IN THE SUPREME COURT OF OHIO

EMOI Services, LLC	**:**	**Case No. 2021-1529**
Appellee,	**:**	
v.	**:**	**On Appeal from the Second Appellate District, Montgomery County Court of Appeals No. 29128**
OWNERS INSURANCE COMPANY,	**:**	
Appellant.		

MERIT BRIEF OF APPELLANT, OWNERS INSURANCE COMPANY

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INTRODUCTION AND SUMMARY OF ARGUMENT

Traditional Business Property Policies Are Not Intended to Address Cyber Breaches

Cybersecurity is a dramatically increasing and expensive problem for businesses. Traditional property insurance policies do not cover these intangible but important risks, which is why a specialty insurance market has developed. A traditional policy is directed at physical items that can be physically damaged, and are underwritten and priced with these intended risks. Specialty cyber insurance policies, specifically directed at digital breaches and incursions, are commensurately underwritten and priced to meet the decidedly different risks posed by inherently intangible information being compromised.

The present matter presents an all-too-common scenario in this ever-expanding digital age and is one of first impression in Ohio. In this case, Appellee, EMOI Services, Inc., ("EMOI"), a medical billing/scheduling intermediary business that does much of its work through online transmission of information to and from its clients, has attempted to shoe-horn a cyber loss into a claim under its traditional businessowners property insurance policy with Appellant, Owners Insurance Company. In September, 2019, EMOI sustained a ransomware attack on its computer system and were unable to access portions of the data and/or software in the system for a short period of time until the demanded ransom was paid. Once the ransom was paid, access to the system software and data was recovered and the system functioned as intended and as it had previously. No tangible item or element of the computer system was damaged. In essence, the situation was no different than if one forgot the password to a bank account – you cannot get to the funds, but the funds are neither lost nor damaged as a result and are still there when you reset the password.

The loss claimed by EMOI is solely an economic loss and not a "physical loss or damage" to covered property

The "loss" EMOI seeks to recover in this case thus is not for physical loss or damage to property but solely the economic loss for the ransom, the economic loss for the period before the ransom was paid and its system function was recovered, and, the economic cost of upgrading its software and security to try and prevent another such hack or ransom situation in the future. Businessowners or commercial property insurance policies, like the Owners policy here, do not provide coverage for purely economic losses in the absence of simultaneous physical loss of or physical damage to tangible property at the insured's premises. The policy required the "covered cause of loss" to be a "risk of direct physical loss of or damage to property" and required the resulting damage to be "direct physical loss of or damage to" covered property. The proper construction and application of this policy threshold is the critical issue in this matter.

Using the common and ordinary meaning of the unambiguous policy language and construing the policy as a whole, it is clear that "direct physical loss of or damage to" property means that structural, perceptible harm must occur to a tangible item for coverage to exist, such as from fire, water, storm, electrical surge, or permanent dispossession. The phrase "direct physical loss of or damage to" property does not and is not intended to encompass temporary inability to access intangible information like computer software or digital data in the absence of structural **physical** harm, destruction or permanent loss of the tangible **physical** equipment or media upon which the inherently intangible data is recorded. The Data Compromise endorsement in the policy is inapplicable to the claims presented based upon its express definitions, and, even if it was applicable, contains specific exclusions for all the damages sought by EMOI, including payment of the ransom, computer system investigation and upgraded system security costs.

The "direct physical loss of or damage to" policy language as applied to a ransomware scenario should follow the great weight of authority addressing that phrase in other contexts, which the Court of Appeals did not do

This Court has not addressed the "direct physical loss of or damage to" property requirement in the context of a hacking, ransomware or other cyber/digital loss claim, making this issue one of important first impression. However, the same requirement of "direct physical loss of or damage to" property **has** been addressed in Ohio, by the federal courts sitting in or encompassing Ohio, and by courts nationwide in other contexts, including, but not limited to environmental claims, computer/electronic equipment claims, and, most notably of late, claims related to business loss from the Covid-19 pandemic.

The question of contract construction is undisputedly a question of law for the Court. The overwhelming weight of authority from all these decisions is that "direct physical loss of or damage to" property requires just what it states – a tangible, structural alteration of tangible property. To conclude otherwise – as did the court of appeals - renders significant portions of the policy meaningless, contrary to well-established rules of policy construction and the intended purpose of a traditional "all risk" policy of property insurance.

The court of appeals impermissibly grafted a requirement for expert opinion on coverage determinations by insurers

Because there is no coverage for the claims asserted, under well-established Ohio law, there can be no bad faith claim for the denial of coverage. The court of appeals decision below, however, implicitly grafts a requirement that expert opinion must be obtained by an insurer before a denial of coverage could issue and impermissibly shifts the burden of establishing the right of recovery away from the insured, where it resides properly under established Ohio law, to the insurer. These divergences from established law add an extra layer of hoops to jump through for insurers acting in good faith and following policy language that do not currently exist.

I. STATEMENT OF FACTS

This case was accepted on appeal from the Second District Court of Appeals, which reversed summary judgment granted in favor of Owners by the Montgomery County Common Pleas Court.

EMOI operates as a medical billing and application service and support for medical providers. (V. Glaser Deposition at p. 7.) EMOI's clients obtain information from their patients and provide it to EMOI so it can bill the appropriate payers, usually insurance companies. (Glaser Dep. at pp. 7-8.) EMOI also offers scheduling applications. (Id.) About 15 clients utilized EMOI's online "portal" to interact with EMOI's system. (Glaser Dep. at p. 21; D. Glaser-Garbrick Deposition at pp. 7-8.)

In September 2019, EMOI reported to Owners, its insurance carrier, that it was the victim of a ransomware attack by unknown third parties. (Complaint, ¶¶4, 13; Answer ¶4, and, Affidavit of Bradley Weaner, Aff. Ex. A1, Appx. D, pp. 41, 43-44.)[1] On September 13, Vernon Glaser, on behalf of EMOI spoke with Owners, specifically to claim representative, Bradley Weaner, regarding the ransomware incident. (Weaner Aff. Ex. A1, Appx. D, pp. 43-44; Glaser Dep. at p. 21, 49.) **Glaser reported to Owners that the data was not physically damaged, but was inaccessible due to being encrypted and held for ransom**. (B. Weaner Deposition at pp. 19, 21, 23, 26; Glaser Dep. at pp. 51-53 (testifying he does not recall what he told Weaner); Weaner Aff. Ex. A1, Appx. D, p. 43 ("There is no direct physical loss or damage to the data, [Named Insured] just cannot access it").)

[1] Mr. Weaner's affidavit and its exhibits were attached to Owners' Motion for Summary Judgment filed January 21, 2021. The exhibits included the claim file notes, Owners' coverage position letter, the coverage position letter of Hartford Steam Boiler and a copy of the Owners policy at issue. A copy of the Affidavit and its exhibits are attached hereto for ease of reference at Appendix D, pp. 41-187.

A. The Owners Businessowner's Policy at Issue Does Not Provide Coverage

EMOI maintained a Businessowners Policy of insurance with Owners Insurance Company, policy number 49-753-197-00, effective from March 13, 2019 to March 13, 2020. (Compl., ¶11; Ans. ¶6, Countercl. ¶1; and, Glaser Dep. at p.11.) The policy contains the three policy forms that are most relevant to the ransomware claim at issue.

The Businessowners Special Property Coverage Form Does Not Extend to Intangible Information Held for Ransom

First, in the Businessowners Special Property Coverage form, Section A. Coverage, the insuring agreement states, "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.**" (Weaner Aff. Ex. A4, Appx. D, p. 149, emphasis added.) The "Covered Causes of Loss" are defined at subsection A.3., as "risks of **direct physical loss**," unless otherwise excluded or limited under the terms of the policy. (Id., Appx. D, p. 150, emphasis added.) Subsection A.4., Limitations, provides:

> a. We will not pay for loss of or damage to:
> ***
> (3) Property that is missing, but there is no **physical** evidence to show what happened to it, such as shortage disclosed on taking inventory.
> (4) Property that has been transferred to a person or to a place outside the described premises on the basis of **unauthorized instructions**.

(Id., Appx. D, p. 150, emphasis added.)

Section E of the Businessowners Special Property Coverage form contains additional specific limitations related to electronic media and records. (Id., Appx. D, pp. 159-160.) In addition to requiring that any claimed loss of business income caused by "**direct physical loss of or damage to**" electronic media and records, it defines "Electronic Media and Records" as "Electronic data processing, recording or storage **media** such as films, tapes, discs, drums or cells; data **stored on**

such media; or, programming records used for electronic data processing or electronically controlled equipment." (Id., emphasis added.)

The Electronic Equipment Endorsement Does Not Extend to Intangible Information Held for Ransom

Second, the policy contains a specific endorsement for Electronic Equipment. (Id., Appx. D, pp. 81-86.) The insuring agreement for this endorsement states in relevant part:

> Under A. COVERAGE, 5. Additional Coverages, the following Additional Coverage is added:
> Electronic Equipment
> 1. COVERAGE
> Covered Property
> ***
> (2) Unscheduled Equipment
> (a) When a limit of insurance is shown in the Declarations under ELECTRONIC EQUIPMENT, EQUIPMENT – UNSCHEDULED, for unscheduled equipment, we will pay for **direct physical loss of or damage to** electronic **equipment**, component **parts** of such equipment and air conditioning **equipment** necessary for the operation of the electronic equipment which you own, which is leased or rented to you or which is in your care, custody or control while located at the premises described in the Declarations.
>
> We do not cover unscheduled laptop computers.
>
> (b) When a limit of insurance is shown in the Declarations under ELECTRONIC EQUIPMENT, MEDIA, we will pay for **direct physical loss of or damage to "media"** which you own, which is leased or rented to you or which is in your care, custody or control while located at the premises described in the Declarations. We will pay for your costs to research, replace or restore information **on "media" which has incurred direct physical loss or damage** by a **Covered Cause of Loss**.
>
> **Direct physical loss of or damage to Covered Property must be caused by a Covered Cause of Loss**.

(Id., Appx. D, p. 81, emphasis added.) The Declarations for this policy include "Electronic Equipment, Equipment – Unscheduled" and "Electronic Equipment – Media". (Id., Appx. D, p. 56.)

The Electronic Equipment endorsement contains the following exclusions, among others:

> 2. Exclusions
> Under B. EXCLUSIONS of the COVERAGE FORM, the following exclusions are added to apply to this Additional Coverage.
> ***
> e. Loss or damage caused by:
> (1) **Data processing "media" failure**; or
> (2) Breakdown or **malfunction** of the data processing equipment and component parts while the "media" is being run through the system. We will cover loss, damage or expense caused directly by ensuing fire or explosion.
> f. Actual work upon, installation or testing of covered property. We will cover loss caused by ensuing fire or explosion.
> ***
> h. **Delay or loss of market**.
> i. Loss or damage caused by or **resulting from improper operation** of Covered Property.
> ***

(Id., Appx. D, pp. 81-82, emphasis added.)

The Electronic Equipment endorsement also includes specific terms for Business Income and Extra Expense. (Id., Appx. D, pp. 83-86, section 5. Additional Coverages, b.) These terms expressly require that the suspension of operations "**must** be the **direct** result of interruption of your business **caused by accidental direct physical loss or damage to the electronic equipment or media covered** by this Additional Coverage. (Id., Appx. D, p. 83-84, subsections 5.b.(1)(a) 1) and 5.b.(2)(a) 1), emphasis added.) The Business Income and Extra Expense terms contains their own specific exclusions at subsection 5.b.(4), which include:

> (4.) Exclusions
> The following exclusions apply only to the Business Income and Extra Expense provisions of this Additional Coverage above, in addition to those contained in B. EXCLUSIONS:
> ***
> (b) We will not cover loss or damage caused directly or indirectly by any of the following, whether or not any other cause or happening contributes concurrently or in any sequence to the loss or damage:
> 1.) **Theft** of any property which is **not** an integral part of a building or structure at the time of loss. ***
> 2.) **Any other consequential or remote loss**.

(Id., Appx. D, pp. 84-85, emphasis added.)

"Media" is defined by the Electronic Equipment endorsement at 9. Definitions, d.:

> "Media" means **materials on which information is recorded** such as film, magnetic tape, paper tape, disks, drums and cards. "Media" includes computer software and reproduction of data **contained on covered media**.

(Id., Appx. D, p. 86, emphasis added.)

Data Compromise Endorsement Contains Express Exclusions for the Damages Sought by EMOI

Third, the policy contains a Data Compromise Coverage endorsement. (Id., Appx. D, pp. 132-136.) This coverage extends to incidents of "personal data compromise". (Id., Appx. D, p. 132, Data Compromise 1. a.) That definition requires that an "affected individual" be involved. (Id., Appx. D, p. 136, Definitions 7.c.) The definition of "affected individual" expressly excludes businesses or organizations and those only indirectly related to the insured:

> (1) "**Affected individual" does not include any business or organization**. Only an individual person may be an "affected individual."
> (2) An "affected individual" must have a **direct relationship** with your interests as insured under this policy. ***

(Id., Appx. D, p. 135, Definitions, 7.a., emphasis added.)

"Personal data compromise" is defined in the endorsement at Definitions 7.c., as follows:

> c. "Personal data compromise" means the loss, theft, accidental release or accidental publication of "personally identifying information" **as respects one or more "affected individuals"**, if such loss, theft, accidental release or accidental publication has or could reasonably result in the fraudulent use of such information. This definition is subject to the following provisions:
> ***

(Id., Appx. D, p. 136.)

Subsection 5. Exclusions, of the Data Compromise endorsement contains the following specific exclusions, among others:

> ***
> e. Except as specifically provided above* * *, **costs to review any deficiency** in the systems, procedures or physical security that may have contributed to the personal data compromise;
>
> f. **Costs to correct any deficiency**. This includes but is not limited to, any deficiency in your systems, procedures or physical security that may have contributed to a "personal data compromise".
> ***
> i. **Any threat, extortion or blackmail**. This includes, but is not limited to, ransom payments and private security assistance;
>
> j. Any **virus or malicious code** that is or becomes named and recognized by the CERT Coordination Center, McAfee, Seunia, Symantec or other comparable third party monitors of malicious code activity.
> ***

(Id., Appx. D, pp. 133, emphasis added.)

Both the Electronic Equipment and the Data Compromise provisions expressly provide that all other policy terms and conditions apply. (Id., Appx. D, pp. 86, 136.)

B. The Underlying Incident – Encryption and Ransom of the System Did Not Physically Damage Any Covered Property

Glaser testified that he learned of the incident initially through a call from an employee about 7:30 am on September 12, 2019, advising that she could not log into EMOI's computer operating system. (Glaser Dep at p. 16.) Glaser called EMOI's in-house IT employee, Garbrick. (Glaser Dep. at pp. 16, 19; Garbrick Dep. at p.12.) Upon Garbrick's attempt to resolve the problem, he discovered the system had been "hacked" and was encrypted by an outside source. (Garbrick Dep. at pp. 13-14, 16-17.) It is not known how the hacker gained access, but it is believed it was through a client's remote desktop access to the system. (Garbrick Dep. at p. 38.) "Ransom notes" had been left by the hacker in text messages in the system folders on seven or eight of the company's "virtual" servers (not all servers were encrypted) demanding three Bitcoin in exchange for the

decryption and release of the data/system functionality. (Garbrick Dep. at pp. 16-17, 34; Glaser Dep. at pp. 31-33, 35.)

Full functionality was restored to EMOI on payment of the ransom

Encryption works based upon a complicated mathematical function so that it is hard to find a solution, but if one has the answer key, it can be undone. (Garbrick Dep. at p. 23.) EMOI admits that it also used encryption for email and/or for transmission of sensitive or confidential information in the course of its business and admits the data encrypted is not damaged by this process. (Glaser Dep. at p. 36; Garbrick Dep. at pp. 23-24.) EMOI researched data recovery companies to attempt to recover the encrypted information, however, it was ultimately decided to just pay the ransom.[2] (Glaser Dep. at pp. 29-30; Garbrick Dep. at pp. 20, 29, 30.) The three Bitcoin ransom was arranged and paid and, **within about an hour after the ransom was paid, the hacker promptly provided EMOI the decryption key and instructions.** (Glaser Dep. at p. 35-36 Garbrick Dep. at p. 31.) **The decryption worked and EMOI's system was released.** (Glaser Dep. at pp. 36-37; Garbrick Dep. at pp. 31-33, 38.)

Upon decryption, the system functioned as it was intended. (Garbrick Dep. at p. 33, 47; Glaser Dep. at 36, 37.) **It operated as before, clients could log in and the usual business could be conducted**. (Garbrick Dep. at p. 38, 47.) There is no evidence or claim that any data was compromised or released. **There was no hardware or equipment damage**. (Glaser Dep. at p. 17, 18 (local, independent computers operated, just could not log into customer operations system)). This includes **no damage** to any **physical** media. EMOI subsequently obtained updates/upgrades to its server and operating software as well as additional computer security after

[2] EMOI's backups of its system were maintained on one of the virtual servers that were encrypted. (Garbrick Dep. at p.11).

this incident, but these were as preventative measures from a similar event recurring in future. (Garbrick Dep. at pp. 38-42.)

No physical damage occurred to any equipment, component or media

Importantly, as noted above, there was no damage to any hardware component of EMOI's computer and/or server system or any physical media as the result of the encryption of its files or the ransomware. When Glaser spoke with Owners regarding EMOI's ransomware claim on September 13, 2019, **he reported to Owners that its data was not physically damaged, but was simply inaccessible due to being encrypted and held for ransom.** (Weaner Aff. Ex. A1, Appx. D, p. 43.)

Owners' review of the policy and reasonable determination that no coverage exists

Upon receipt of EMOI's reported claim, Owners' claim representative, Weaner, identified the portions of the policy potentially applicable to the claim and reviewed them, both before and after speaking with Glaser. (Weaner Dep. at pp. 11-12; 19, 23; 29-31; Weaner Aff. and Aff. Ex. A1, Appx. D, pp.43.) Weaner had handled a number of computer system-related claims before this one, all of them involving **physical** damage to the system, for example, from fire, lightning/electrical surge, water or storms. (Weaner Dep. at p. 17.)

Because a "ransomed" data and encrypted computer system was a novel claim, in addition to reviewing the policy himself, Weaner also discussed the matter with his direct supervisor and branch manager. (Weaner Dep. at pp. 10-11; Weaner Aff. Ex. A1, Appx. D, pp. 43.) He also contacted a commercial lines claims examiner in Owners' home office regarding the potentially applicable portions of the policy and the application of the same. (Weaner Dep. at 11-12; 30-31; 39-41; Weaner Aff. Ex. A1, Appx. D, p. 43.) Weaner relayed the factual information provided by

Glaser, identified the pertinent policy forms and terms and with their assistance looked for coverage under the policy for the claim. (Id.)

The conclusion following all this review was that the terms of EMOI's businessowner's policy did not apply to a ransomware situation such as at issue. (Id.; see also, Compl. ¶14 and Compl. Exhibit B; Ans. ¶6; and, Weaner Aff. Ex. A1, Appx. D, p. 43.) Weaner then spoke with Glaser again to explain this analysis and conclusion. (Weaner Aff. Ex. A1, Appx. D, p. 43.) **The primary conclusion was because there was no direct physical loss or damage to the system, and specifically to the physical media or hardware (and thus any data on it), and also because the situation did not fall within the terms of the "data compromise" endorsement coverage, there was no coverage available under the terms of the policy**. (Weaner Dep. at pp. 30-31, 39-41;Weaner Aff. Ex. A1, Appx. D, pp. 43.) At that time, Glaser asked whether the policy would apply to the efforts and costs expected while waiting to regain access to the system data. Weaner again reviewed the policy but also concluded it did not apply for similar reasons as the previous. (Weaner Aff. Ex. A1, Appx. D, pp. 43.)

The coverage position letter by Owners explained the lack of coverage to EMOI and no additional information was provided

The same date as these conversations occurred, Weaner prepared and issued to EMOI Owners' coverage position letter explaining the relevant policy terms and conclusions reached. (Weaner Dep. at pp.39-40;Weaner Aff. Ex. A2, Appx. D, pp. 45-49.) The reasons identified in that letter regarding the unavailability of coverage are the same as those discussed on the phone with Glaser. Glaser was upset with the coverage position expressed but did not provide any additional information to Owners for further consideration prior to filing suit, despite the request to do so in

the coverage position letter. (Glaser Dep. at pp. 52-53; Weaner Dep. at pp. 43-44, 45;Weaner Aff. Ex. A2, Appx. D, p. 48.)[3]

II. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

This matter is before the court as an appeal from a summary judgment decision. As a consequence, the court's consideration is de novo. *AKC, Inc. v. United Specialty Ins. Co.*, __Ohio St.3d__, 2021-Ohio-3540, __N.E.3d__ (Oct. 6, 2021), citing, *Nationwide Mut. Fire Ins. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 1995-Ohio-214, 652 N.E.2d 684.

PROPOSITION OF LAW NO. I: A BUSINESSOWNERS PROPERTY POLICY THAT REQUIRES "DIRECT PHYSICAL LOSS OF OR DAMAGE TO" PROPERTY DOES NOT COVER LOSSES FROM A RANSOMWARE ATTACK.

This Court has not yet addressed the legal meaning of the critical language "direct physical loss of or damage to" property in the context of a traditional first-party businessowners property policy and, particularly, in the context of a cyber hacking or ransomware incident. Well-established Ohio contract law, however, requires the conclusion that a hacking or ransomware incident does **not** constitute or result in direct **physical** loss or damage under a commercial or business property policy like the Owners policy in this case. This needs to be clearly elucidated by this Court for guidance in a burgeoning risk category for both insureds and insurers.

A. The Owners policy requires a physical loss to physical property

Policy interpretation is a matter of law for the Court and addressed de novo

The interpretation of a policy of insurance, like all contracts, is a question of law for the court. *Sauer v. Crews*, 140 Ohio St.3d 314, 2014-Ohio-3655, 18 N.E.3d 410; *Cincinnati Insurance v.*

[3] Owners had a re-insurer for the Data Compromise portion of this policy, Hartford Steam Boiler. Hartford Steam Boiler also concluded that no available coverage existed under the terms of the Data Compromise endorsement. See, Weaner Aff. Ex. A3, Appx.D, pp. 50-53.

CPS Holdings, Inc., 115 Ohio St.3d 306, 2007-Ohio-4917, 875 N.E.2d 31, ¶7. As such, the axiomatic rules of contract construction apply.

The intentions of the parties must be derived from the insurance contract as a whole and not from "detached or isolated parts thereof." *Gomolka v. State Auto Mutual Insurance Company*, 70 Ohio St.3d 166, 172-173, 436 N.E.2d 1347 (1982). Where the policy sets forth coverages and exclusions in unambiguous terms, the court must apply the terms as written, in accordance with their plain and ordinary meeting. *AKC, Inc.*, ¶8; *Westfield v. Custom AgriSystems, Inc.*,133 Ohio St.3d 476, 2012-Ohio-4712, 979 N.E.2d 269, ¶8, quoting *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶11 (internal citations omitted).

Words and phrases used in an insurance policy must be given their **natural and commonly accepted meaning** unless otherwise defined. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 245-246, 374 N.E.2d 146 (1978), (where common words appear in an instrument, they will be given their ordinary meaning unless "manifest absurdity results" or unless some other meaning is clearly intended from the face or overall contents of the instrument). Any analysis that fixates on a single word in a policy is faulty because it fails to consider the intent of the policy as a whole. *Sauer*, ¶20. Courts also examine Ohio case law for assistance in interpreting undefined terms in a policy. *Auto-Owners Ins. C. v. Merillat*, 167 Ohio App.3d 148, 2006-Ohio-2491, 854 N.E.2d 513 (6th Dist.), ¶35, citing, *Shear v. West Am. Ins. Co.*, 11 Ohio St.3d 162, 165, 464 N.E.2d 545 (1984).

Coverage Analysis Follows a Logical Flow, Similar to a Computer Program

Policy coverage analysis, similar to a computer software program, essentially follows a series of logically sequenced inquiries to reach an end. If the answer at any sequential step is "no" to the query presented, then the analysis ends and no coverage is available. The path is a progression and does not skip intermediary steps. For example, the first basic question might be, "Is the entity

making the claim an insured as defined by the policy?" Here, the answer is "yes," so we proceed to the next step, such as, "was the policy in effect at the time of the subject loss?" Again, here, the answer is "yes." **The next question is then, "was there direct physical loss of or damage to covered property?" The answer here is no and the analysis is done and stops there. Alternatively, if the next question was, "was the claimed harm caused by a covered cause of loss as defined by the policy?" The answer to this question is still no.** The analysis again is done and stops.

A ransom of digital information without structural damage to tangible property is not covered by the Owners policy.

It is important to the analysis of this matter that the policy at issue is not and was not intended to be a "cyber" insurance policy.[4] The insuring agreement in EMOI's Businessowners Special Property Coverage Form with Owners, plainly states, "**We will pay for direct physical loss of or damage to Covered Property . . . caused by or resulting from any Covered Cause of Loss**." The "**Covered Causes of Loss**" are further defined as "**risks of direct physical loss**". Thus, the covered causes of loss, according to the natural and commonly accepted meaning of those words, are those that inflict **physical, i.e., structural, material, tangible loss or damage**. The requirement of the physical loss of or damage to physical, tangible property is a core element in business or commercial all risk property insurance policies like the Owners policy with EMOI.

The adjectives in the insuring agreement, "direct" and "physical," both modify the nouns "loss" and "damage." See, *Bethel Vill. Condo. Assn. v. Republic-Franklin Ins. Co.*, 10th Dist., Franklin

[4] The considerations and nuances in selecting or evaluating an appropriate cyber policy are significantly different than those related to a traditional property policy for good reason – it is an entirely different risk. See, e.g., John R. Hardin, "*Evaluating Your Company's Coverage for Ransomware Attacks Under Its Cyber Insurance Policy*", 24 N. 2 Cyberspace Lawyer NL 2, March 2019, attached as Appx. E, pp. 188-189; See also, Robert P. Hartwig, "*Cyberrisk: Threat and Opportunity*", Insurance Information Institute, October 2016, Appx. F, pp. 190-225.

No. 06AP-691, 2007-Ohio-546, ¶19. None of these words is ambiguous as used here, which has been concluded by innumerable courts in a variety of contexts. See, *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App.3d 23, 2008-Ohio-311, 884 N.E.2d 1130 (8th Dist.) and cases discussed further below. These words are also part of a cohesive phrase, which is, in turn, part of a cohesive policy construction. Otherwise, all the words and terms in the policy are not being given effect.

A contract is unambiguous if it can be given a definite legal meaning. *Galatis*, 100 Ohio St.3d 216, ¶11. "The mere absence of a definition in an insurance contract does not make the meaning of the term ambiguous." *Guman Bros. Farm*, 73 Ohio St.3d 107, 108. A court cannot create ambiguity in an insurance contract where there is none, and this includes creating an ambiguity by asking whether the parties could have included different or more express language in their agreement. *AKC, Inc.*, 2021-Ohio-3540, ¶12. A contract term is not ambiguous simply because parties disagree as to its meaning, either. *Shifrin v. Forest City Enterprises*, 64 Ohio St.3d 635, 638, 1992-Ohio-28, 597 N.E.2d 499.

The Electronic Equipment Endorsement unambiguously extends only to physical damage to tangible items, not to the temporary inaccessibility of intangible information

The plain, unambiguous terms of the policy's Electronic Equipment endorsement, likewise, expressly limit the coverage to direct physical loss or damage to specifically defined property and caused by a physical harm:

> (a) * * * [W]e will pay for **direct physical loss of or damage to electronic equipment, component parts of such equipment * * *** which you own, * * * while located at the premises described in the Declarations.
> * * *
> (b) * * * [W]e will pay for **direct physical loss of or damage to "media"** which you own, * * * while located at the premises described in the Declarations. We will pay for your costs to research, replace or restore information **on "media" which has incurred direct physical loss or damage by a Covered Cause of Loss**.

> **Direct physical loss of or damage to Covered Property must be caused by a Covered Cause of Loss.** (Emphasis added).

The "physical" requirement of the insuring agreement in the Electronic Equipment endorsement, with respect to the nature of the damage, the nature of the covered property and the nature of the cause of loss resulting in harm cannot be ignored. The description of the covered property in subdivision (a) is of "equipment" and "parts" and supporting mechanical systems. There is also a plain requirement spelled out in the last sentence of subdivision (b) requiring that to have costs of replacement or restoration of information to be covered, it **must** be **on "media"** – defined as **physical** items or devices - that has incurred "direct physical loss or damage".

"Media" is specifically defined by the Electronic Equipment endorsement as follows:

> 'Media' means **materials on which information is recorded** such as film, magnetic tape, paper tape, disks, drums and cards. 'Media' includes computer software and reproduction of data **contained on covered media**.

(Weaner Aff. Ex. A4, Appx. D, p. 86, emphasis added). The plain intention of the definition of "media" is that it includes software or data reproduction/replacement **only** when **recorded** on some **physical item or device**. Thus, it would only be covered under the policy terms if the **tangible media** upon which it is recorded is physically lost (e.g., stolen) or physically damaged (e.g., fire). The inherent reciprocal conclusion is that if software or data is **not** contained on physical "covered media", i.e., it is information or software in the abstract, then it is **not** included in the definition. Extending this logic, it is plain that if physical media (film, magnetic tape, paper tape, disks, drums or cards) or physical equipment does **not** sustain physical damage, then any alleged loss to data/software/information does **not** fall within the terms of the insuring agreement.

Removing or omitting the requirement of "direct" and "physical" fails to give full effect to the plain intent of the policy

If the policy requirements of a "direct" and "physical" item of property and a "direct" and "physical" loss or damage are ignored or omitted, all the operative terms in the insuring agreement(s) are not given effect and the intent of policy is not met. A court is required to consider "the policy language as a whole." In *Mapletown Foods, Inc. v. Motorists Mut. Ins. Co.*, 104 Ohio App.3d 345, 348, 662 N.E.2d 48 (8th Dist. 1995), the court stated the duty as follows:

> In construing a written instrument, effect should be given to all of its words if this can be done by any reasonable interpretation; and it is the duty of a court to give effect to all parts of a written contract, if this can be done consistently with the expressed intent of the parties. If possible, every provision in a contract should be held to have been inserted for some purpose and to perform some office, and an attempt must be made to harmonize, if possible, all the provisions of a contract.

Mapletown, quoting, *Ford Motor Company v. John L. Frazier & Sons Co.*, 8 Ohio App.2d 158, 161, 196 N.E.2d 335 (1964). See also, *Sauer*, 140 Ohio St. 3d 314, 2014-Ohio-3655 at ¶¶14-15, ¶20, ("[t]he fault in Crew's analysis is that it fixates upon a single word, 'cargo' and fails to consider the intent of the policy as a whole").

The Business Income and Extra Expense terms of the Endorsement also require that a "direct physical loss of or damage to" covered property have occurred

The Business Income and Extra Expense terms of the Electronic Equipment endorsement also expressly require that the claimed loss must be "caused by accidental **direct physical loss or damage to the electronic equipment or media** . . . ." **By these unambiguous terms, it is plain that there must be "direct physical loss or damage" to the tangible media items or devices on which software is recorded in order for any claimed software loss or damage to be covered**. Software or data, in the abstract or incorporeal form, is not included in the terms of the Electronic Equipment endorsement.

The common and ordinary definition of "software" is generally the collection of instructions and data that tell a computer how to work. See, e.g., Wikipedia, https://en.wikipedia.org/wiki/software; Tech Terms, https://techterms.com/definition/software; Encyclopedia Britannica, https://www.britannica.com/technology/software (also noting "the term was coined to differentiate these instructions from hardware – i.e., the **physical** components of a computer system." (Emphasis added)). On the Tech Terms page, the author notes that "Software can be difficult to describe **because it is 'virtual,' or not physical like computer hardware"** and also notes that "when you buy a software program, it often comes on a disc, which is a **physical** means of storing the software." Id. (Emphasis added).

The Owners policy is clear that it does not extend to intangible property or temporary inaccessibility due to encryption of digital information

The Owners policy at issue is replete with references in the Businessowners Special Property Coverage and the Electronic Equipment endorsement that "direct physical loss of or damage to" covered property must exist for any prima facie claim to exist, i.e., before addressing any potentially relevant exclusions. Those two policy forms alone reference the phrase direct physical loss or damage **34 times** in various provisions. Thus, the focus of the Owners policy issued to EMOI is on the **tangible** nature of the property covered – such as the building, contents, machines, and the like - which is readily apparent from the reiteration of the need for **physical** loss of or damage to the property throughout the policy. An intangible bit of information simply cannot sustain "physical" damage in the natural and ordinary meaning of the words. The definition of "covered cause of loss" in the policy also expressly states that it is limited to "risk of direct **physical** loss." This is entirely consistent with the history and development of all-risk business and commercial property insurance, discussed further below.

The temporary encryption of incorporeal system data or software, which is not physical or tangible, and which does not cause structural, material damage to the physical media or computer equipment, is not a loss or damage within the plain and unambiguous terms of the Owners policy. This situation is essentially no different than forgetting the password to your computer – the information is there, undamaged, and accessible once you remember or reset the password. Extending the property policy to the claimed loss at issue results in "manifest absurdity" from, at best, a strained and contorted reading of unambiguous policy language or by simply leaving express words and phrases out of the policy terms, all of which is prohibited by Ohio's rules of contract interpretation.

Traditional property policies do not contemplate and are not intended to extend to "cyber" risks

Just as there is specific insurance policies for other specialty types of risk – e.g., employment, farming, medical practice, public entities – there is specialty insurance available for cyber risks. **Specialized "cyber" risk policies have been developed in recent years to provide protection for modern digital ransom, hacking, or other information/data-related risks.** The reason it was developed is because the traditional commercial or business policy does **not** contemplate coverage of such risks. This is amply demonstrated in this case.

Historically, property insurance insured against the risk of fire for ships, buildings, and some commercial property at a time when most structures in use were wooden. 10A Couch on Insurance, §148.1 (3d Ed. 2021); see also, Philip L. Bruner & Patrick J. O'Connor, Jr., Bruner and O'Connor on Construction Law §11:418 (explaining how property insurance developed after the Great Fire of London in 1666). The traditional "all risk" property policy form developed in the 1950s and began incorporating "physical loss or damage" language similar to that at issue in this case. The purpose of requiring "physical loss or damage" was to "clarify the underwriters' intent that there

was no coverage for intangible losses such as loss of market, loss of value, losses due to delay, loss of use or purely financial losses." Scott G. Johnson, *What Constitutes Physical Loss or Damage in a Property Insurance Policy?* 54 Tort Trial & Ins. Pract. L.J. 95, 96-97, n.2, pp. 98-99. Appx. G, pp. 227-230.

This Court has acknowledged that the core purpose of an insurance contract matters to its interpretation. See, *Sauer*, 140 Ohio St. 3d 314, 2014-Ohio-3655, ¶¶10, 13 and *Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶20. For example, in *Galatis*, this Court states: "[t]he **general intent** of a motor vehicle insurance policy issued to a corporation is to insure the corporation as a legal entity against liability arising from the use of motor vehicles." Id. Based on this recognized core purpose of the policy, the Court concluded the policy did not extend to cover employees not involved in company business. Id. Part of the intrinsic policy interpretation then, is the fundamental nature of the policy at issue.

The fundamental nature of a traditional business property policy is to cover tangible property from physical damage

Here, the **fundamental nature of a traditional commercial or business property policy** is to cover **tangible, material property from physical harm**. In other words, the nature of a businessowners property policy is to provide coverage only where physical damage to tangible property is damaged by some physical force, i.e., wind, water, lightning, fire, etc. See, Couch on Insurance, §148:46 (3d Ed. 2020). Terms for business income and extra expense are another, secondary, layer of coverage still dependent on an underlying direct physical loss of or damage to property at the insured premises – **the insured's "*operations* are not what is insured – the building and the personal property in or on the building are**." *Real Hosp. LLC, v. Travelers Cas. Ins. Co. of Am.*, 499 F.Supp.3d 288, 296 (S.D. Miss. Nov. 4, 2020), (italic emphasis in

original, bold emphasis added). The concept of direct physical loss of or damage to property does **not** translate to encryption of digital information and software.

B. The weight of legal authority requires a conclusion there was no direct physical loss

Ohio has previously determined the phrase "direct physical loss of or damage to" property to require demonstrable physical change to the structure of tangible property

A ransomware attack on a business computer system and resultant claim under an all risk commercial property insurance policy has not been addressed in Ohio or by courts applying Ohio law. The seminal case in Ohio to date addressing the phrase "direct physical loss or damage" in a property insurance context is ***Mastellone v. Lightning Rod Mut. Ins. Co.,*** 175 Ohio App.3d 23, 2008-Ohio-311, 884 N.E.2d 1130 (8th Dist.) This Eighth District Court of Appeals decision found the phrase, in plain and ordinary language, required a **demonstrable, physical change** to occur to the **structure of tangible property**. The court expressly found that this interpretation was consistent with the authorities on insurance law, citing 10A Couch on Insurance (3rd Ed. 1998), §148:46:

> **The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal, and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property**.

The court found that since the exterior mold at issue in *Mastellone* could be cleaned and did not cause structural damage to the home, there was no direct physical loss of or damage to property. Similarly, the encryption by the hacker here could be "cleaned" from EMOI's intangible computer data or software and there was no structural or material damage to any tangible property. Consequently, the ransomware claim does not fall within the plain and unambiguous terms of the policy.

Mastellone and its reasoning are frequently followed across jurisdictions

Several other cases in Ohio and elsewhere have followed *Mastellone*. In *Universal Image Prods. v. Fed. Ins. Co.*, 475 Fed. Appx. 569 (6th Cir. 2012), (applying Michigan law), the Sixth Circuit also addressed the "direct physical loss or damage" issue. In that case, the court concluded that **where the insured suffered no tangible damage to its insured property, there was no "direct physical loss or damage" within the policy**. The property at issue in this case was a commercial office property leased by the insured that developed mold within the HVAC system. Portions of the floor had to be vacated while work was performed and the HVAC system had to be shut down, resulting in significant disruptions to business. The HVAC system and the commercial office spaces were cleaned of the mold. The policy provided in its insuring agreement that "we will pay for direct physical loss or damage to building or personal property" caused by a peril not otherwise excluded. The policy did not define "direct physical loss or damage." The court surveyed decisions from a number of jurisdictions, including *Mastellone*, from Ohio, concluding that "direct physical loss or damage" requires **tangible** damage to **material** property and is distinct from "economic" losses. *Universal Image* at 573.

Similarly, in *Penton Media, Inc. v. Affiliated FM Ins. Co.*, 245 Fed Appx. 495 (6th Cir. 2007), (applying Ohio law), the Sixth Circuit found that where a policy extended coverage for direct physical loss or damage at certain locations, the policy did **not** extend coverage for losses incurred from the **inability to access** trade show locations due to a shutdown by civil authorities because this **did not constitute "direct physical loss or damage" to property**. This is essentially the same circumstance at issue here – EMOI was unable to access its computer system due to a "shutdown" by the hacker who had encrypted the files. This does not constitute "direct physical loss or damage", particularly where EMOI later regained access to and function of its system. See also,

Source Food Tech., Inc., v. United States Fid. & Guar. Co., 465 F.3d 834 (8th Cir. 2006), (where government ban precluded importation of beef cattle purchased by insured, there was no "direct physical loss" to the product itself to bring the loss of income claimed within policy coverage because the product still existed and was not physically damaged). Like in *Source Food Tech*, EMOI's temporary inability to access its intangible computer data or software was not a "direct physical loss" but rather an **economic loss** that does not fall within the policy insuring agreement.

In *Pentair v. Am. Guar. & Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005), the insured submitted a claim to the defendant insurer for certain business interruption losses due to its overseas supplier having been damaged in an earthquake, making it impossible for it to meet customer orders. The plaintiff argued the damage to the supplier constituted "direct physical loss or damage" sufficient to meet the terms of its policy which required it. The court rejected this argument finding that (a) the insured plaintiff submitted no case law holding that a **mere loss of use or function** constituted "direct physical loss or damage" within the meaning of the policy and **specifically rejected the implication that direct physical loss or damage is established whenever property cannot be used for its intended purpose**. The court distinguished cases that did involve direct physical loss or damage. See also, *Mama Jo's, Inc. v. Sparta Ins. Co.*, 823 Fed.Appx. 868 (11th Cir. 2020), ("direct" and "physical" modify "loss" and require that damage be an actual change in the insured property and that **an item or structure that merely needs to be cleaned has not suffered a loss that is both direct and physical**); *Promotional Headwear International v. The Cincinnati Insurance Company*, 504 F.Supp.3d 1191 (D. Kan. 2020), (a virus that can be wiped away is neither a direct nor physical loss of property). Similarly, here, **where use and function were restored by decryption of EMOI's intangible system data or software, there is and has been no direct physical loss or damage to tangible property.**

Intangible items, such as information, software or data, cannot sustain physical damage

First-party property cases related to computer losses, in general, are rare, but the great weight of authority for similar claims also concludes that intangible property, including software, data or digital "information", cannot sustain physical damage. See, for example:

- The Southern District of Ohio held there was **no "direct physical loss of or damage to" checks** caused by the insured depositing them pursuant to email scheme and later having funds withdrawn from their account when they were determined fraudulent because the **deposited funds were intangible** (as opposed to the paper checks themselves). The court expressly noted that, "[t]his is *not* an instance in which, for example, cashier's checks were destroyed and lost in a fire," in differentiating a physical loss from the intangible loss existing in that case. *Schmidt v. Travelers Indemn. Co. of Am.*, 1010 F.Supp. 3d 768, 781 (S.D. Ohio, 2015), (applying Ohio law, emphasis in italics original, emphasis in bold added) and citing *Florists Mutual*, infra, in footnote 23;

- In *Florists Mut. Ins. Co. v. Ludy Greenhouse Mfg. Corp.*, 521 F.Supp.2d 661, 680 (S.D. Ohio 2007), (applying Ohio law), the court found that "funds deposited in a bank account do not have physical existence and thus are not susceptible to physical loss or damage." **Like the funds at issue in *Schmidt* and *Florists Mutual*, the data hijacked by the ransomware attack here likewise has no physical existence and thus is not susceptible to "physical loss or damage"**;

- **Digital information is not tangible and thus could not, itself, sustain physical loss or damage** - *Ward General Ins. Services, Inc. v. Employers Fire Ins. Co.*, 114 Cal.App.4th 548, 7 Cal. Rptr. 3d 844 (4th App. Dist. 2003). In *Ward*, the court found that "data" according to dictionary definition, "is defined quite simply, as factual or numerical 'information.'" Thus, the insured's computer database crash, in the ordinary sense, was a loss of organized information, and that **"information qua information" cannot be said to have a material existence formed out of tangible matter or be perceptible to the sense of touch**;

- **Temporary inability to access computer system or data does not constitute "direct physical loss of or damage to" property.** *J.O. Emmerich & Assoc. v. State Auto Ins. Cos.*, No. 3:06cv00722-DPJ-JCS, 2007 U.S. Dist. LEXIS 108969 at *7 (S.D. Miss., Nov. 19, 2007) (Hurricane Katrina knocked out electrical power and thus the insured's ability to access its computer system to publish its newspaper and advertising; however, this did not constitute "direct physical loss of or damage to property" within the terms of the business property policy at issue). The situation in *J.O. Emmerich* is much like the one at issue in that an external situation temporarily restricted access to the plaintiff's computer system (later rectified), but neither demonstrate a "physical loss or

damage" to the computer information, media or equipment themselves sought to be accessed;

- "Computer data, software and systems are not 'tangible' property in the common sense understanding of the word. . . . **Computer data, software and systems are incapable of perception by any of the senses and are therefore intangible.** Similar to the information written on a notepad, . . . software and systems are intangible items stored on a tangible vessel – the computer or a disk." - *America Online, Inc. v. St. Paul Mercury Ins. Co.*, 207 F.Supp.2d 459, 468 (E.D. Va. 2002);

- **In the absence of physical damage to any components of host drive or computer, there was no "physical damage to the tangible property of others"** - *Seagate Technology, Inc. v. St. Paul Fire and Marine Ins. Co.*, 11 F.Supp.2d 1150, 1155 (N.D. Cal. 1998)

- An **all risk property insurance policy was found inapplicable to remediation costs** incurred to convert computer system from two-digit date to four-digit date recognition capability to avoid Y2K computer problems in *AFLAC, Inc. v. Chubb & Sons, Inc.*, Ct. App. Ga., Second Div., 260 Ga.App. 306, 581 S.E.2d 317. The court noted, "In effect, AFLAC seeks no more than an ordinary cost of doing business – that is, a maintenance and renovation expense in the nature of upgrading its computer systems and software upon a known design limitation."[5]

See also, *MRI Healthcare Ctr. Of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App.4th 766, 778-779, 115 Cal.Rptr.3d 27 (Ct.App.2d Dist. 2010), (**where no "distinct, demonstrable, or physical alteration of" MRI machine** after it did not work properly following "ramp down" to permit roof repair, there was **no "direct physical loss" or damage to property**); *Northeast Ga.*

[5] The Court of Appeals referred to *Nat. Ink and Stitch, LLC v. State Auto Prop. & Cas. Ins. Co.*, 435 F.Supp.3d 679 (D.Md. 2020), however, in addition to being in the extremely small minority of jurisdictions and decisions in terms of its interpretation of 'physical loss or damage', the policy terms are different and distinguishable from those in the Owners policy and its policy analysis is flawed under its acknowledged rules of contract construction. Moreover, *Nat. Ink and Stitch* has been distinguished by the U.S. District Court of Maryland in other cases discussing "direct physical loss of or damage to" property. See, e.g., *Cordish Companies, Inc. v. Affiliated FM Ins. Co.*, No. CV ELH-20-2419 __F.Supp.3d__, 2021 WL 5448740 (D. Md., Aug. 31, 2021), *13-*14, *16 (including a lengthy analysis to reach the conclusion that physical damage is a "distinct, demonstrable physical alteration of the property" and "direct physical loss occurs when a structure has been rendered "uninhabitable and unusable", permanently. Economic loss alone is insufficient to trigger coverage, physical alteration to the property is required and excludes losses that are intangible or incorporeal. *Nat'l Ink*, distinguished on its facts.)

Heart Ctr., P.C. v. Phoenix Ins. Co., N.D. Ga. No. 2:12-cv-00245-WCO, 2014 WL 12480022 at *6 (May 14, 2014), (in case where solution generator was recalled rendering PET scanner unusable, court held it **"will not expand 'direct physical loss' to include loss of use damages when the property has not been physically impacted in some way.** To do so would be equivalent to erasing the words 'direct' and 'physical' from the policy."); *Port Authority of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3rd Cir. 2002), ("[i]n ordinary parlance and widely accepted definition, physical damage to property means 'a distinct, demonstrable, and physical alteration' of its structure." (relying on 10 Couch on Ins. §148:46 (3d Ed. 1998))).

The system's digital information, while inaccessible, was not physically damaged

The overall reading of the Owners business property policy **as a whole**, makes it obvious that **the policy is intended to cover material, physical property from tangible, structural damage**. That did not happen in this case with the encryption and subsequent decryption of intangible data. In effect, there is no difference between this matter and having misplaced a password for an account or the key to a bank lockbox. The contents of the account or the box still exist, undamaged but are simply inaccessible until the password or key is found.

The court of appeals departed from the policy language, without basis and departing from well-established interpretation rules. To conclude otherwise is to ignore the fundamental nature as well as the plain intent of the policy and to ignore plain and unambiguous words used repeatedly in the operative terms of the policy, contrary to essentially universal rules of contract construction.

The plethora of recent Covid-19 pandemic business loss cases also conclude "direct physical loss or damage" requires tangible, material, structural harm to property

The same phrase, "direct physical loss or damage" has taken centerstage in the context of business interruption claims arising from loss of business during the Covid-19 pandemic. Hundreds of decisions have been issued addressing this phrase in the past two years. **The great**

bulk of caselaw has concluded that there must be some perceptible change to a tangible item for "direct physical loss or damage" within the scope of a property policy to exist. See, e.g., *The Nail Nook, Inc. v. Hiscox Insurance Co., Inc.*, No 110341, 2021-Ohio-4211, 182 N.E.3d 356 (8th Dist.), (relying on *Santo's Café,* infra). To conclude that the same phrase also within a business or commercial property policy means something different in this context also dealing with a claim of economic loss where there has been no structural change to any tangible item of property is illogical, unreasonable and would reach "manifest absurdity" prohibited by the rules of contract construction.

The myriad "coronavirus" cases being decided across the country largely turn on the same or very similar "direct physical loss or damage" language and have repeatedly concluded that the "direct physical loss or damage" requirement means that **tangible** property must be **structurally** changed to be met. Indeed, several federal decisions, following extensive analysis, conclude that Ohio law requires this conclusion. See, for example, representative cases from the Sixth Circuit, Ohio District Courts and Ohio, many of which cite and rely upon *Mastellone*:

- *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398, 401 (6th Cir. 2021), (analyzing numerous cases and **expressly concluding that "Ohio law construes 'direct physical loss of or damage to" insured property to require that the plaintiff-insured plead distinct, demonstrable, physical alteration of the insured property,**" emphasis added);

- *Dakota Girls, LLC v. Philadelphia Indemnity Ins. Co.*, 17 F.4th 645, 649 (6th Cir. 2021), (following *Santo's Italian Café'* and finding Ohio law requires direct physical alteration of property to show damage, **mere economic injury and loss of use is "simply not the same as a physical loss"**);

- *Sys. Optics, Inc. v. Twin City Fire Ins. Co.* No. 21-3556, 2022 WL 616968 (6th Cir., Mar. 2, 2022) (per curiam) (following *Santo's Italian Café,* and **finding 6th Circuit predicts Ohio interprets "direct physical loss of or damage to" property to require "tangible destruction" or "tangible or concrete deprivation"**);

- *Bridal Expressions, LLC v. Owners Ins. Co.*, Sixth Cir. No. 21-3381, 2021 WL 5575753 (Nov. 30, 2021), (affirming district court dismissal of complaint based upon

decision in *Santo's Italian Café*, applying the plain and ordinary meaning of the operative coverage language requiring direct physical loss of or damage to property requires tangible harm and that **"[a] loss of use simply is not the same as a physical loss"**);

- *Equity Planning Corporation v. Westfield Insurance Company*, 522 F.Supp.3d 308, 318-328 (N.D. Ohio 2021), (providing detailed analysis and following legal principle announced in *Mastellone* "demonstrates that Ohio courts, when construing the term 'physical injury' within an insurance policy, look to whether the insured has suffered **harm from a physical force that altered or tangibly affected the property**");

- *MIKMAR, Inc. v. Westfield Insurance Co.*, 520 F.Supp.3d 933, 939-942 (N.D. Ohio 2021), (court concluding the **phrase "direct physical loss of or damage to" property is not ambiguous** and that the **"phrase intends a tangible loss of or harm to" property and that physical, in particular means "having material existence: perceptible especially through the senses and subject to the laws of nature,"** quoting Merriam-Webster.com and *Mastellone*);

- *Family Taco, LLC v. Auto Owners Ins. Co.*, 520 F.Supp.3d 909, 916-919 (N.D. Ohio 2021), (following *Mastellone* and finding "Ohio courts understand that **physical injury** in an insurance policy **requires actual harm to a structure, not superficial or intangible effects"**);

- *Brunswick Panini's LLC v. Zurich American Ins. Co.*, 520 F.Supp.3d 965, 975-977 (N.D. Ohio, 2021), (following both *Mastellone* and *Universal Image* and concluding (a) "direct physical loss of or damage to" is **not ambiguous** and (b) **"physical" excludes the incorporeal or intangible**);

- *Ceres Enterprises, LLC v. Travelers Ins. Co.*, 520 F.Supp.3d 949, 956 (N.D. Ohio 2021) (concluding "direct physical loss of or damage to" property requires a material, perceptible destruction or deprivation or harm); and,

- *Sanzo Ent. v. Erie Indemn. Co.*, __Ohio App.3d__, 2021-Ohio-4268, 182 N.E.3d 393,¶54, (reviewing cases and concluding policy language requiring direct physical loss of or damage to property is **not ambiguous** and requires a **tangible and structural damage to property**).

In other jurisdictions, outside of Ohio and its related federal courts, similar results have been reached, for example:

- *1 S.A.N.T., Inc. v. Berkshire Hathaway, Inc.*, 513 F.Supp.3d 623, 629-631 (W.D. Penn. 2021), (applying dictionary definitions to read "direct physical loss or damage" in "plain and generally accepted meaning of the term" and concluding actual physical damage to property and **rejecting "mere economic losses" as stretching the language beyond its plain meaning** and interpretive authority of the court);

- *Edison Kennedy, LLC v. Scottsdale Ins. Co.*, 510 F.Supp.3d 1116, 1122-1124 (M.D. Fla. 2021), (**necessity of cleaning property does not mean property suffered direct physical damage or loss** as required by the policy and no direct physical damage or loss to insured premises demonstrated), citing *Mama Jo's Inc. v. Sparta Ins. Co.*, supra;

- *Johnson v. Harford Fin. Servs. Grp.*, 510 F.Supp.3d 1326, 1332-1334 (N.D. Ga. 2021), (reviewing numerous cases and concluding direct physical loss or damage requires **actual change** in the property);

- *10e v. Travelers Indemn. Co.*, 483 F.Supp.3d 828, 835-836 (C.D. Cal. 2020), (inability to use property does not amount to "direct physical loss of or damage to property" within ordinary meaning of words, "distinct, demonstrable, physical alteration" to property required; "**An insured cannot recover by attempting to artfully plead temporary impairment to economically valuable use of property as physical loss or damage,**" emphasis added.) The court subsequently dismissed the plaintiff's second amended complaint, also for failure to allege the existence of direct physical loss or damage, as well as due in part, to a virus exclusion. see, *10e v. Travelers Indemn. Co.*,500 F.Supp.3d 1070 (C.D. Cal. 2020);

- *Gavrilides Management Co., v. Mich. Ins. Co.*, Ingham Cir. Ct. No. 354418, __N.W.2d__, 2022 WL 301555 (Mich. Ct. App.) (per curium) at *4-*5, (no direct physical loss or damage to property from SARS-CoV-2 virus);

- *Creative Business, Inc. v. Covington Specialty Insurance Company*, No. 2:20-cv-02452-JTF-atc, 2021 WL 4191466 (W.D. Tenn. Sept. 9, 2021), (applying Tennessee law), (all-risk insurance policy stating that the insurer will pay for "direct physical loss of or damage to" covered property requires **tangible damage or destruction** to that covered property);

- *TJBC, Inc. v. The Cincinnati Insurance Company, Inc.*, S.D. Ill. No. 20-cv-815-DWD, 2021 WL 243583, *4-*5, (**"physical injury unambiguously connotes damage to tangible property causing an alteration in appearance, shape, color or in other material dimension"**), quoting, *Windridge of Naperville Condominium Assoc. v. Philadelphia Indemnity Ins. Co.*, 932 F.3d 1035 (7th Cir. 2019), in turn citing *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 197 Ill.2d 278, 258 Ill. Dec. 792, 757 N.,E.2d 481 (Ill. 2001);

- *Image Dental v Citizens Ins. Co. of Am.*, 543 F.Supp.3d 582, 587-589 (N.D. Ill), ("**A 'physical loss' of property does not mean a mere inability to run a business,**" emphasis added. "The nature of the loss must be physical, not intangible, immaterial, economic or regulatory." **The policy is "chockfull of textual clues that there must be loss of or damage to a thing, meaning a tangible object"**); and,

- *Nguyen v. Travelers Cas Ins. Co. of Am.*, 541 F.Supp.3d 1200, 1215-1218 (W.D. Wash 2021), (no direct, physical damage to property as required by a commercial property

> policy where surfaces can be cleaned; also, **direct physical loss of property does not equate to loss of use of property and does not include "purely economic losses"**, emphasis added).

This Court, as well, has a pending Covid-19 coverage case before it, argued in February, 2022, with the decision eagerly awaited, *Neuro-Communications, Inc. v. The Cincinnati Insurance Company*, Sup.Ct. Case No. 2021-0130 (on certified question from the U.S. Dist. Ct., Northern Dist. Ohio). The issue of the phrase "direct physical loss of or damage to" property is also the key issue in that case. The extensive discussion therein by Cincinnati Insurance Company and its amici in their merit briefing is guiding and persuasive.

C. The plain terms of the policy must be enforced, consistent with the "hard reality about insurance"

The dissent in the court of appeals properly observed that **the "medium, presumably a server, upon which the software at issue was stored, did not sustain physical loss or damage. Therefore, coverage under the [Electronic Equipment] endorsement was not triggered."** *EMOI Services, Inc. v. Owners Insurance Company*, Montgomery App. No. 29128, 2021-Ohio-3942, ¶71 (Tucker, dissenting, emphasis added), Appx. A, p. 28. This conclusion is entirely consistent with the rules of policy interpretation, the Ohio law set forth in *Mastellone* and all the cases following *Mastellone's* logic across nationwide jurisdictions, the decisions in *Schmidt, Florists Mutual, Ward, J.O. Emmerich, America Online,* and *Seagate*, above, as well as the heavy weight of authority in the Covid-19 cases. The dissent also recognized the "hard reality about insurance":

> **It is not a general safety net for all dangers.** If risk is not having money when you need it, insurance is one answer to perilous events that could prompt a sudden drop in revenue. Fair pricing of insurance turns on correctly accounting for the likelihood of the occurrence of each defined peril and the cost of covering it. Efforts to push coverage beyond its terms creates a mismatch, an insurance product that covers something no one paid for and, worse, runs the risk of leaving insufficient funds to pay for perils that insureds did pay for. **That is why courts must honor**

> **the coverage the parties did – and did not – provide for in their written contracts of insurance.**

Id. at, ¶74, (Tucker, dissenting), Appx. A, p. 29, quoting *Santo's Italian Café*.

Giving effect to the plain words and language of the Owners policy results in no coverage being available because there was no physical loss or damage to tangible property. To do otherwise "writes out" the unambiguous modifiers "direct" and "physical" entirely from the policy language. *Promotional Headwear Int'l.*, 504 F.Supp.3d 1191 (D. Kan. 2020) (modifiers "direct" and "physical" cannot be written out but must be considered when read together and in conjunction with the policy as a whole; the words are plain and unambiguous; "'direct physical loss or damage' to property requires some showing of actual or tangible harm to or intrusion on the property itself" or "permanent dispossession" of the property); see also, *Plan Check Downtown III, LLC v. AmGuard Ins. Co.*, 485 F.Supp.3d 1225, 1231-1232 (C.D. Cal. 2020) ("loss of" property under an all-risk property insurance policy does not extend to instances where property owner was temporarily dispossessed of property since allowing coverage in such a situation would result in "a sweeping expansion of insurance coverage without any manageable bounds"); *Mark's Engine Co. No. 28 Restaurant, LLC v. Travelers Indemn. Co. of Connecticut*, 492 F. Supp.3d 1051 (C.D. Cal. 2020), (any interpretation "that 'direct physical loss of' encompasses deprivation of property without physical change in the condition of the property * * * would be an interpretation without any 'manageable bounds'", citing *Plan Check*).

A similar expression was made in relation to the Covid-19 coverage claims in *Dime Fitness, LLC v. Markel Ins. Co.*, Fla.Cir.Ct. No. 20-CA-5467, 2020 WL 6691467 at *2 (Nov. 10, 2020):

> This Court is sympathetic to the plight of so many business owners in the wake of the COVID-19 pandemic. **Yet, this Court cannot allow sympathy to cloud its review of the plain meaning of an insurance policy.** Insurance companies cannot bear the burden of this crisis where, as here, the Policy does not provide for coverage of purely economic losses resulting from the COVID-19 pandemic.

(Emphasis added).

Stated otherwise, insurers are not and cannot be guarantors against the consequences of all adverse events affecting society. Insurers can assist individuals and businesses they insure by providing coverage for **contractually defined** events and damages. Despite the ever-increasing reality of hacking, phishing, ransomware or other malware attacks on computer systems, a traditional business or commercial all-risk property insurance that requires "direct physical loss of or damage to" property caused by a "risk of direct physical loss or damage" simply **does not** and **is not** intended to cover **intangible** cyber risks of economic harm in the absence of material, structural damage to tangible physical property. To conclude otherwise results in a "sweeping expansion of insurance coverage without any manageable bounds".

D. ***Henderson Road*** **has been reversed based upon the Sixth Circuit decision in** ***Santo's Italian Café***

EMOI relied heavily on *Henderson Road Restaurant Systems, Inc. v. Zurich American Ins. Co.*, N.D. Ohio No. 1:20 cv 1239, 2021 WL 168422, in its arguments below, which was an outlier in the decisions discussing the "direct physical loss or damage to" language. Since that decision, however, the Sixth Circuit decided *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398, 401 (6th Cir. 2021). As a result of the *Santo's Italian Café* decision, the decision in *Henderson Road* was vacated and reversed by the Northern District just three days before the Second District's decision in this case was issued. See, *Henderson Road v. Zurich American Ins. Co.,* N.D. Ohio No. 1:20 cv 1239, 2021 WL 5085283 (N.D. Ohio, Nov. 2, 2021), ("*Henderson 2*"). **The court in *Henderson 2* acknowledged it must follow the Sixth Circuit's interpretation of "direct physical loss" and "property", which requires a "tangible and concrete deprivation of the property itself."** It further stated that **"*Santo's* makes clear that coverage for a 'direct physical loss' of 'property' applies only to physical property"** and that "the Sixth Circuit has determined

that this language covers only the loss of physical property – not the loss of use of the property for its original purpose." This conclusion in *Santo's Italian Café* and *Henderson 2* is consistent with *Mastellone* and the plain terms of the property insurance policy at issue.

PROPOSITION OF LAW NO. II: A COURT CANNOT READ RANSOMWARE COVERAGE INTO A BUSINESSOWNERS ALL RISK PROPERTY POLICY BY READING KEY RANSOMWARE EXCLUSIONS OUT.

A. The Data Compromise endorsement contains specific exclusions directed at hacking and ransomware that preclude coverage, as the Trial Court found

The policy between EMOI and Owners contained a Data Compromise endorsement. This endorsement is specifically directed to potential losses from "hacking" computer information, in specified circumstances. However, by its own definitions, no "affected person" exists in this situation, no personally identifying information of "affected persons" is claimed to have been compromised. **And, even if there had been a situation within the insuring terms of this endorsement**, **express exclusions apply to preclude ransom reimbursement, as well as costs to correct the deficiencies addressed by EMOIs subsequent upgrades of its database, servers and security protocols.**

The Data Compromise endorsement contains the following pertinent exclusions:

> ***
> e. Except as specifically provided above* * *, **costs to review any deficiency in the systems, procedures or physical security** that may have contributed to the personal data compromise;
>
> f. **Costs to correct any deficiency.** This includes but is not limited to, any deficiency in your systems, procedures or physical security that may have contributed to a "personal data compromise".
> ***
> i. **Any threat, extortion or blackmail. This includes, but is not limited to, ransom payments and private security assistance**;
>
> j. **Any virus or malicious code** that is or becomes named and recognized by the CERT Coordination Center, McAfee, Seunia, Symantec or other comparable third party monitors of malicious code activity.

(Weaner Aff. Ex. A4, Appx. D, p. 133.)

The trial court expressly found this endorsement determined the claim for coverage and that the claimed loss was expressly excluded:

> **In reality, this is a data compromise situation, rather than a situation involving physical damage to electronic equipment.** The hacker gained unauthorized access to EMOI's computer systems as a result of a vulnerability within the system, and EMOI ultimately had to pay a ransom in order to regain control of [its] software and data. **Unfortunately for EMOI, the Data Compromise endorsement in its insurance policy expressly excludes coverage for costs arising from any threat, extortion or blackmail, including ransom payments.** The Data Compromise endorsement also excludes costs arising from correcting any deficiency in its 'systems, procedures or physical security that may have contributed to a 'personal data compromise. **In other words, the cost endured by EMOI to upgrade its systems to cure the deficiency that left it vulnerable to attack is expressly excluded under the Data Compromise endorsement.**

Trial Court Order and Entry, Appx. C, p. 38, emphasis added.

The policy considered – and excluded – economic damages resulting from "hacking" or ransomware

This is not a situation where computer hacking or ransomware attack was not contemplated by the policy at all, rather, it is a situation where such attacks and resulting losses like those claimed here are expressly excluded by the terms of the policy. To divert attention away from this fact, EMOI did not argue for coverage under the Data Compromise endorsement on appeal, instead arguing only for coverage only under the Electronic Equipment endorsement.

Wish as it might that it had purchased a "cyber" policy that might have provided coverage for this situation, EMOI did not. EMOI maintained a businessowner's property policy providing coverage for physical, tangible damage or loss to physical, perceptible things. There was no such damage to any such thing here. Thus, there simply is no coverage. Even if the Data Compromise endorsement was found to apply to EMOI's claims, it contained

specific and express exclusions precluding the precise claims asserted by EMOI. The lack of coverage is consistent with whole of the policy, the history of such policies, the case law in Ohio, and the weight of nationwide authority.

B. Electronic Equipment exclusions preclude coverage

Beyond the fact that the insuring agreement is not triggered due to the lack of either a covered cause of loss or the existence of any direct physical loss of or damage to covered property, the Electronic Equipment endorsement also contains exclusions for loss or damage caused by data processing **media failure**, breakdown or **malfunction of data processing equipment** and component parts, **work on covered property**, **delay or loss of market** or as a result of **improper operation of covered property**. (Weaner Aff. Ex. A4, Appx. D, p. 82.)

While the "breakdown" and "work upon" exclusions in particular reinforce the policy intention of applying to physical damages from a physical cause, such as the fire and explosion referenced in those provisions, they may also be applied to the claims here, in addition to the obvious exclusions for "media failure", delay and "improper operation". Notably, exclusions a. (wear and tear), b. (corrosion, dryness/dampness, and temperature extremes), d. (electrical disturbance other than lightning), g. (faulty construction unless resulting in a fire or explosion), j. (breakage or marring of a laptop except in specified situations), and k. (loss or damage to unscheduled laptop) all expressly and unambiguously apply to exclude structural damages to material equipment resulting from physical causes of loss, consistent with the nature and intent of an all risk business property policy and this policy in particular. (See, Id., Appx. D, pp. 81-82.) This further bolsters the conclusion that coverage of **intangible information** in the abstract is **not included** within the policy terms.

Specific additional exclusions to the Business Income and Extra Expense portion of the Electronic Equipment endorsement also preclude coverage for loss or damage caused directly or indirectly by "**theft** of any property which is **not** an **integral part of a building or structure** at the time of loss" or "**any other consequential or remote loss**." (Id., Appx. D, p. 85.) Restricted access to software through encryption might plausibly be construed as a "theft" of something that is "not an integral part of a building or structure."[6] Any claims for costs incurred in updating its system and improving its data security taken after this ransom event occurred also may reasonably be considered a "consequential or remote loss" of the underlying encryption (and later decryption and recovery). Consequently, coverage under the Business Income and Extra Expense terms of the Electronic Equipment endorsement is simply excluded, even if coverage existed.

C. Businessowners Special Property limitations preclude coverage

Finally, the Electronic Equipment endorsement adds coverage terms, but does not eliminate otherwise existing Businessowners Special Property Coverage terms and confirms that "[a]ll other policy terms and conditions apply." The overarching Businessowners Special Property Coverage form of the Owners policy also contains express limitations that preclude coverage where there is no **physical** evidence to show what happened to missing property as well as precluding coverage for property that is transferred to a place outside the described premises on the basis of **unauthorized instruction**. (Weaner Aff. Ex. A4, Appx. D, p. 150.) Either of these limitations apply if one accepts an argument that the data at issue was encrypted because of "unauthorized instructions".

[6] This is for purposes of argument only. Owners does not agree that the software was stolen even though data was encrypted and access was **later returned** upon payment of the ransom.

No coverage is available for the economic losses claimed by EMOI as a result of the temporary, digital encryption of its intangible data that was later decrypted and released.

PROPOSITION OF LAW NO. III: EXPERTS ARE NOT REQUIRED FOR EITHER COVERAGE DETERMINATIONS OR TO AVOID BAD FAITH CLAIMS.

A. The Court of Appeals' decision adds the requirement of expert opinion to the longstanding insurance bad faith standards, contrary to precedent

Expanding the reach of bad faith litigation by essentially **requiring** subject matter experts to investigate and opine on claims coverage grafts a new requirement on to Ohio bad faith law, creates new law and departs from precedent. The court of appeals, without explanation, declared that Owners' failure to consult a subject matter expert in IT or other computer science regarding the "types of damage" that might occur created a question of fact on the claim of bad faith. However, such a conclusion flies in the face of existing precedent.

Ohio precedent does not require an expert be consulted to avoid bad faith on a coverage decision

The bad faith standard in Ohio, as established in *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 1994-Ohio-461, 644 N.E.2d 397, is "reasonable justification". This Court has previously made clear that "mere refusal to pay a claim is not bad faith." *Helmick v. Republic-Franklin Ins. Co.*, 39 Ohio St.3d 71, 529 N.E.2d 464 (1988). Nor is a mere "wrongful denial". *Sanzo Ent.*, 2021-Ohio-4268, at ¶72, citing *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 452 N.E.2d 1315 (1983). See also, *Hart v. Republic Mut. Ins. Co.*, 152 Ohio St.185, 187-188 (1949) (mere negligence or even bad judgment does not support a claim for bad faith); *Klein v. State Farm Fire & Cas.*, 250 Fed.Appx. 150, 157 (6th Cir. 2007) (applying Ohio law). Where a claim is "fairly debatable" based upon either facts or applicable law, there also is no bad faith. *Tokles & Son v. Midwestern Indemnity Co.*, 65 Ohio St.3d 621, 630, 605 N.E.2d 936 (1992); *Retail Ventures Inc. v. National Union Fire Ins. Co. of Pittsburg, PA*, 691 F.3d 821, 834-835 (6th Cir. 2012) ("Denial of a claim

may be reasonable justified when 'the claim was fairly debatable and the refusal was premised on either the status of the law at the time of the denial or the facts that gave rise to the claim'"). **No requirement for expert opinion exists in this standard, especially as relates to the initial coverage decision.** It is anticipated that initial coverage decisions are routinely handled by insurance claims representatives based upon the policy language and generally known case law.

Further, refusal to cover a claim where no coverage exists is axiomatically **not** bad faith. See, *Family Taco, LLC,* 520 F.Supp.3d 909 (N.D. Ohio 2021); *Bolton v. State Farm Fire & Cas. Co.*, No.3:16-cv-220, 2017 U.S. Dist. LEXIS 183469 (N.D. Ohio, Nov. 6, 2017) at *43; *Kelly v. Auto-Owners Ins. Co.*, Hamilton No. C-050450, 2006-Ohio-3599 (1st Dist.) at ¶14, (no bad faith where court upheld denial of coverage); *Daniels v. Citizens Ins. Co. of Ohio*, No. CA2005-03-008, 2005-Ohio-6166 (12th Dist.) (no bad faith claim exists in the absence of coverage); *Bob Schmitt Homes, Inc. v. Cincinnati Ins. Co.*, Cuyahoga No. 75263, 2000 WL 218379 (8th Dist.) at *4, ("The rule announced in *Zoppo [v. Homestead Ins. Co.]* presupposes that the insured is entitled to coverage in the first instance"; where the insured is not entitled to coverage, the factual prerequisite for a bad faith claim is lacking and summary judgment was appropriate); *Pasco v. State Auto Mut. Ins. Co.*, Franklin No. 99AP-430, 1119 WL 1221633 (10th Dist. Dec. 21, 1999) at *16-*17, (no coverage, no bad faith); *Hahn's Electric Co. v. Cochran*, Franklin No. 01AP-1391, 01AP-1394, 2002-Ohio-5009 (10th Dist.) at ¶¶42-44, ("obviously if a reason for coverage denial is correct, it is per se reasonable"); *Link v. Wayne Ins. Group*, No. 1-18-13, 2018-Ohio-3529 (3rd Dist.) at ¶¶26-27, (where court declared no coverage, no bad faith claim exists).

Requiring a subject matter expert to make coverage decisions is unsupported by law and unmanageable

Since the interpretation of an insurance policy is a matter of law for the court, expert testimony is not only unnecessary on that point but inadmissible. The court of appeals implicitly requiring

that an expert opinion be obtained by the insurer in making a policy interpretation coverage determination is nonsensical. Here, where the operative phrase "direct physical loss or damage" is clear and unambiguous and the physical nature of the property covered by the policy is specifically and plainly defined by the policy language, **an adjuster need only reference policy language to have a reasonable basis upon which to make the coverage determination**. The case law further supports this conclusion, even just considering *Mastellone*, which declared the same operative phrase "direct physical loss or damage" to be unambiguous. There was no causal question at issue, either, since it was not disputed that a hacker held EMOI's intangible data hostage by encrypting files and later releasing it upon payment of the demanded ransom. Thus, there is and was no need and no reason to require an expert to have been consulted, as a matter of course, as implied by the court of appeals.

Moreover, the broad conclusion that an expert is necessary to make a coverage determination based on unambiguous language is **unwieldy and unmanageable**. This is a case involving computers, but **it is a slippery slope to require experts to support daily coverage determinations simply to avoid bad faith**. If this case requires an expert because it involves computers and digital information, then cases involving any case involving a specialty area would require an expert to opine that plain and unambiguous policy terms rendered coverage unavailable or excluded. Permitting the alteration of the long-established bad faith standard in this manner would also significantly increase costs to insurers and insureds alike since such a position is tantamount to requiring an expert to be consulted with **every** insurance claim made, regardless of the policy at issue, the coverage determination ultimate reached, or the admitted facts, including cause, provided to the insurer.

B. The Court of Appeals' decision reverses the burden of establishing a loss within coverage, contrary to precedent

The Court of Appeals' decision also departs from the recognized and well-established burden on the **insured** to both establish the **existence** of a loss **and to demonstrate that it is a loss within the coverage of the policy**. *Schwartz v. Stewart Title Guar.*,134 Ohio App.3d 601, 606, 731 N.E.2d 1159 (8th Dist. 1999), citing, *Inland Rivers Service Corp. v. Hartford Fire Ins.*, 66 Ohio St.2d 32, 34, 418 N.E.2d 1381 (1981); *Murray v. Auto-Owners*, Erie App. No. E-18-060, 2019-Ohio-3816, ¶17 (6th Dist.), 144 N.E.3d 1151; *City of Sharonville v. Am. Emplrs. Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, ¶19. **An insurance company has no obligation to its insured unless the conduct at issue falls within the scope of the coverage as defined by the policy.** *Gearing v. Nationwide Insurance Company*, 76 Ohio St.3d 34, 36, 1996-Ohio-113, 665 N.E.2d 1115.

The Second District decision adding a subject matter expert requirement to make the coverage determination effectively **reverses the well-established burden on the insured** to establish a claim under a policy. Because in this case, EMOI did **not** establish a claim within the unambiguous policy language, or under the existing case law, yet the court of appeals does not hold it to its duty. Express testimony was provided by Owners about how it, in a good faith effort to aid the insured, looked for available coverage under the policy, multiple times, but when looking at the plain and ordinary policy language, found none for these circumstances.

Notwithstanding the **admitted** lack of physical damage to any tangible property and notwithstanding applicable **exclusions** for damages such as claimed and notwithstanding the proper and reasonable application of the policy's **commonly understood words** to the facts of this case, the court of appeals would require Owners to hire an expert before making any coverage decision. This **improperly shifts the burden of establishing coverage** under the policy from the

insured and places a burden of establishing the lack of coverage on the insurer, contrary to existing law or reason. This position cannot and should not be supported in Ohio.

CONCLUSION

The case is one of first impression with regard to the application of a businessowners property insurance policy to claims of computer hacking or ransomware. This type of claim will only become more prevalent as technology invades all aspects of daily life. (Do you hear me Alexa? Siri? Google Assistant?) Cloud-based information storage if already prevalent, if not the norm, in many businesses; internet portals and operations the daily experience of many industries. "Virtual" and "remote" operations have been brought even more sharply into the forefront through the Covid-19 pandemic pivot of business operations.

The court of appeals decision in this case is unsupported by the plain and unambiguous terms of the Owners policy at issue as well as by governing and persuasive caselaw. Summary judgment to Owners was wrongly reversed.

This court should clarify that a policy insuring against "direct physical loss of or damage to" covered property does **not** extend to risks associated with a ransomware attack where there is no damage to physical equipment or physical media, clarify that expert opinion is **not** required for an insurer to establish it acted in good faith and should **affirm the trial court's ruling granting summary judgment to Owners Insurance Company** in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was served by and through electronic mail upon appellee's counsel of record this 25th day of April, 2022 as follows:

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APPENDIX

A. Second District Court of Appeals for Montgomery County, No. 29128, Opinion 11/5/21, 2021-Ohio-3942, 180 N.E.3d 683

B. Second District Court of Appeals for Montgomery County, No. 29128, Final Entry 11/5/21

C. Montgomery County Common Pleas Court No. 2019 CV 05979, Decision, Entry and Order Sustaining Defendant's Motion for Summary Judgment, 5/4/21

D. Affidavit of Brad Weaner, Owners Insurance Company with Exhibits including Claim File Notes, Coverage Position Letter, Hartford Letter and Policy issued to EMOI (previously attached to Motion for Summary Judgment

E. John R. Hardin, "*Evaluating Your Company's Coverage for Ransomware Attacks Under Its Cyber Insurance Policy*", 24 N. 2 Cyberspace Lawyer NL 2, March 2019

F. Robert P. Hartwig, "*Cyberrisk: Threat and Opportunity*", Insurance Information Institute, October 2016

G. Scott G. Johnson, *What Constitutes Physical Loss or Damage in a Property Insurance Policy?* 54 Tort Trial & Ins. Pract. L.J. 95, 96-97, n.2, pp. 98-99