and causing vast property damage. Workmen's error in the prefabrication of a flange on a truss, which apparently failed and permitted increased deflection of the truss, resulting in local or general buckling ***566** and overloading of adjacent trusses, was found to be one of the causes of the loss. Against an argument that the collapse was inevitable as the direct result of a faulty design, the court affirmed a finding of coverage under an "all risks" policy.

In Essex House v. St. Paul Fire and Marine Ins. Co., 404 F.Supp. 978 (S.D.Ohio 1975), there was a brick failure on an insured commercial building whereby a considerable portion of the face brick detached from the back-up block and fell to the ground. Upon a showing of numerous deficiencies in the construction of the brick facing creating conditions of overstress, the insurer attempted to escape liability under an "inherent or latent defect" exclusion. The court held the collapse to be a fortuitous event covered by the policy and not within the exclusion claimed by the insuror.

In Millers Mutual Fire Ins. Co. v. Murrell, 362 S.W.2d 868 (Tex.Civ.App.1962) a house partially collapsed as a result of earth movement beneath it. The all risks policy had exclusions for "settling, shrinkage, or expansion in foundations, walls, floors, or ceilings," except for "landslide, total or partial collapse . . . " The insuror argued that the earth movement which caused the damage was inevitable hence not fortuitous; it was certain from the time the house was built that the damage would happen, and therefore there was no risk to be insured. All of the experts testified, after examining the soil under the home, that damage like that which occurred was inevitable. Still the court held that the policy coverage applied, obviously rejecting the type of reasoning urged by Kansas City Fire & Marine in the instant case.

II

Some of defendant's objections to the jury instructions result from a different view of the policy language than that taken above, on the essential elements to be proved by the insured parties and affirmative defenses by the insurance company. We hold that in the context of this case the trial judge adequately instructed on the definition of fortuity and on the affirmative defenses.

The proper rule of construction is stated in Equitable Fire and Marine Ins. Co. v. Allied Steel Construction Co., 421 F.2d 512, 513 (10th Cir. 1970), applying Oklahoma law, in the context of an all risks policy with the same deficiency in design exclusion involved here:

> The primary attempt must be to construe the contract so as to give effect to all the provisions, giving the terms their plain and ordinary meaning. And where there are exceptions or exclusions in the policy which exempt the insurer from certain specified risks, those exemptions are to be construed strictly against the insurer when their application is doubtful (footnote omitted).

See also Universal Underwriters Ins. Co. v. Bush, 272 F.2d 675 (10th Cir. 1959).

There was an issue of ambiguity here, really a fact issue, as to the intention of the parties with respect to the exclusions in the context of this policy covering cavern construction. The instructions must be viewed as a whole, Connecticut Fire Ins. Co. v. Fox, 361 F.2d 1, 6 (10th Cir. 1966); so considered, they properly informed the jury of its responsibility and were not prejudicial.

III

At trial there was testimony and comments of counsel concerning labor unrest, previous acts of sabotage and vandalism on the cavern project, and inferences that sabotage could be a cause of the loss. On this appeal the insurer contends that this evidence is irrelevant under Fed.R.Evid. 401, or if relevant, its probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues, and hence it should have been excluded in accordance with Fed.R.Evid. 403.

The determination of whether the evidence is relevant is a matter within the sound discretion of the trial court, and we will not disturb that decision on appeal absent a showing of a clear abuse of discretion. Young v. Anderson, 513 F.2d 969 (10th Cir. 1975). See also 1 Weinstein's ***567** Evidence P 401(01), at 401-7 (1977). Even though the evidence is found to be relevant, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues. Fed.R.Evid. 403. The burden also falls on the trial court to balance the probative value of the evidence against its potential for prejudicing the jury, and we will not reverse that determination absent an abuse of discretion. Rigby v. Beech Aircraft Co., 548 F.2d 288 (10th Cir. 1977).

We cannot say the trial judge abused his discretion in allowing the introduction of testimony concerning labor violence on the project. There had been substantial damage at the project in an early labor dispute, and the National Labor Relations Board handed down a decision against the local union, finding it guilty of unfair labor practices, just about 12 days prior to the cavern collapse. Our review of

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the record indicates that this evidence did not play a major role in the trial. It was presented as just one of several possibilities for a cause of the collapse. Most mention of it was actually in the statements of counsel. There were no comments or inferences that the men who testified for defendant were involved in the earlier sabotage or had anything to do with the cavern's collapse.

IV

Defendant Kansas City Fire & Marine claims the closing argument of plaintiff's counsel prejudiced the jury. Counsel's references to defendant as an insurance company from New York trying to get away without paying legitimate claims in Oklahoma is said to be inflammatory and calculated to prejudice the jury.

This case was hotly contested by excellent attorneys representing parties who are all relatively large corporations. Counsel vigorously pursued their respective theories. Under those conditions an appellate court must rely upon an experienced trial judge to keep the trial within the bounds of decorum and justice. Major deviations rendering the proceeding a circus are grounds for reversal, but the conduct must be highly reprehensible.

> (A)ppellate courts should exercise great caution in setting aside a judgment because of remarks made by counsel in closing argument during a hotly contested case, and even though the argument be improper, the judgment should not be disturbed unless it clearly appears that the remarks in question unduly aroused the sympathy of the jury and thereby influenced the verdict.

Julander v. Ford Motor Co., 488 F.2d 839, 842 (10th Cir. 1973). There is no indication in the record that counsel objected to the statements prior to filing its motion for new trial.

We have read the jury arguments of the lawyers. They were all somewhat emotional, and no doubt the one complained of was more "country" than the others. But all were good examples of the art of jury argument, and we see no prejudicial error in any of those arguments, viewed as a whole.

V

Defendant asserts that the trial court abused its discretion when it refused to transfer the trial to Illinois, where the collapsed cavern was located. A district court may transfer any civil action for the convenience of the parties and witnesses and in the interests of justice to any forum where the action could have been brought. 28 U.S.C. s 1404(a). The moving party has the burden to show that the existing forum is inconvenient. Plaintiff's choice is also given considerable weight. Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145, 147 (10th Cir. 1967).

> The transfer lies within the sound judicial discretion of the trial judge and his determination should not be rejected unless the appellate court can say there has been a clear abuse of discretion. (Footnote omitted.)

Id.

The contract was proposed and executed in Oklahoma. The parties agree that Oklahoma law governs this dispute. Oklahoma ***568** was plaintiff's choice of forum; it is not clearly an inconvenient forum. Although most witnesses did not reside in the district where the trial took place, proximity to the courthouse is only one factor to consider in a s 1404(a) motion. The decision of the trial court was not clearly an abuse of discretion.

VI

Finally, Kansas City Fire & Marine contends that the award of post-judgment interest upon prejudgment interest was improper.

At pretrial the parties stipulated that:

> Any principal amount recoverable herein will bear interest at the rate of six per cent (6%) per annum from December 27, 1973, to date of judgment, and thereafter as provided by law.

In our opinion this stipulation contemplates that if the insurance company should lose, as it did, the amount payable under the policy (later stipulated by the parties) should bear interest at six per cent until the date of the district court's judgment. Thereafter, during a period of appeal or until otherwise paid, the entire judgment, including the accrued six per cent interest, would bear interest at the legal rate provided by law. The law of Oklahoma controls and provides ten per cent interest from the date of rendition of the judgment. 28 U.S.C. s 1961; Okl.Stat. tit. 12, s 727.

But even if the stipulation is not to be given that effect, the general rule is that "a judgment bears interest on the whole amount thereof, although such amount is made up partly of interest on the original obligation, and even though the interest is separately stated in the judgment." 47 C.J.S. Interest s 21b (1946) (footnotes omitted). Oklahoma law is in accord with this rule. First National Bank and Trust Co. v. Exchange National Bank and Trust Co., 517 P.2d 805 (Okl.App.1973); Nichols v. T.I.M.E.-D.C., Inc., 373 F.Supp. 811 (E.D.Okl.1973).

For the reasons stated, the judgment is AFFIRMED.

All Citations

579 F.2d 561, 3 Fed. R. Evid. Serv. 27

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EXHIBIT 8

KeyCite Red Flag - Severe Negative Treatment
Order Vacated by Oregon Shakespeare Festival Association v. Great American Insurance Company, D.Or., March 6, 2017

2016 WL 3267247
Only the Westlaw citation
is currently available.
United States District Court, D. Oregon,
Medford Division.

OREGON SHAKESPEARE FESTIVAL ASSOCIATION, Plaintiff,
v.
GREAT AMERICAN INSURANCE COMPANY, Defendant,

Case No. 1:15-cv-01932-CL
|
Signed June 7, 2016

Attorneys and Law Firms

Michael E. Farnell, Parsons Farnell & Grein, LLP, Portland, OR, for Plaintiff.

Matthew E. Hedberg, Douglas G. Houser, Bullivant Houser Bailey, PC, Portland, OR, for Defendant.

ORDER

CLARKE, Magistrate Judge

*1 Plaintiff Oregon Shakespeare Festival Association, the insured, brings this cause of action against first party insurance carrier defendant Great American Insurance Company for denial of coverage under a property insurance policy. Plaintiff claims it suffered loss or damage to property when smoke from a nearby wildfire filled the Allen Elizabethan Theatre in the summer of 2013, causing Plaintiff to cancel performances and lose business income. This case comes before the Court on the defendant's amended motion for summary judgment (#25) and Plaintiff's cross motion for partial summary judgment (#17). For the reasons below, defendant's motion is GRANTED in part and DENIED in part, and Plaintiff's motion is GRANTED.

LEGAL STANDARD

Summary judgment shall be granted when the record shows that there is no genuine dispute as to any material of fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party has the initial burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc). The court cannot weigh the evidence or determine the truth but may only determine whether there is a genuine issue of fact. *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 800 (9th Cir. 2002). An issue of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

When a properly supported motion for summary judgment is made, the burden shifts to the opposing party to set forth specific facts showing that there is a genuine issue for trial. *Id.* at 250. Conclusory allegations, unsupported by factual material,

EXHIBIT
8

are insufficient to defeat a motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposing party must, by affidavit or as otherwise provided by Rule 56, designate specific facts which show there is a genuine issue for trial. *Devereaux*, 263 F.3d at 1076. In assessing whether a party has met its burden, the court views the evidence in the light most favorable to the non-moving party. *Allen v. City of Los Angeles*, 66 F.3d 1052, 1056 (9th Cir. 1995).

FACTUAL BACKGROUND

Plaintiff Oregon Shakespeare Festival Association (OSF) operates the Oregon Shakespeare Festival in Ashland, Oregon. The Festival takes place at three live stage production venues owned by OSF. Two of the venues, the Angus Bowmer Theatre and the Thomas Theatre, are fully enclosed. The third venue, the Allen Elizabethan Theatre, is an open-air, partially enclosed structure. It is walled and enclosed, but the roof does not extend over the entirety of the top of the building.

In late July and early August, 2013, smoke from several different wildfires was present in the area. The fires caused smoke, soot, and ash to accumulate on the surface of the hard plastic seats and concrete ground of OSF's open-air theater. According to Director of Production Alys Holden, the ash and soot consisted of "very small ashes and dust." The smoke, ashes, and dust permeated the interior of the theatre, coating the seating, HVAC, lighting, and electronic systems.

*2 OSF's Executive Director Cynthia Rider decided to cancel a total of four separate evening performances due to health concerns from the poor air quality caused by the wildfire smoke. The performances had been scheduled to take place at OSF's Allen Elizabethan Theatre at 8:00 p.m. on July 30, July 31, August 1, and August 7, 2013.

Ms. Rider reached her decision on the night of each scheduled performance after consulting with a special committee, of which she was the chairperson, comprised of a total of eight OSF employees and managers. The committee included: OSF's Associate Producers, Kimberley Barry, Claudia Allen, and Ted DeLong, Director of Production Alys Holden, Associate Artistic Director Christopher Acebo, its Director of Marketing and Communications Mallory Pierce, and Director of the American Revolutions Program Alison Carey. The committee created, and relied upon, documents setting forth specific criteria regarding potential performance cancellation.

Each evening during late July and early August of 2013, the committee met at 6:15-6:30 p.m. to determine whether or not to cancel the regularly scheduled 8:00 p.m. performance at the Allen Elizabethan Theatre. Decisions were announced by 7:00 p.m., prior to each performance. The committee also assigned a "smoke team" each evening that performances went on as scheduled. The members of the "smoke team" met at 7:30 p.m. and stayed through intermission or the end of the performance, depending on weather conditions. The "smoke team" determined

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whether any last minute cancellations needed to take place.

The committee's decisions each evening included an analysis of: (1) current weather conditions, (2) the forecast for the remainder of the evening, and (3) the health status of the actors. Specifically, if the Air Quality Rating was "Good to Moderate," the performance would continue as planned. If the Air Quality Rating was "Unhealthy to Hazardous," the performance would be cancelled. If the Air Quality Rating was "Unhealthy for Sensitive Groups," the committee would make a determination based on the following, specific criteria:

1. Ashland Air Quality / Particle Data (specifically the one hour average PM2.5 and instantaneous reading taken during the show from the Ashland monitoring device "R2D2")

2. Trending of the air quality data

3. Forecast for evening—consultation with the Weather Service Office

4. Visibility

5. Current air quality conditions in and around the Elizabethan Theatre

6. Conditions in Medford (only if Ashland data is unavailable or Medford conditions are pertinent to the Ashland weather forecast)

7. Is performance possible with alterations, e.g., slowing down stage combat, etc?

8. Is performance possible with curtain time delay (latest start time 9:00 p.m.)?

During the show, the committee also relied on feedback from cast members regarding their physical ability to continue performing.

Executive Director Rider testified during her Examination Under Oath that the reason OSF cancelled the performances was due to "air quality from surrounding forest fires." OSF's Associate Producer of Stage Management, Kimberley Barry, confirmed that the performances were cancelled due to poor air quality. Ms. Barry testified that there "had been concerns about the forest fires and what affect the smoke related to fires could affect the well-being of the company and audience. The company, meaning the actors and crew working in the outdoor theater." Jerry Roos, OSF's Director of Finance and Administration, testified that, in making the decision to cancel performances, OSF's "primary concern was for our acting company and our production staff and our patrons."

***3** In addition to the concern expressed by OSF employees and managers, a number of the OSF actors and performers, including the actors' union equity deputy, were concerned about performing in smoky conditions. According to Ms. Barry, after a union representative spoke with OSF actor Anthony Heald, OSF was told to cancel performances due to "health concerns because of air quality."

Ms. Rider confirmed that no federal, state, local agency, or public authority of any kind, such as the Environmental Protection Agency or Oregon Department of Environmental Quality,

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ordered cancellation of the performances due to air quality concerns. Ms. Rider also admitted that OSF does not know which fire caused the smoke, or how far away the fire was located.

During defendant GAIC's investigation of the claim, OSF representatives and employees confirmed that, even though there was some temporary accumulation of soot and ash on the surface of the open-air theater, OSF did not suffer any permanent or structural damage to its property. Indeed, it is undisputed that the performances were cancelled due to poor air quality and the related health concerns.

The outdoor theater floor is made of concrete and the seats are made of hard resin plastic. OSF employees testified that they cleaned up the soot and ash well before any scheduled performances each day using rags and buckets of water; no special chemicals or other cleaning equipment were needed. OSF employees testified that it took them between 20 minutes and one hour each day to clean up the soot and ash in the open-air theater.

OSF employees were not paid overtime for the time spent cleaning the soot and ash. OSF employees testified that their schedules remained the same, but their duties were slightly reallocated to deal with the soot and ash. OSF employees changed air filters three or four times during this period. OSF employees completed the clean-up by mid-afternoon each day, and OSF never had to cancel an 8:00 p.m. evening performance due to clean-up.

There were days during the smoky time period that soot or ash landed on the seats in the open-air theater and OSF chose not to cancel the performance that evening. Ms. Rider stated that the decision of whether to remain open or cancel was based on the perceived "level of particulates in the air" and considerations such as "[w]ere your eyes itchy, was your throat [itchy], were you having trouble breathing" were factors OSF considered in making the decision to cancel performances. Ms. Tacconi stated that if the air quality had been better, OSF would have been in a position to hold performances each night.

On July 30, 2013, (the date of the first performance cancellation), the Air Quality Index ("AQI") registered a high of 400 PM2.5, which constituted "very unhealthy" conditions. On July 31, 2013, (the date of the second performance cancellation), the AQI again registered a high of 400 PM2.5. On August 1, 2013, (the date of the third performance cancellation), the AQI registered a high of around 250 PM2.5, which constituted "unhealthy" conditions. On August 7, 2013, (the date of the fourth performance cancellation), the AQI registered a high of approximately 220 PM2.5, which constituted "unhealthy" conditions. On August 6, 2013, (a night in which performances were not cancelled), the AQI registered a high of approximately 150 PM2.5, which also constituted "unhealthy" conditions. On August 8, 2013, (a night in which performances were not cancelled), the AQI registered a high of approximately 200 PM2.5, which constituted "unhealthy" conditions.

APPLICABLE INSURANCE POLICY PROVISIONS

*4 The applicable Policy terms state:

Building and Personal Property Coverage Form

A. Coverage

We will pay for direct physical loss of or damage to covered property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

...

Business Income (and Extra Expense) Coverage Form

A. Coverage

1. Business Income

...

We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to property at the premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations.

...

The policy, amended by endorsement, defines "period of restoration," in part, as:

The period of time that:

a. Begins:

1. at the time of direct physical loss or damage for Business Income Coverage; or

2. immediately after the time of direct physical loss or damage for Extra Expense Coverage;

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

b. Ends on the earlier of:

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

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

Causes of Loss – Special Form

A. Covered Causes of Loss

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

B. Exclusions

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

i. Ordinance or Law

...

ii. Earth Movement

...

iii. Governmental Action

...

iv. Nuclear Hazard

...

v. Utility Services

...

vi. War and Military Action

...

vii. Water

...

viii. "Fungus," Wet Rot, Dry Rot, and Bacteria

...

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

a. Artificially generated electrical, magnetic or electromagnetic energy that damages, disturbs, disrupts or otherwise interferes with any: (1) electrical or electronic device, appliance, system, or network; or (2) device, appliance, system or network utilizing cellular or satellite technology.

...

b. Delay, loss of use or loss of market.

c. Smoke, vapor or gas from agricultural smudging or industrial operations.

d. (1) wear and tear, (2) rust or other corrosion, decay, deterioration, hidden or latent defect... (3) smog, (4) settling, cracking, shrinking or expansion, (5) nesting or infestation... (6) mechanical breakdown....

...

DISCUSSION

I. Plaintiff's claim is covered by the policy because the Elizabethan Theatre sustained "physical loss or damage to property" when the wildfire smoke infiltrated the theater and rendered it unusable for its intended purpose.

Determining whether insurance coverage exists is a two-step process under Oregon law. The insured has the burden of proof of first establishing that the loss falls within the scope of the policy's coverage grant. *ZRZ Realty Co. v. Beneficial Fire and Cas. Ins. Co.*, 222 Or. App. 453, 465, 194 P.3d 167, 174 (2008) (citations omitted). If the insured meets its initial burden, the insurer then bears the burden of establishing that the loss is excluded by specific language in the policy. *Id.* However, for a court interpreting an insurance

policy's terms in Oregon, "[t]he primary and governing rule of the construction of insurance contracts is to ascertain the intention of the parties." *Hoffman Const. Co. of Alaska v. Fred S. James & Co. of Oregon*, 313 Or. 464, 469, 836 P.2d 703, 706 (1992) ("*Hoffman*") (quoting *Totten v. New York Life Ins. Co.*, 298 Or. 765, 770, 696 P.2d 1082 (1985)). The court determines the intention of the parties based on the terms and conditions of the insurance policy. *Id.* (citing ORS 742.016). If the insurance policy does not define the crucial term, the court is required to give the term meaning in the context of the dispute. *Id.*

*5 If the parties submit two or more plausible interpretations of the term, the court must examine the interpretations in light of the particular context of that term in the policy, as well as the broader context of the policy as a whole. *See* *Hoffman*, 313 Or. at 470, 836 P.2d at 706. "If two or more plausible interpretations of the term withstand scrutiny, i.e., continues to be reasonable," after such an examination, the term is considered ambiguous. Such an ambiguity "justifies application of the rule of construction against the insurer." *Id.* "That is, when two or more competing, plausible interpretations prove to be reasonable after all other methods for resolving the dispute over the meaning of particular words fail, then the rule of interpretation against the drafter of the language becomes applicable, because the ambiguity cannot be permitted to survive." *Id.*

a. The plain meaning of the terms of the Policy favors coverage.

In this case, the parties disagree over the term "direct physical loss of or damage to covered property." The parties agree that the Allen Elizabethan Theatre is "covered property," but they dispute whether the smoke that filled the partially-enclosed, open-air facility constituted "direct physical loss or damage," such that another provision – the loss of business income coverage – is activated. The insurance policy does not define the term "direct physical loss or damage."

Plaintiff defines the terms in question by relying on Webster's Dictionary, defining "physical" as "of or belonging to all created existence; relating to or in accordance with the laws of nature; of or relating to natural or material things as opposed to things mental, moral, or spiritual." Plf. Mtn. 14 (#17) (citing Webster's Third New Int.l Dictionary 1339 (unabridged ed. 1993)). Plaintiff distills this definition down to mean a "natural or material thing." *Id.* "Loss" is defined as the "state or act of being destroyed or placed beyond recovery" or the "amount of an insured's financial detriment due to the occurrence of a stipulated event..." *Id.* "Damage" means "loss due to injury; injury or harm to person, property, or reputation." *Id.* Plaintiff asserts that these definitions, taken together, create a plain meaning of "physical loss or damage" as "any injury or harm to a natural or material thing." Based on this interpretation, Plaintiff claims that the wildfire smoke caused injury or harm to the interior of the theater, which includes the air within the theater.

Defendant disputes this definition, arguing that the air in the theater cannot be insured by the policy because such air is not "property."

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The policy itself does not give any indication that the air within a covered building cannot suffer contamination or infiltration such that "physical loss of or damage to property" exists.

Defendant nevertheless stresses that the loss or damage must be *physical*, but does not give a sufficient explanation for why air is not physical. Certainly, air is not mental or emotional, nor is it theoretical. For example, if the dispute were over the theater's reputation or its fair market value, the Court might be inclined to agree with the Defendant. By contrast, while air may often be invisible to the naked eye, surely the fact that air has physical properties cannot reasonably be disputed. Defendant's contention implies a different definition of "physical" altogether. Defendant implies that, in order to be "physical," the loss or damage must be *structural* to the building itself. Defendant does not provide any evidence from within the policy to show that the plain meaning of the term "physical" includes such a limitation.

Additionally, defendant argues that the smoke in the air at the theater did not require any "repairs" to the structure of the property; therefore, there was no "period of restoration" such that business income loss coverage would apply. The applicable terms state:

> A. Coverage
>
> 1. Business Income
>
> ***6** ...
>
> We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage muse be caused by or result from a Covered Cause of Loss....

The policy, amended by endorsement, defines "period of restoration," in part, as:

> The period of time that:
>
> a. Begins:
>
> 1. at the time of direct physical loss or damage for Business Income Coverage; or
>
> 2. immediately after the time of direct physical loss or damage for Extra Expense Coverage;
>
> caused by or resulting from any Covered Cause of Loss at the described premises; and
>
> b. Ends on the earlier of:
>
> 1. The date when the property at the described premises should be repaired, rebuilt, or replaced with reasonable speed and similar quality; or
>
> 2. The date when business is resumed at a new permanent location.

In this case, it is undisputed that the interior of the building had to be cleaned, the air

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filters had to be changed multiple times, and smoke in the air within the theater had to dissipate before business could be resumed. While the cleaning of the space took merely a few hours, the dissipation of the smoke took several days, during which time the Plaintiff was forced to suspend operations. Defendant claims that this period of time cannot be considered "restoration" because no *structural* repairs were necessary. Once again, the Court can find no such limitation within the terms of the policy.

The Court finds that defendant's interpretation, which would add the word "structural," and exclude the air within the building, is not a plausible plain meaning of the term "direct physical loss of or damage to property." However, even if such an interpretation were plausible, the text and context of the policy would preclude such a definition.

b. Text and context of the Policy favors coverage.

The Court has already considered the specific terms of the policy requiring a "direct physical loss of or damage to property," and a "period of restoration." The Court now considers the policy as a whole to determine if the terms could reasonably include the wildfire smoke that infiltrated the interior of the theater in this case. The Defendant points to three different exclusions to show that the smoke should be excluded from coverage.

i. Delay, loss of use, loss of market

Defendant does not specify how the exclusion for "delay, loss of use or loss of market" applies in this case. The delay and loss of use of the theater for performance was caused by smoke. Thus it was caused by the claimed damage. In any other situation, if a delay or loss of use of covered property was caused by a claimed damage to the property, yet was excluded from coverage, that exclusion would void the entire purpose of the policy. This interpretation is unreasonable. The exclusion only makes sense in the context of the policy when a delay external to the damage causes a loss of use. For instance, in this case, if the actors and production staff of OSF were not ready to perform at the scheduled time, causing a delay or cancellation of a show, such loss of business income would not be covered by the policy. There is no contention of an external delay here.

ii. "Smog" or "smoke"

*7 "Smog" is a specific exclusion contained in the policy, but the term is not defined by the policy. Defendant argues that the dictionary definition of smog includes smoke. Citing the Oxford Dictionary, defendant defines smog as "fog or haze combined with smoke and other atmospheric pollutants." "Haze" is defined as "a slight obscuration of the lower atmosphere, typically caused by fine suspended particles." Therefore, according to the defendant, the wildfire smoke in this case is excluded from coverage.

First, there is no evidence in the record that there was any fog or haze with which the smoke could have combined to create "smog" in this case. Second, the defendant's interpretation

would require the Court to ignore the fact that "smoke" is specifically excluded from coverage by the policy in another provision.

Leach v. Scottsdale Indemn. Co., 261 Or. App. 234, 242, 323 P.3d 337 (2014) (any proposed interpretation that requires a court to disregard a provision of the policy is not reasonable as a matter of law). The specific smoke exclusion, however, is limited to "smoke, vapor or gas *from agricultural smudging or industrial operations*" (emphasis added). Such a limited exclusion does not apply to this case, as there is no evidence of agricultural smudging or industrial operations. Applying either exclusion to the wildfire smoke in this case is not a reasonable interpretation of the policy terms.

iii. Pollutants

Defendant argues a similar exclusion here, attempting to construe the wildfire smoke as a "pollutant." The context of the pollutant exception demonstrates why it does not apply in this case. Under the policy, the "period of restoration" excludes:

> any increased time required due to the enforcement of or compliance with any ordinance or law that ... requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify, or neutralize or in any way respond to, or assess the effects of "pollutants."

"Pollutants" means "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." This provision does not apply because there is no required "enforcement of or compliance with any ordinance or law." Even if there were such a requirement, "pollutants" would not include wildfire smoke for the same reason discussed above regarding "smog." If the policy drafters wanted to exclude smoke other than smoke "from agricultural smudging or industrial operations," they could have done so.

Based on the text and the context of the policy, it is not reasonable to exclude wildfire smoke from policy coverage. The Plaintiff's interpretation that the infiltration of smoke into the interior of the theater is a covered "physical loss of or damage to property" remains reasonable.

c. Case law favors coverage.

Plaintiff's interpretation of the policy terms remains the only reasonable interpretation offered by the parties. However, even if both parties' interpretations were reasonable, case law from Oregon and other jurisdictions would favor the Plaintiff's argument.

In *Farmers Ins. Co. of Oregon v. Trutanich*, 123 Or. App. 6, 858 P.2d 1332 (1993), the Oregon Court of Appeals was asked to determine whether or not a "pervasive

odor" in a residential home caused by a subtenant's illegal methamphetamine operation was considered a "direct physical loss." The court concluded that odor was "physical," because it damaged the house. The court distinguished *Wyoming Sawmills, Inc. v. Transportation Ins. Co.*, 282 Or. 401, 578 P.2d 1253 (1978), in which a manufacturer's defective studs were determined not to be covered by a similar policy provision because there was no physical damage to the building, only a loss in value, or depreciation. The court determined that *Trutanich* was different because there was "evidence that the house was physically damaged by the odor that persisted in it." 123 Or. App. at 10, 858 P.2d at 335.

***8** *Trutanich* was cited favorably along with *Largent v. State Farm Fire & Cas. Co.*, 116 Or.App. 595, 842 P.2d 445(992), by District of Oregon Judge Hubel to stand for the proposition that "physical damage can occur at the molecular level and can be undetectable in a cursory inspection." *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, 1999 WL 619100, at *6 (D. Or. Aug. 4, 1999). Judge Hubel cautioned that "recognition that physical damage or alteration of property may occur at the microscopic level does not obviate the requirement that physical damage need be distinct and demonstrable." *Id.* at *7. In making the determination, "courts consider the nature and intended use of the property itself and the purpose of the insurance contract." *Id.* at *6.

In another District of Oregon case, a hammer was left behind in the Plaintiff's furnace and disintegrated, causing the furnace to be contaminated with lead particles. *Stack Metallurgical Services Inc. v. Travelers Ind. Co. of Connecticut*, 2007 WL 464715 (D. Or. 2007) ("*Stack*"). The furnace could no longer be used for treating medical devices because those devices would then also be contaminated. The defendant insurance company argued that the only "direct physical damage" sustained to plaintiff's property was the loss of the hammer that disintegrated in the furnace. The insurance company asserted that, because the furnace could still be used to treat materials other than medical devices, it did not suffer "physical damage," and therefore the Plaintiff could not make a claim under the business income coverage provision. *Id.* at *7. The court disagreed. Though the terms "direct physical loss" and "physical damage" were not defined in the policy, the court determined that, because the lead particle contamination "prevented the furnace from being used for its ordinary expected purpose, [it] is fairly characterized as a 'direct physical loss of or damage to' the furnace." *Id.* at *8.

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

inside the plant. Set up fans and all that." *Id.* at *4. The defendant insurance company asserted that the incident was not covered because "physical loss or damage" necessarily involves a "physical change or alteration to insured property requiring its repair." *Id.* at *2. The court disagreed, noting that "while structural alteration provides the most obvious sign of physical damage," various courts have found "that property can sustain physical loss or damage without experiencing structural alteration." *Id.* at *5. *See also* *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524, 543, 968 A.2d 724, 736 (App. Div. 2009) (holding that property can be physically damaged, without undergoing structural alteration, when it loses its essential functionality). The court concluded that the packaging facility incurred "physical loss or damage" when ammonia gas was discharged into the facility's air... and rendered the facility temporarily unfit for occupancy." *Id.* at *8.

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

In different circumstances, courts have also found that certain losses to property are not covered by such policy terms. In *Great Northern Ins. Co. v. Benjamin Franklin Fed. S & L Ass'n*, 793 F.Supp. 259 (D.Or.1990), asbestos was discovered in the insulation of the building during a remodel, causing the building's tenant to threaten to vacate unless the asbestos was removed. The building's owner filed a proof of loss under the property insurance policy for anticipated removal of the asbestos, loss of use, and related expenses. The court determined that the asbestos, which had not been released into the building, was not a covered loss because "the building remained physically intact and undamaged." *Id.* at 263. Moreover, the court found that even if the asbestos was a "direct, physical loss," it would be excluded by the policy as a "pollutant." *Id.*

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

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d. Smoke infiltration of the theater was a fortuitous event affording coverage.

Defendant argues in its response to Plaintiff's motion for partial summary judgment that the decision to cancel the performances was "voluntary" and therefore not a fortuitous event affording coverage. The court disagrees. Plaintiff has submitted extensive evidence that the air inside the theater was infiltrated by smoke from multiple local wildfires. The smoke was not within the Plaintiff's control. It is undisputed that the air contained an unhealthy level of particulates and that Plaintiff cancelled the performances out of concern for the health of patrons and OSF actors and staff.

e. The fact that the Allen Elizabethan Theatre is only partially enclosed does not change the Court's analysis.

As discussed above, the smoke that infiltrated the theater caused direct property loss or damage by causing the property to be uninhabitable and unusable for its intended purpose. Defendant GAIC claims, in part, that this is impossible because the Allen Elizabethan Theatre is an "out-door," open-air facility, and therefore it is subject to the weather conditions and any passing winds that may come and go. Defendants do not dispute the fact that the theater is completely enclosed by a walled structure, and partially enclosed by a roof in certain portions of the facility. The conditions of the theater are uniquely exposed to the elements of the outdoors, but the insurance policy does not limit any of its terms based on this unique condition. Therefore, the open-air aspect of the theater does not affect the policy's coverage as to the damage to the property or the business income provision.

II. Defendant's motion for summary judgment regarding Plaintiff's claim for breach of the implied covenant of good faith and fair dealing is denied.

***10** Oregon law does not allow a first-party extra contractual tort claim for bad faith against an insurance company. *See, e.g.,* *Santilli v. State Farm*, 278 Or. 53, 562 P.2d 965 (1977); *Farris v. U.S. Fid. and Guar. Co.*, 284 Or. 453, 587 P.2d 1015 (1978). However, "[a] party may violate its [contractual] duty of good faith without also breaching the express provisions of the contract." *McKenzie v. Pac. Health & Life Ins. Co.*, 118 Or. App. 377, 380-81, 847 P.2d 879, 881 (1993) (citing *Elliot v. Tektronix, Inc.*, 102 Or. App. 388, 796 P.2d 361, *rev. den.* 311 Or. 13, 803 P.2d 731 (1990)). Accordingly, "a [contract] claim for breach of the duty of good faith may be pursued independently of a claim for breach of the express terms of the contract." *Id.* In the context of an insurance dispute, within defendant's obligation to pay all covered claims is the duty to determine, in good faith, whether a claim is covered, and to refrain from arbitrarily denying a claim. *Id.*

Plaintiff's second cause of action asserts that the insurance policy contains an implied covenant of good faith and fair dealing, and that defendant GAIC breached this covenant by failing and refusing to promptly and fairly investigate the Business Income and Extra Expense claims made by Plaintiff. Particularly, Plaintiff claims that:

a. GAIC unnecessarily required fourteen (14) OSF employees to submit to examinations under oath after it had already denied the Business Income and Extra Expense Claims;

b. GAIC required fourteen (14) OSF employees to submit to examinations under oath regarding the factual circumstances of OSF's claim that were unrelated to the only legal theory GAIC has ever provided as a basis for denying OSF's claims. There is no good faith reason to have required fourteen (14) examinations under oath when no amount of factual investigation would have changed GAIC's only legal theory for denial;

c. GAIC caused OSF to incur substantial costs responding to redundant, repeated, and immaterial document requests after it had already denied OSF's Business Income and Extra Expense Claims;

d. GAIC caused OSF to incur substantial costs responding to redundant, repeated, and immaterial document requests that were unrelated to the only legal theory GAIC has ever provided as a basis for denying OSF's Business Income and Extra Expense Claims. That includes demands for five years' worth of unrelated corporate board records, committee agendas, and minutes and all pre-read materials, regardless of subject matter, provided to board members, as well as employees' personal photographs. There is no good faith reason to have required OSF to incur these costs when no amount of factual investigation would have changed GAIC's only legal theory for denial.

e. GAIC caused OSF to incur substantial costs responding to its extensive demands for a detailed breakdown of OSF's total lost business income during periods of physical loss and/or physical damage between ticket refunds, exchanges, donations, and the issuance of vouchers, which, in turn, required OSF to dedicate staff resources to writing new software code to extract the detail sought by GAIC from existing accounting and box office data, even after GAIC had denied OSF's Business Income and Extra Expense Claims; and

f. GAIC caused OSF to incur substantial costs responding to its extensive demands for a detailed breakdown of OSF's total lost business income during periods of physical loss and/or physical damage between ticket refunds, exchanges, donations, and the issuance of vouchers that was unrelated to the only legal theory GAIC has ever provided as a basis for denying OSF's claims, which, in turn, required OSF to dedicate staff resources to writing new software code to extract the detail sought by GAIC from existing accounting and box office data. There is no good faith reason to have required OSF to incur these costs when no amount of factual investigation would have changed GAIC's only legal theory for denial.

*11 Complaint ¶ 38(a-f).

Plaintiff has not moved for summary judgment on this claim. Defendant has moved for

summary judgment, but has not asserted specific facts or submitted evidence to show that GAIC's actions in investigating were taken promptly, fairly, and in good faith. It may very well be that this is the case, but on the record before the Court, judgment as a matter of law is not appropriate at this time.

While the Court finds that the defendant's coverage position is not taken in bad faith, due to the unique circumstances of the partially-enclosed, open-air facility of the Allen Elizabethan Theatre, the Plaintiff's claim stems from the extensive, allegedly unnecessary and over-broad investigation conducted by defendant. This is not a duplicative cause of action stemming from the same facts as the breach of the terms of the policy, but a separate claim based on the harm caused by the defendant's alleged misconduct in the course of the investigation. The Court cannot find as a matter of law, based on the evidence currently in the record, that defendant's actions were reasonable, fair, and in good faith. Therefore, Defendant's motion for summary judgment on this claim is denied.

III. Defendant's motion for summary judgment as to Plaintiff's claim for negligence is granted.

Plaintiff brings its third cause of action for negligence based on defendant GAIC's breach of the standard of care set forth in the Oregon Unfair Claims Settlement Practices Act. Compl. ¶ 42. However, violations of the Act are not independently actionable, and are therefore appropriately dismissed on summary judgment. *Richardson v. Guardian Life Ins. Co. of Am.*, 161 Or. App. 615, 623-24, 984 P.2d 917, 923 (1999) (citing *Farris v. U.S. Fid. and Guar. Co.*, 284 Or. 453, 458, 587 P.2d 1015 (1978)). Additionally, the facts alleged in this claim are the same as alleged in the prior claim for breach of the implied duty of good faith and fair dealing. Therefore this claim is duplicative. It is dismissed with prejudice.

ORDER

For the forgoing reasons, the Plaintiff's motion for partial summary judgment (#17) as to the first claim for relief is GRANTED. Defendants' motion for summary judgment (#25) is GRANTED in part and DENIED in part. Plaintiff's third claim is dismissed with prejudice. Plaintiff's second claim for breach of the implied covenant of good faith, and Plaintiff's damages as to the first claim, are issues of fact for a jury to resolve at trial.

It is so ORDERED and DATED this 7th day of June, 2016.

All Citations

Not Reported in Fed. Supp., 2016 WL 3267247

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EXHIBIT 9

KeyCite Yellow Flag - Negative Treatment
Distinguished by Ward General Ins. Services, Inc. v. Employers Fire Ins. Co., Cal.App. 4 Dist., December 17, 2003

165 Colo. 34
Supreme Court of Colorado, En Banc.

The WESTERN FIRE INSURANCE COMPANY, a Kansas Corporation, Plaintiff in Error,
v.
The FIRST PRESBYTERIAN CHURCH, Littleton, Colorado, Defendant in Error.

No. 21769.
|
Feb. 5, 1968.
|
Rehearing Denied Feb. 26, 1968.

Synopsis

Insured brought action against insurer for damages due to direct physical loss of church. The District Court, Arapahoe County, Marvin W. Foote, J., entered judgment for insured, and the insurer brought error. The Supreme Court, McWilliams, J., held that where loss of use of church was result of accumulation of gasoline around and under church building making premises so infiltrated and saturated as to be uninhabitable and making further use of the building dangerous, such loss was equated with direct physical loss coverage of policy covering church building, and where the buildup of gasoline to the point of rendering church building uninhabitable occurred subsequent to issuance of policy, the loss sustained occurred within policy.

Affirmed.

Hodges, J., dissented.

Attorneys and Law Firms

*35 **53 Blunk & Johnson, Denver, for plaintiff in error.

Shoemaker & Wham, Richard Plock, Denver, for defendant in error.

Opinion

McWILLIAMS, Justice.

The First Presbyterian Church of Littleton, Colorado, hereinafter referred to as the insured, filed a claim for relief against The Western Fire Insurance Company, a Kansas corporation, hereinafter referred to as the Company. The insured's claim was based on a certain contract of insurance issued the insured by the Company. Trial by jury culminated in a judgment for the insured against the Company in the sum of $21,404.83, and by writ of error the Company now seeks reversal of the judgment thus entered against it.

The central issue here to be resolved is whether the insured suffered a 'direct physical loss' within the period of coverage provided for by the insurance contract. *36 Before summarizing the evidence adduced at the trial of this matter, reference should first be made to certain terms and provisions contained in the insurance contract between the parties.

On March 16, 1963, the Company issued a policy of insurance to the insured covering, among other things, a certain church building located in Littleton. It should be noted that the insured had carried insurance on this

EXHIBIT 9

church building prior to March 16, 1963, and the particular policy of insurance with which we are here concerned was issued as the result of a consolidation of several policies of insurance theretofore carried by the insured on not only the church building, but also the manse and two other church buildings. In the policy issued on March 16, 1963, the value of the church building was declared to be $320,000. The policy thus issued was one claimed to be specially designed for 'public and institutional property,' and it not only contained an 'Extended Coverage Endorsement' but also contained that which was denominated by the Company as a 'Special Extended Coverage Endorsement.' As concerns coverage, the Special Extended Coverage Endorsement provided that 'in **54 consideration of the premium for this coverage * * * THIS POLICY IS EXTENDED TO INSURE AGAINST ALL OTHER RISKS OF DIRECT PHYSICAL LOSS, EXCEPT AS HEREINAFTER PROVIDED.'

As noted above, the inception date for this policy of insurance was March 16, 1963. At the outset of the trial a part of the pre-trial order was read to the jury as being a 'stipulation' between the insured and the Company. By this stipulation the parties agreed that on March 28, 1963 the insured acting upon the orders of the Littleton Fire Department closed the church building 'because of the infiltration of gasoline in the soil under and around the building, which gasoline and vapors thereof infiltrated and contaminated the foundation and halls and rooms of the church building, making the same uninhabitable *37 and making the use of the building dangerous.' As stated above, trial by jury resulted in a verdict in favor of the insured in the sum of $21,404.83, which sum represented the cost of remedying the infiltration and contamination problem. No complaint is here made regarding the amount of damages thus awarded. Rather it is the basic position of the Company that as a matter of law the trial court should have directed the jury to return a verdict in its favor. More specifically, the Company now contends that: (a) the insured did not suffer 'a direct physical loss' within the meaning of that phrase as such is used in the Special Extended Coverage Endorsement; or that (b) if the insured did sustain such a loss, the loss in such event did not occur Subsequent to the inception date of the policy, namely March 16, 1963.

In connection with this latter contention, at least a brief recital of certain background information established upon trial is in order. And, as we see it, the testimony concerning this phase of the case is not in any real dispute. During January and February, 1963, several persons noted a strange odor in the vault located in the basement of the church. Investigation by church officials, as well as Public Service Company employees, failed to establish with any degree of certainty the exact cause of the odor. Some thought it was a gaseous odor. Others thought it was caused by a dead rodent, or stationery ink, and so on. Nor was there anything to indicate that there was any danger of explosion connected with this odor, whatever it was. Tests to detect the presence of flammable vapors generally proved negative, though in one instance where the test did show the presence of some flammable material, the quantity thereof was said to be below the 'explosion level.' And, in any event, the odor problem was considered to have been 'solved,' at least momentarily, in mid February

1963, when a leak in a joint in a natural gas line was discovered and fixed.

*38 Quite admittedly then, there was evidence of a strange odor in the church vault prior to March 16, 1963. In this regard it should be mentioned, however, that though the Company originally pled misrepresentations and concealment on the part of the insured, these affirmative defenses were voluntarily withdrawn by the Company at the conclusion of all of the evidence. The Company in its brief emphasizes that it does not now suggest any 'bad faith or concealment on the part of the insured.'

Rather, as indicated above, the basic contention advanced here by the Company is that the insured sustained no 'direct physical loss' after March 16, 1963. The argument, as we understand it, runs somewhat as follows:
1. this is not a 'loss of use' policy, as such, and hence the mere 'loss of use' of the church premises occasioned by the 'closing down' of the building by the fire authorities is not covered by the policy, as such does not constitute a 'direct physical loss';

2. if there was any 'direct physical loss' sustained by the insured, it consisted of the 'infiltration and contamination of the premises by gasoline';

3. that the insured failed to establish that such infiltration and contamination **55 of the premises occurred on or after March 16, 1963; and

4. that, on the contrary, the infiltration of gasoline onto the premises quite obviously antedated the inception date of the insurance policy, i.e., March 16, 1963.

With this general line of reasoning we do not agree. It is perhaps quite true that the so-called 'loss of use' of the church premises, standing alone, does not in and of itself constitute a 'direct physical loss.' A 'loss of use' of course could be occasioned by many different causes. But, in the instant case the so-called 'loss of use,' occasioned by the action of the Littleton Fire Department, cannot be viewed in splendid isolation, but must be viewed in proper context. When thus considered, *39 this particular 'loss of use' was simply the consequential result of the fact that because of the accumulation of gasoline around and under the church building the premises became so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous. All of which we hold equates to a direct physical loss within the meaning of that phrase as used by the Company in its Special Extended Coverage Endorsement insuring against 'all other risks.'

We also are of the firm view that the direct physical loss thus sustained by the insured did occur within the policy period of the insurance contract. No doubt the chain of events which eventually resulted in a direct physical loss to the insured did start prior to March 16, 1963, but this does not mean that the actual 'loss' was also incurred prior to March 16, 1963. Our analysis of the instant case leads us to conclude that there was no direct physical loss sustained on, for example, the first day that gasoline actually seeped onto the insured's premises. To the contrary, no direct physical loss was incurred by the insured until the Accumulation

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of gasoline under and around the church Built up to the point that there was such infiltration and contamination of the foundation, walls and rooms of the church building as to render it uninhabitable and make the continued use thereof dangerous. There is nothing in the record to indicate that Prior to March 16, 1963 the church building was rendered uninhabitable and the continued use thereof highly dangerous because of the infiltration and contamination of the church building. On the contrary, the evidence indicates that such infiltration and contamination was first determined only about a day or two prior to March 28, 1963, and that the premises were then closed on March 28, 1963 upon order of the Littleton Fire Department. And the stipulation referred to above also recognizes that it was only on March 28, 1963 that the church building was closed because of the aforementioned infiltration and ***40** contamination of the very foundation, walls and rooms of the church building.

In short, we hold that on what we deem to be the virtually undisputed evidence, the insured established that there was a direct physical loss occasioned to the church building within the policy period of the insurance contract. Such brings the insured within the 'all risk' coverage provided by the Special Extended Coverage Endorsement.

Our attention has not been directed to any Colorado decision bearing on this particular point. Of the outside authorities brought to our attention, Hughes v. Potomac Insurance Company, 199 Cal.App.2d 239, 18 Cal.Rptr. 650 presents perhaps the most analogous factual situation. There, as the result of a series of heavy rains, there was a gradual buildup of water pressure, or ground water, which eventually caused a landslide to the end that the 'backyard' of the insured's dwelling slid into a creek, leaving the house proper perched precipitously on the edge of a very newly created cliff. The house itself, however, suffered no tangible injury, as such. The policy in the Hughes case was like the policy in the instant case, ****56** and insured against all risks of physical loss and damage to the dwelling. There, as here, it was contended that the insured suffered no direct physical loss. In rejecting this argument the First Appellate District of the California District Court of Appeals made the following pertinent comment:

> 'To accept appellant's interpretation of its policy would be to conclude that a building which has been overturned or which has been placed in such a position as to overhang a steep cliff has not been 'damaged' so long as its paint remains intact and its walls still adhere to one another. Despite the fact that a 'dwelling building' might be rendered completely useless to its owners, appellant would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires ***41** that a policy should not be so interpreted in the absence of a provision

> specifically limiting coverage in this manner.'

The Company argues additionally that there is no coverage because of an exclusion contained in the Special Extended Coverage Endorsement. The particular exclusion relied on provides that the policy does not insure against loss occasioned by 'smoke, vapor or gas from * * * industrial operations.' The source of the gasoline which accumulated over a period of time under the church building was not established. Located across the street from the church was a filling station, and this circumstance alone certainly made the filling station a rather prime suspect as being the fountainhead of the runaway gasoline. But, as just stated, insofar as the evidence adduced at trail is concerned, there is nothing in this record other than strong suspicion tying the filling station in as the origin and source of the gasoline which drained in, under and around the nearby church building. Such then being the state of the record in this regard, we need not here concern ourselves with whether 'gasoline' is 'gas,' or whether a retail filling station is an 'industrial operation.' It is sufficient to say that under the circumstances the trial court did not err in refusing to submit to the jury the question as to whether this particular exclusion had applicability.

Finally, the Company assigns as error the several rulings of the trial court on instructions, the Company contending that the trial court erroneously submitted certain instructions to the jury, and on the other hand erred when it refused to give several instructions submitted by the Company. As indicated above, as we view the matter there really were no genuine issues of fact relating to the issue of liability which required submission of the case to the jury. At the conclusion of the evidence each side moved for a directed verdict in its favor on the issue of liability. And in the last analysis this entire controversy boils down to a determination ***42** as to whether the insured sustained a direct physical loss within the policy period of the insurance contract. It seems to us this was a question of law and not one of fact, and that under the circumstances the trial court should have granted the insured's motion and permitted the jury to fix the damage sustained by the insured. Such being the case, then, we need not now examine In minutiae the several instructions relating to the issue of liability about which complaint is here made.

However, perhaps out of an abundance of caution, the trial court denied both motions for a direct verdict and submitted all issues to the jury. And in our view the jury was adequately and properly instructed as to the law of the case. Even assuming there were issues of fact concerning liability which had to be resolved by the jury, we still perceive no prejudicial error as to instructions either given, or refused.

The judgment is affirmed.

HODGES, J., dissents.

All Citations

165 Colo. 34, 437 P.2d 52

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EXHIBIT 10

257 Mont. 376
Supreme Court of Montana.

Stanley DUENSING and David Duensing, a general partnership, d/b/a The Parrot Confectionery, Plaintiffs and Appellants,
v.
The TRAVELER'S COMPANIES, a Connecticut corporation, Defendant, Respondent and Cross–Appellant.

No. 92–203.
|
Submitted on Briefs Aug. 13, 1992.
|
Decided March 29, 1993.

Synopsis

Business owners filed declaratory action against property insurer seeking determination of rights of parties under contract after business owners voluntarily destroyed candy inventory after it was discovered that employee had been exposed to hepatitis A. The District Court, First Judicial District, Lewis and Clark County, Dorothy McCarter, J., granted summary judgment for insurer based on contamination exclusion of policy. Business owners appealed. The Supreme Court, Gray, J., held that: (1) contamination exclusion in policy required actual contamination, rather than merely suspected contamination; (2) health department did not make finding of actual contamination of inventory based on its statement that it would petition court if business owners did not voluntarily dispose of inventory so as to render applicable contamination exclusion in policy; and (3) health department embargo restricting movement of inventory did not authorize governmental agents to take possession of inventory nor order destruction of property so as to preclude coverage under governmental action exclusion in policy.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

**204 *378 W. William Leaphart, Leaphart, Leaphart Law Firm, Helena, for plaintiffs and appellants.

**205 James R. Walsh, Robert J. Vermillion, Smith, Walsh, Clarke & Gregoire, Great Falls, for defendant and respondent.

Opinion

GRAY, Justice.

Stanley and David Duensing appeal from an order of the First Judicial District Court, Lewis and Clark County, granting summary judgment in favor of the Travelers Companies. On cross-appeal, the Travelers Companies asserts an alternative basis for the granting of summary judgment in its favor. We reverse and remand.

We state the issues on appeal as follows:

1) Did the District Court err in granting summary judgment in favor of the Travelers Companies based on the contamination exclusion contained in the insurance policy?

2) If the District Court erred in granting summary judgment in favor of the Travelers Companies based on the contamination

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exclusion, can this Court nonetheless uphold the grant of summary judgment pursuant to the governmental action exclusion?

3) Are the Duensings entitled to entry of summary judgment in their favor?

The facts in this case are relatively straightforward. On August 28, 1990, Stanley and David Duensing (the Duensings), a partnership ***379** doing business as the Parrot Confectionery (the Parrot), discovered that a worker had been exposed to Hepatitis A. The Duensings immediately informed the City–County and State Health Departments and their insurance agency, Burrington Insurance Agency (Burrington). The next morning, the Duensings, their attorney, their accountant, Will Selser and Larry Fenster of the Lewis and Clark City–County Health Department (the health department), and an agent from Burrington met to discuss the possible problems associated with the hepatitis exposure. Later that same day, the Montana Department of Health and Environmental Sciences issued a "Notice of Embargo" to the Parrot, which prohibited the movement or sale of any of the Parrot's candy without permission. Although the Parrot's inventory had not been tested, the Duensings agreed to destroy voluntarily all existing inventory.

On August 31, 1990, the Duensings destroyed the Parrot's entire inventory of candy and food. They subsequently submitted a claim on their business owners' property insurance policy with Travelers for loss of contents and business interruption as a result of the destruction of the inventory. Travelers denied coverage, relying on the "contamination exclusion" and the "governmental action exclusion" contained in the policy.

The Duensings then filed a declaratory action against Travelers for a determination of rights of the parties under the insurance contract, waiver and estoppel. Both parties moved for summary judgment based on the contamination and governmental action exclusions. After briefing and oral argument, the District Court granted summary judgment for Travelers based on the contamination exclusion; it did not address the governmental action exclusion.

Did the District Court err in granting summary judgment in favor of Travelers based on the contamination exclusion contained in the insurance policy?

Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), M.R.Civ.P. Faced with cross motions for summary judgment on the same legal questions, with both parties asserting an absence of factual issues as to those questions, the District Court concluded that Travelers was entitled to summary judgment based on the contamination exclusion.

The contamination exclusion relied on by the District Court reads:

> 2. We will not pay for loss or damage caused by or resulting from any of the following: ...
>
> ***380** d. ... (7) The following causes of losses to personal property: ...
>
> (d) Evaporation, loss of weight, *contamination,* exposure to light or change

in flavor, color, texture or finish. [Emphasis added.]

**206 The District Court determined that the policy did not require scientific findings of contamination and that reasonable belief of such contamination destroyed the business value of the inventory and was sufficient to fall within the exclusion. The District Court also stated that the fact that the contamination was not confirmed through testing was not material for purposes of the insurance contract. The court concluded that, given the common sense, usual meaning of the language, the parties had intended to exclude coverage for loss of the Parrot's inventory, which was destroyed because of the high probability of contamination. Thus, the contamination exclusion of the policy precluded coverage.

The Duensings contend that the District Court incorrectly concluded that the inventory was contaminated within the language of the contamination exclusion. They argue that the District Court erred by interpreting the contamination exclusion to exclude anything other than actual contamination. They further argue that, contrary to the rule of construing exclusions in insurance policies strictly against the insurer, the District Court enlarged the contamination exclusion to include suspected contamination.

The interpretation of an insurance contract is a question of law. *Truck Ins. Exchange v. Waller* (1992), 252 Mont. 328, 331, 828 P.2d 1384, 1386. Therefore, we review whether the District Court correctly interpreted the policy in question. *Steer, Inc. v. Department of Revenue* (1990), 245 Mont. 470, 475, 803 P.2d 601, 603.

Well-established principles guide our interpretation of insurance contracts. The language of the insurance policy governs if it is clear and explicit. *Waller*, 252 Mont. at 331, 828 P.2d at 1386. Furthermore, exclusions from coverage will be narrowly and strictly construed because they are contrary to the fundamental protective purpose of an insurance policy. *Farmers Union Mut. Ins. Co. v. Oakland* (1992), 251 Mont. 352, 356, 825 P.2d 554, 556.

In this case, the contamination exclusion is unambiguous, clear and explicit: Travelers will not pay for loss or damage to personal property caused by or resulting from contamination. The exclusion from coverage requires two elements. First, there must be "contamination;" and second, the contamination must cause loss to personal property. Only if contamination exists does it become necessary ***381** to determine whether the contamination caused the loss to personal property.

The District Court concluded that the high probability of contamination and the reasonable belief of contamination were sufficient to exclude coverage. In essence, these conclusions define "contamination" to include suspected contamination. In interpreting insurance contracts, the words of the policy are to be understood in their usual meaning; common sense controls. *James v. Prudential Ins. Co.* (1957), 131 Mont. 473, 477, 312 P.2d 125, 127 (citations omitted).

In *Hi-G, Inc. v. St. Paul Fire and Marine Ins. Co.* (1st Cir.1968), 391 F.2d 924, 925,

the First Circuit Court of Appeals defined contamination as the introduction of a foreign substance that injures the usefulness of the object. Similarly, the Fifth Circuit Court of Appeals defined contamination as a condition of impurity resulting from mixture or contact with a foreign substance, and stated that this definition is consistent with the common understanding of contamination. *American Casualty Co. of Reading, Pennsylvania v. Myrick* (5th Cir.1962), 304 F.2d 179, 183.

The Court of Appeals of Texas adopted the definition of contamination from *Myrick* in *Auten v. Employers Nat. Ins. Co.* (Tex.App.1987), 722 S.W.2d 468, 469. In *Auten,* an exterminator sprayed a toxic pesticide inside of Auten's home, and expert testimony established that the toxin was deposited on surfaces throughout the home. After touching these surfaces, the members of the Auten family absorbed the pesticide through their skin and became ill. *Auten,* 722 S.W.2d at 469. As in *Myrick,* the contamination involved the presence of a foreign substance, thus triggering the contamination exclusion.

We adopt the rationale expressed in *Hi–G, Myrick* and *Auten,* and conclude that ****207** contamination requires the actual presence of a foreign substance. We conclude, therefore, that the plain, ordinary meaning and understanding of "contamination" is actual contamination, not suspected contamination. Absent proof of actual contamination, the contamination exclusion does not bar coverage for the Duensings' losses.

Accordingly, we examine the record to determine whether it contains any proof of actual contamination. In this case, the candy was destroyed before it was tested, thereby preventing anyone from verifying whether it was actually contaminated by the hepatitis virus. Nonetheless, Travelers urges us to conclude that the candy was contaminated because the health department made a "finding" that the inventory was contaminated. The Duensings assert that the ***382** parties did not complete the necessary statutory steps to allow anyone to conclude that the inventory was actually contaminated. The parties base their respective arguments on § 50–31–509, MCA, which reads in pertinent part:

> **Detainer of adulterated or misbranded articles.** (1) If an agent of the department finds or has probable cause to believe that any food, drug, device, or cosmetic is adulterated or so misbranded as to be dangerous or fraudulent within the meaning of this chapter, he shall affix to the article a tag or other appropriate marking giving notice that the article is or is suspected of being adulterated or misbranded and has been detained or embargoed and warning all persons not to remove or dispose of the article by sale or otherwise until permission for removal or disposal is given by the agent or the court.... The owner of an embargoed article or another authorized person and the department may enter into a disposal agreement providing for the disposal, reconditioning, or other disposition of the embargoed article....
>
> (2) If an article detained or embargoed under subsection (1) is found by the agent to be adulterated or misbranded and a disposal agreement is not executed as provided in subsection (1), the agent shall petition the

> justice of peace, city judge, or district court ... for an order for condemnation of the article. If the agent finds that an article so detained or embargoed is not adulterated or misbranded, he shall remove the tag or other marking.
>
> (3) If the court finds that a detained or embargoed article is adulterated or misbranded, the article shall, after entry of the decree, be destroyed....

Travelers notes that § 50–31–509(2), MCA, requires the health department to make a "finding" of contamination before petitioning the court. On the basis of Larry Fenster's statement to the Duensings that he would petition the court for an order to destroy the inventory if they would not agree to destroy it voluntarily, Travelers argues that Fenster "found" the inventory to be contaminated. We disagree.

Fenster's affidavit clearly shows that he had made no finding of contamination, but only a finding of probable cause. The affidavit of Larry Fenster reads:

> In my handwritten notes of August 30, 1990 ... [I stated that] all of this product must be "considered contaminated." In making this statement, I was not implying that there was any factual or scientific finding of contamination. There had been no testing of ***383** the candy. This statement was merely my finding, on behalf of the Department, that, since a candy maker was diagnosed with jaundice, we had "probable cause to believe" the product was contaminated....

Similarly, Will Selser, another health department official, explained in his affidavit that:

> [a]s of the date of the Aug. 31, 1990, destruction of the candy, there had been no laboratory testing of the candy and thus there was no factual determination as to whether or not the candy was, in fact, contaminated.

Furthermore, comparing these facts to the statutory procedure set forth in § 50–31–509, MCA, does not support a conclusion that the health department had made a finding of contamination. ****208** Subsection (1) of § 50–31–509, MCA, requires either a finding of adulteration *or* probable cause to believe an article is adulterated before the health department can issue an embargo order. Under subsection (2), if no disposal agreement is reached *and* the agent finds that the object is adulterated, the agent can petition the court for an order of condemnation; subsection (2) also is clear that the agent could find at this post-embargo stage of the process that the article *is not* adulterated. Finally, under subsection (3), the embargoed object can be ordered to be destroyed only after a court finds that it is

adulterated. Again, at this third stage of the process, the court could find that the object was not adulterated.

Fenster's statement that he would petition the court if the parties did not reach a disposal agreement does not require us to conclude that the health department "found" that the inventory was contaminated. The parties here completed subsection (1) of the statutory procedure based on a "probable cause" determination and reached a disposal agreement. The parties did not need to proceed through subsections (2) and (3) of § 50–31–509, MCA, to a finding of adulteration.

Given the clear language of § 50–31–509, MCA, and the affidavits of the health department officials, we conclude that no finding of contamination had been made. No other evidence was offered that the inventory actually was contaminated. We hold that the District Court erred as a matter of law in interpreting the contamination exclusion to preclude coverage in this case.

If the District Court erred in granting summary judgment in favor of Travelers based on the contamination exclusion, can this Court nonetheless uphold the grant of summary judgment pursuant to the governmental action exclusion?

***384** On cross-appeal, Travelers asserts that the governmental action exclusion provides an alternative basis for summary judgment in its favor. We have affirmed the correct conclusion of a trial court even though that conclusion may have been arrived at for the wrong reason. See *Wolfe v. Webb* (1992), 251 Mont. 217, 234, 824 P.2d 240, 250. We cannot do so in this case, however, because we conclude that the governmental action exclusion does not preclude coverage for the Duensings' losses.

The governmental action exclusion in the Duensings' policy with Travelers excludes coverage for "loss or damage caused directly or indirectly by ... [s]eizure or destruction of property by order of governmental authority." Travelers argues that both the seizure and destruction clauses of the governmental action exclusion apply to the facts at hand. Specifically, Travelers argues that the seizure clause bars coverage because the embargo constituted a "constructive seizure," thus triggering the exclusion. Travelers also asserts, under the destruction clause, that the embargo order (as a governmental order) caused the destruction of the candy. We address each clause in turn.

In support of its contention that the seizure clause bars coverage under these facts, Travelers argues that "constructive seizure" via the embargo satisfies the exclusion. Webster's Third New International Dictionary defines seizure as the act of taking possession of persons or property by virtue of a warrant or by legal authority.

Here, although the embargo restricted the movement of the inventory, the embargo order did not authorize governmental agents to take possession of the inventory; nor was possession taken. Therefore, no seizure occurred. As discussed above, the rule of strict construction of exclusions from insurance coverage prevents us from expanding the plain language of this exclusion to include constructive seizure. See

Oakland, 251 Mont. at 356, 825 P.2d at 556. We hold that the Duensings' losses are not excluded by the seizure clause of the governmental action exclusion.

Travelers' reliance on the destruction clause of the governmental action exclusion also is misplaced. For this clause to apply, property must be destroyed by order of governmental authority, and such **209 a destruction then must cause, directly or indirectly, the loss claimed by the insured.

The embargo order only restricts the sale or movement of the property; it does not order or require the destruction of the property, nor could it do so under § 50–31–509, MCA. An embargo pursuant to *385 § 50–31–509, MCA, merely serves as a means of preserving the status quo until further proceedings occur. Indeed, under § 50–31–509(3), a governmental authority can only require the destruction of property after a court finds that the object is adulterated. Thus, it is clear that the inventory was not destroyed by order of governmental authority in this case.

Travelers additionally notes that Will Selser, in describing the embargo order in his first affidavit, stated that the Duensings were required to destroy the inventory. According to Travelers, this demonstrates that the inventory was destroyed pursuant to governmental order. However, Will Selser's second affidavit controverts Travelers' argument. He stated:

> In my prior affidavit when I stated that the Duensings were "required" to destroy the food, I merely meant that they were being told by me and my staff that if they did not voluntarily destroy the candy, the Department would take the next step and petition the Court for an order to destroy the candy. In fact, no such petition had been filed with the Court. The only governmental order in effect was the Order of Embargo from the Montana Department of Health. *The Department had no authority to "require" the Duensings to do anything beyond comply with the embargo.* [Emphasis added.]

Absent a court order under subsection (3) of § 50–31–509, MCA, the health department could not order the destruction of the inventory. No court order for the destruction of the Parrot's inventory was obtained. We hold, therefore, that the inventory was not destroyed by order of governmental authority and the destruction clause of the governmental action exclusion does not bar coverage in this case.

Are the Duensings entitled to entry of summary judgment in their favor?

Before the trial court, both parties moved for summary judgment as a matter of law on the question of insurance coverage under the contamination and governmental action exclusions of the Travelers' policy. The parties presented identical legal theories,

albeit seeking opposite legal conclusions; both asserted that no genuine issues of material fact existed as to the legal theories propounded. Travelers now argues that factual questions remain "regarding the actions of the Health Department."

The fact that both parties have moved for summary judgment does not establish, in and of itself, that no genuine issues of material fact exist. A party may assert that there is no remaining factual issue ***386** if his legal theory is accepted and still maintain that there is a genuine dispute as to material facts if his opponent's theory is adopted. *Faith Lutheran Retirement Home v. Veis* (1970), 156 Mont. 38, 47, 473 P.2d 503, 507. Conversely, if the parties presented identical legal theories to the trial court, while arguing that no issues of fact remain, neither party can then maintain on appeal that factual questions have surfaced on that very same issue. A trial court has no duty to anticipate such possible proof. *Id.*

In this case, Travelers has asserted for the first time on appeal that "factual questions remain regarding the actions of the Health Department." We have stated many times that this Court will not hear on appeal an issue not presented to the trial court. *Wyman v. DuBray Land Realty* (1988), 231 Mont. 294, 299, 752 P.2d 196, 200. In any event, Travelers cannot rely on speculative, fanciful or conclusory statements to raise a genuine issue of material fact, but must specify the precise facts which are disputed. *Sprunk v. First Bank System* (1992), 252 Mont. 463, 466, 830 P.2d 103, 105. Travelers' assertion is conclusory and speculative and does not identify any genuine factual issue in dispute.

****210** This Court has the power to reverse a district court's grant of summary judgment and direct it to enter summary judgment in favor of the other party only when it is clear that all of the facts bearing on the issues are before the court. *Canal Ins. Co. v. Bunday* (1991), 249 Mont. 100, 108, 813 P.2d 974, 979. Given the record before us and our determination that the contamination and governmental action exclusions do not preclude coverage for the Duensings' losses, we conclude that the Duensings are entitled to entry of summary judgment on the issues of coverage under the contamination and governmental action exclusions.

We reverse and remand for entry of summary judgment consistent with this opinion.

TURNAGE, C.J., and HARRISON, HUNT, McDONOUGH, TRIEWEILER and WEBER, JJ., concur.

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EXHIBIT 11

ENDORSEMENT 5

COMMUNICABLE DISEASE EXCLUSION

1. This policy, subject to all applicable terms, conditions and exclusions, covers losses attributable to direct physical loss or physical damage occurring during the period of insurance. Consequently and notwithstanding any other provision of this policy to the contrary, this policy does not insure any loss, damage, claim, cost, expense or other sum, directly or indirectly arising out of, attributable to, or occurring concurrently or in any sequence with a Communicable Disease or the fear or threat (whether actual or perceived) of a Communicable Disease.

2. For the purposes of this endorsement, loss, damage, claim, cost, expense or other sum, includes, but is not limited to, any cost to clean-up, detoxify, remove, monitor or test:

   2.1. for a Communicable Disease, or

   2.2. any property insured hereunder that is affected by such Communicable Disease.

3. As used herein, a Communicable Disease means any disease which can be transmitted by means of any substance or agent from any organism to another organism where:

   3.1. the substance or agent includes, but is not limited to, a virus, bacterium, parasite or other organism or any variation thereof, whether deemed living or not, and

   3.2. the method of transmission, whether direct or indirect, includes but is not limited to, airborne transmission, bodily fluid transmission, transmission from or to any surface or object, solid, liquid or gas or between organisms, and

   3.3. the disease, substance or agent can cause or threaten damage to human health or human welfare or can cause or threaten damage to, deterioration of, loss of value of, marketability of or loss of use of property insured hereunder.

4. This endorsement applies to all coverage extensions, additional coverages, exceptions to any exclusion and other coverage grant(s).

All other terms, conditions and exclusions of the policy remain the same.

LMA5393

25 March 2020

EXHIBIT 11

EXHIBIT 12

PANDEMIC AND EPIDEMIC EXCLUSION

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

Notwithstanding any provision to the contrary within this policy or any endorsements thereto, it is understood and agreed,

This Contract shall exclude any loss, damage, liability, cost or expense or any other amount incurred by the (re)insured directly or indirectly arising out of, originating from, resulting from, caused by and or contributed to and or a consequence of and by, regardless of any other cause contributing concurrently or in sequence to the loss or otherwise, in connection with any Communicable Disease or threat or fear of Communicable Disease (whether actual or perceived) or the outbreak of an Epidemic or Pandemic, whether declared as such or not by any person or entity, including foreign and domestic governments and their representatives, agencies, and courts, the United Nations and its representatives and agencies, and similar persons and entitles responsible for managing public health, or any action taken by any party, person, entity, company, agency, and/or government to treat or prevent the spread thereof.

For the purposes of this Contract, "Communicable Disease" shall mean:

illnesses due to infectious agents or their toxic products, which may be from a reservoir to a susceptible host either directly as from an infected person or animal or indirectly through the agency of an intermediate plant or animal host, vector, or the inanimate environment;

any disease that spreads from one human to another or from animal to human by either transmission of bacteria, viruses or other pathogen between the carrier and the infected person, or through any vector;

diseases, illnesses and/or infections that may be transmitted, directly or indirectly, from a person, animal, or inanimate environment and/or object; or

diseases, illnesses and/or infections that can be spread from person to person, animal to person, animal to animal, person to animal, and object to person.

For the purposes of this Contract, "Epidemic" shall mean an increase, often sudden, in the number of cases of a disease above what is normally expected in that population in that area.

For the purposes of this Contract, "Pandemic" shall mean an Epidemic that has spread over several countries or continents, usually affecting a large number of people.

This Exclusion precludes any and all loss, injury or damage arising out of or related to the presence of, suspected presence of, or exposure to Communicable Diseases and precludes any loss, damage, cost or expense arising out of the testing for, monitoring of, cleaning up of, removal of, containment of, treatment of, detoxification of, neutralization of, remediation of, disposal of, or any other response to or assessment of, the effects of Communicable Diseases.

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This Exclusion applies whether or not the insured has sustained direct physical loss or damage to its building, property or premises, whether or not the insured has sustained a loss of functionality, whether or not the Communicable Disease is actually present in the insured's building, property or premises, whether or not the Policy contains civil authority coverage, whether or not a federal, state, or local government order prevents access to the insured's building, property or premises, whether or not the Policy otherwise contains any coverage for business interruption, contingent business interruption, extra expense, or coverage similar to those coverages, and whether or not any person employed at the building, property or premises sustained physical or personal injury due to a Communicable Diseases, whether or not any persons present at the building, property or premises sustained physical or bodily injury due to a Communicable Disease, and whether or not any person in contact with a person employed or present at the building, property or premises sustained physical or bodily injury.

The terms of this Exclusion 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 Policy. The Exclusion supersedes all other policy forms and endorsement which would otherwise provide coverage for the items excluded by the Endorsement.

All other terms and conditions remain unchanged.