

IN THE SUPREME COURT OF OHIO

EMOI SERVICES, LLC,)	CASE NO. 2021-1529
)	
Appellee,)	On Appeal from the Montgomery
)	County Court of Appeals, Second
vs.)	Appellate District,
)	Case No. 29128
OWNERS INSURANCE COMPANY,)	
)	
Appellant.)	

**BRIEF OF *AMICI CURIAE* THE OHIO INSURANCE INSTITUTE AND THE
AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF
APPELLANT OWNERS INSURANCE COMPANY**

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**THIS CASE RAISES ISSUES OF GREAT PUBLIC AND SPECIFIC INTEREST FOR
AMICI CURIAE**

The rules of the road in Ohio regarding the proper interpretation of insurance policies are both well established and well known to Ohio courts. **The Court of Appeals' decision below will sow confusion and generate unnecessary disputes** as to the proper interpretation of insurance policies, as well as an insurer's obligations to investigate and pay claims for uncovered specialized risks under traditional Property & Casualty policies. **The Court of Appeals created new law** to reverse the trial court and find coverage for cyberattacks and ransomware under a first-party property policy **by:**

- **inexplicably equating a temporary loss of access to intangible electronic data to physical damage to property or data storage media;**
- **ignoring a data compromise endorsement expressly excluding such losses; and**
- **reinventing this Court's well-established bad faith standard to require insurers in Ohio—for the first time—to obtain costly and time-consuming expert opinions before making a coverage determination.**

The Court of Appeals reached these troubling conclusions by bypassing the main thrust of the Trial Court's findings and reading key language out of the relevant policy.

***Question of ransomware coverage
is a case of first impression in Ohio***

The Court of Appeals' decision on the **novel issue of coverage under property insurance policies for ransomware attacks creates untenable and incongruous new law.** While ransomware is a new and emerging novel risk for businesses across the economic spectrum, the **coverage issues that were presented were neither**

novel nor emerging. Rules interpreting insurance policies are well-established and noncontroversial. By diverging from those rules, the decision from the Court of Appeals threatens to foster **confusion** among Ohio courts **about the distinctions between basic property loss coverage and cybersecurity coverage.** This Court should **reverse to prevent unnecessary future disputes between insurers and their insureds and strike these novel interpretations that read out important policy exclusions.**

This issue is of great public interest and of particular interest to *amici curiae* The Ohio Insurance Institute (“OII”) and The American Property Casualty Insurance Association (“APCIA”). It is a matter of common sense that physical property damage is not the same as holding non-physical data hostage for ransom and that data compromise exclusions plainly apply to ransomware attacks. The bargain between every insurer and every insured is governed by the plain language of the insurance policy, and that language must be enforced by Ohio courts. This Court should apply this basic and foundational principle of Ohio insurance coverage law and reverse the Court of Appeals’ decision below. **Otherwise, the basic property damage policy language will be rendered meaningless and provide policyholders with un-bargained-for and un-paid-for benefits.**

Special cybersecurity policies cover these risks

Ransomware attacks have skyrocketed over the last decade, and insurers have been rapidly innovating to provide the additional necessary coverage to businesses. **Separate coverages for the far more expensive ransomware risks and the**

associated recovery and business interruption-related damages are available to businesses in exchange for additional premium payments.

This Court should clarify the law for Ohio courts and hold that policies written to **cover only physical damage to property cannot be stretched to cover ransomware attacks that temporarily prevent access to computer systems and data** and affirm the Trial Court's findings below. Parties concerned with having coverage for the ever-increasing risk of a ransomware attack are always free to bargain for additional coverage or purchase separate cybersecurity policies. Precisely because the standard property damage policies either do not cover (and therefore have no need to exclude) or expressly exclude coverage for cyberattack-related damages, **separate policies are available to businesses to cover injuries caused by cyber and ransomware attacks**¹.

STATEMENT OF INTEREST OF AMICI CURIAE

OII and APCIA are uniquely qualified to provide this Court with a broad perspective on the principles of insurance law relevant to this appeal, as well as practical insight into the negative consequences for insurers and insureds alike if the ruling below is upheld.

OII is the professional trade association for property and casualty insurance companies in the State of Ohio. Its members include twenty-seven

¹ See e.g. Beazley Group *Beautifully Designed Cyber Insurance for a Dangerous World*, https://www.beazley.com/usa/cyber_and_executive_risk/cyber_and_tech/beazley_breach_response.html?utm_medium=paid_search&utm_source=google&utm_campaign=Cyber_Branded&utm_content=Cyber&gclid=EA1aIQobChMIqvtlx6nS9AIVismUCR2xowBYEAAAYAiAAEgL4_fD_BwE (accessed April 26, 2022); ABA Insurance Services, *Cyber Insurance* <https://www.abais.com/small-businesses/products/cyber-insurance> (accessed April 26, 2022).

domestic property and casualty insurers, twelve foreign property and casualty insurers and reinsurers, seven insurance trade associations, and four insurance-related organizations. OII's member companies represent 87% of Ohio's private passenger auto insurance market, 81% of the homeowners' market and 50% of the commercial market. OII strives for stability, predictability and consistency in Ohio's case law and jurisprudence governing insurance coverage and policy interpretation. On issues of importance to its members, OII has filed amici briefs in significant cases before federal and state courts in Ohio to promote sound public policy and to share its perspective with the judiciary on matters that will shape Ohio insurance law.

APCIA is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions—protecting families, communities, and businesses in the U.S. and across the globe. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits amicus curiae briefs in significant cases before federal and state courts, including this Court.

OII and APCIA appear as amici in this case and submit this amici brief because insurers and their Ohio customers **need a clear, consistent and reasoned opinion explaining that property insurance policies' requirement of a direct physical loss or damage to property at the insured's premises bars claims**—like the one made by Appellee EMOI—**for purely economic losses allegedly caused by ransomware**

attacks. The legal questions presented in this case directly concern OII and APCIA and their members because the outcome can: **(1) significantly reduce availability and affordability of standard property damage policies and (2) chill or stifle innovation on coverage solutions for the rapidly evolving world of technological advancements and the associated novel risks.** Inability to secure or afford insurance coverage **can cause bankruptcies in productive enterprises,** causing the **disappearance of jobs,** and **leaving certain segments of society unprotected, or insufficiently protected, against truly significant liabilities.**

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

- I. **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.**

Ransomware attacks have been on the rise for over a decade, spurring innovation in insurance coverages for cybersecurity breaches, including specific ransomware coverages

Businesses have been adapting to the increasingly digital nature of the economy for decades, but the COVID-19 pandemic and the attendant rise in remote work and switch to online shopping even for the most digitally-reluctant consumers put that transition into overdrive. Unfortunately, as businesses became increasingly digital, cybercriminals became that much more active in exploiting the new economic realities. **In less than one year between July 2020 and July 2021, the number of weekly ransomware attacks increased by more than tenfold, from the “low” number of 13,992 per week to an average of 149,157 per week.²** The general perception shaped

² Fortinet, *Global Threat Landscape Report*, August 2021, available at https://global.fortinet.com/lp-en-1H-threat-landscape-report?utm_source=paid-

by the biggest media stories is that ransomware attacks mainly present a threat to the largest financial, healthcare, and government entities. But the reality is that small businesses in every sector of the economy—nonprofit, transportation, agriculture, food and beverage, construction etc.—are most vulnerable and most frequently attacked because they are less likely to have sophisticated defenses to such attacks.³ **In 2021, business services and IT industry verticals—the industry sector where EMOI Services operates—were among the top five ransomware attacks targets.**⁴

These growing and evolving risks have not gone unaddressed by the insurance industry, which has been innovating and developing new coverages in keeping with the ever-evolving technological advances. For many years, the message from the industry groups has been clear that **specialized insurance is “a critical element of preparing for ransomware attacks.”**⁵ Such insurance coverage has been developed and refined by carriers under the “cyber insurance” umbrella, and, just as the incidence of

[search&utm_medium=google&utm_campaign=ThreatIntelligence-NAMER-US&utm_content=AR-20211HThreatLandscapeReport&utm_term=threat%20landscape&lsci=7012H000001e6D5QAI&s_kwcid=AL!11440!3!563891866763!p!!q!!threat%20landscape&qclid=EAlaQo bChMI8aqq3NnS9AIv4G1vBB13DQfHEAAYASAAEgJxafD_BwE](https://www.techtarget.com/searchsecurity/feature/Ransomware-trends-statistics-and-facts) (accessed April 26, 2022).

³ See *id.* and *Cybersecurity Advisory* issued jointly by the cybersecurity authorities in the United States, Australia and the United Kingdom, noting that “some ransomware threat actors [have began] redirecting ransomware efforts away from ‘big-game’ and towards mid-sized victims to reduce scrutiny,” available at

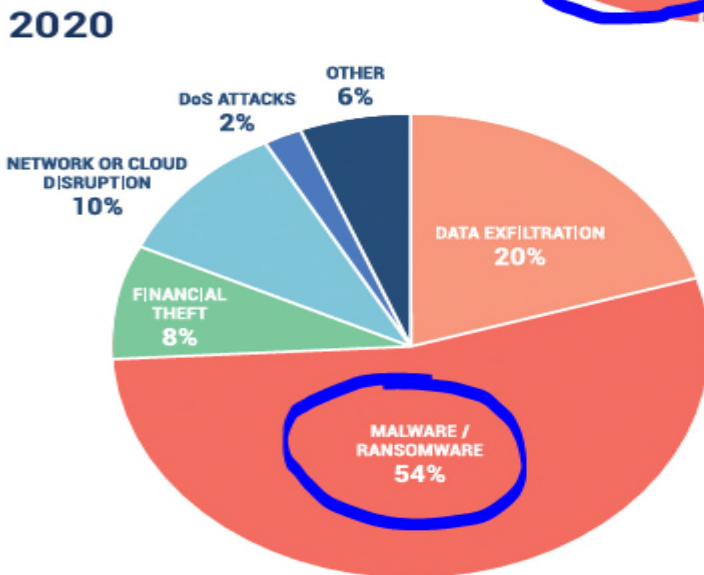
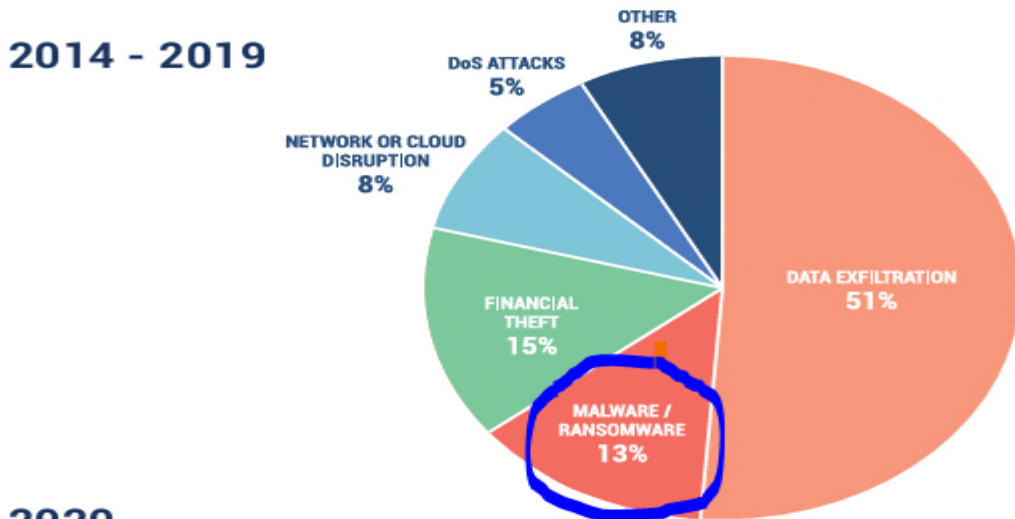
https://media.defense.gov/2022/Feb/09/2002935687/-1/-1/0/2021_TRENDS_SHOW_INCREASED_GLOBALIZED_THREAT_OF_RANSOMWARE_20220209.PDF (accessed April 26, 2022)

⁴ Sean Michael Kerner, *Ransomware Trends, statistics and facts in 2022*, available at <https://www.techtarget.com/searchsecurity/feature/Ransomware-trends-statistics-and-facts> (accessed April 10, 2022)

⁵ See Harry Tuttle, *Ransomware Attacks Pose Growing Threat*, May 2, 2016; available at <http://www.rmmagazine.com/2016/05/02/ransomware-attacks-pose-growing-threat/> (accessed April 26, 2022).

ransomware attacks has grown exponentially, so has the share of related claims made under cyber insurance policies⁶:

Cyber insurance claims by cause



bitsight.com | 2

Cyber insurance policies evolved to cover precisely the types of events that are at issue in this matter, including cyber extortion, data loss recovery,

⁶ BITSIGHT: *Ransomware: The Rapidly Evolving Trend*, <https://info.bitsight.com/ransomware-the-rapidly-evolving-trend-ppc> (accessed April 26, 2022).

business interruption resulting from breaches, etc. For example, the Beazley Group offers First Party cybersecurity coverage that includes:

- First party coverage for cyber extortion;
- Data recovery costs;
- Business interruption resulting from security breaches and system failures;
- Contingent business interruption from incidents occurring at the policyholder's vendors and suppliers; and
- eCrime coverage.⁷

Similarly, ABA Insurance Services offers Cyber Liability insurance that covers losses resulting from "cyber incidents" such as:

- ransomware;
- business interruption;
- data breach; and
- network security, etc.⁸

Proliferation of ransomware attacks and the corresponding development of relevant coverages has led to **increased adoption of cyber insurance either through a standalone policy, with 27% of businesses globally having such coverage in 2021, and another 34% purchasing cybersecurity coverage as a rider to another policy.**⁹ The number of businesses reporting that they planned to continue to forego cybersecurity coverage has gone down from 21% to 18% between 2020 and 2021.¹⁰

⁷ See *supra* note 1.

⁸ *Id.*

⁹ Hiscox International Insurance Group, *Hiscox Cyber Readiness Report 2021*, available at <https://www.hiscoxgroup.com/cyber-readiness> (Accessed April 26, 2022)

¹⁰ *Id.*

**Ordinary property damage insurance policies
are not designed or priced to cover
cybersecurity and ransomware-related risks**

Before an insurer writes a **policy covering ransomware-related risks**, it separately **evaluates many factors, including the business' online presence (whether it sells any products or services online), its cybersecurity processes and procedures, any cybersecurity incident history, existence of employee training programs on social engineering and phishing risks, and other specific factors necessary to properly price the relevant risk.**¹¹ Just as with any type of insurance coverage, **its price depends on the relevant risk profile of the business.** Virtually every cybersecurity expert agrees that **whether a business has in-house or outside dedicated cybersecurity expertise and a robust employee training program on recognizing and avoiding phishing attacks** can be the deciding factor in whether it suffers a devastating ransomware attack.¹² Globally, almost two-thirds (65%) of ransomware victims (and in some countries up to 76%), report that a phishing email (an email enticing an employee to click on a link that will open a door for malicious software to be loaded to company servers) was “the number one way in for the extortionists.”¹³

During the cyber insurance underwriting process, the proposed insured is evaluated for specific cyber risks. **Depending on the risk level, before providing coverage, “insurers may require the insured to employ additional security**

¹¹ See ABA Insurance Services, *Cyber Liability Insurance Agent Product Guide for Small Businesses*, available at <https://www.abais.com/docs/default-source/small-business/cyber/cyber-product-guide-website.pdf> (accessed April 26, 2022).

¹² See *supra* at fn. 9 at 11.

¹³ *Id.*

measures . . . as a condition of coverage.”¹⁴ It is a virtual certainty that **none of the relevant risks were considered, required to be remedied, or priced in during the underwriting of the ordinary property loss policy at issue here.**

The relevant **property loss policy** provision covers “direct physical loss of or damage to” property. The **risks priced into premiums for such policies are based on the insurer’s assessment of the likelihood that tangible property will be “tangibly destroyed, whether in part or in full... a direct physical alteration of the property [is] needed to show ‘damage to’ it, and some form of complete destruction or dispossession [is] needed to show ‘loss of’ the property.”** *Bridal Expressions LLC v. Owners Ins. Co.*, 6th Cir. No. 21-3381, 2021 U.S. App. LEXIS 35676, at *4 (Nov. 30, 2021).

Such policies do not price in, and therefore do not cover (1) risks of temporary loss of use of or access to data stored on the property or (2) a ransom required by hackers to regain access to it—such scenarios are simply not within the realm of possibilities contemplated by the parties bargaining for a premium on a property loss policy. *See Santo’s Italian Café LLC v. Acuity Ins. Co.*, 6th Cir. No. 21-3068, 2021 U.S. App. LEXIS 28720, at *8 (Sep. 22, 2021) (“**A loss of use simply is not the same as a physical loss.**”) *See also Couch on Insurance* § 148:3; 4 Philip L. Bruner & Patrick J. O’Connor, *Bruner & O’Connor on Construction Law* § 11:39 (2021) (describing the “**traditional property insurance product**” as a **method of insuring against “fire, windstorm, and the like”**); 2 Myron Kove et al., *Real Estate*

¹⁴ Robert Sumner and Lesley Firestone, *Does your company have insurance coverage for data breach?*, available at <https://www.mvalaw.com/alert-Does-your-company-have-insurance-coverage-for-a-data-breach>

Transactions § 18:95 (2021) (explaining that property insurance **covers “damage or destruction by the action of the elements”** and has its origins in coverage for damage by fire or lightning).

EMOI, despite being a software design business, did not purchase any special cybersecurity policy

EMOI, the plaintiff in the case below, **designs software** for its medical billing service. Due to the nature of its business, EMOI, more than any other type of business, should have been aware of and prepared for a cyberattack. Despite the sensitive, private, and protected data involved in providing this service, **EMOI clearly did not design sufficient safeguards, or did not properly train its employees, or otherwise failed to take necessary precautions** to prevent such a cybersecurity incident. Nor did EMOI purchase any cybersecurity protection to mitigate this risk of which they should have been aware given their business.

After the ransom had been paid and its services were restored, EMOI then upgraded its security protections, but the upgrade did not function well initially and caused further data issues. Such upgrades were a belated business decision not covered by any insurance policy. **None of the unfortunate events EMOI experienced as a result of the ransomware attack were physical damage covered by the property damage liability policy.** Damages related to the ransomware attack could have been covered by a specific cybersecurity policy.

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

To read ransomware coverage into the standard property loss risk policy of the kind at issue here requires one to read key exclusions out of the specific policy at issue

The plain reading of the policy language at issue, as the Trial Court and Judge Tucker correctly determined below, leaves no doubt that the **parties contracted for coverage of an event that causes physical damage to physical medium on which Appellant’s software and data were stored**. Even if that were not enough, the **Data Compromise Endorsement**—which the **Court of Appeals entirely ignored** in its analysis—**further expressly excludes from coverage loss or theft of data or records that Appellant stores or processes** for another entity (i.e. Appellant’s database it uses to process claims for its customers), **as well as** any costs arising out of correcting deficiencies that led to the loss or **costs arising out of any “threat, extortion or blackmail ... [including] ransom payments...”**

However, the “direct physical loss or damage” policy language cannot be read in isolation from the rest of the policy, which is why the Court of Appeals’ sidelining of the Data Compromise Endorsement without any analysis is particularly troubling. **All of the policy exclusions should be read *in pari materia* to determine the proper limit of liability.** *Am. Hardware Mut. Ins. Co. v. Mansfield Auto Truck Plaza*, 15 Ohio St.3d 367, 368, 474 N.E.2d 310 (1984); *Fostoria Dev. Corp. v. Fid. Deposit Co.*, 8th Dist. Cuyahoga No. 62333, 1992 Ohio App. LEXIS 665, at *10 (Feb. 13, 1992). **The law does not permit any court to ignore the obvious intent of an exclusionary provision.** *AKC, Inc. v. United Specialty Ins. Co.*, 2021-Ohio-3540, ¶ 11.

Nevertheless, EMOI and the Court of Appeals would have us believe that the Data Compromise Endorsement can be sidestepped entirely. **EMOI**, in its brief opposing jurisdiction, appears to go so far as to **argue that the Endorsement only applies to itself, not to the entirety of coverage provided by the policy.** (EMOI's Memorandum in response to jurisdiction, filed January 12, 2022, at 11-12, arguing that the phrase "exclusions apply to this coverage" means exclusions apply only to themselves, and not any other part of the policy). However, **this reading (and the Court of Appeals' wholesale reading of this exclusion out of the policy) renders the exclusion entirely meaningless—if the exclusion does not apply to the coverage provided by the policy, it does not apply to anything.** The reading of the plain policy language that gives meaning to all exclusions is that EMOI would be covered for expenses associated with data recovery only after it suffered actual physical loss to its data storage media.

Just as it declined to render the water backup and pollution exclusions meaningless in AKC, the Court should decline to do so here with respect to the Data Compromise Endorsement. As the Court plainly found in **AKC**, a court **cannot read an exclusion out of the policy to allow for a "hyperliteral reading of the term" elsewhere in the policy.** 2021-Ohio-3540 at ¶7-8. Similar to what EMOI is arguing here, the *AKC* claimant sought to ignore the pollution exclusion, choosing instead to zero in on the part of the policy that excluded coverage for "water that backs up . . . from a sewer" to argue that the Court should have ended its inquiry with the conclusion that the term "water" did not include raw sewage; thus coverage for sewer backup existed. Similarly, **EMOI has taken the position that the Court should ignore the Data**

Compromise Endorsement in favor of a hyper-narrow focus on the term “media” that, because it is defined in the policy to “include[] computer software,” means that intangible non-physical harm is also covered by the standard property damage policy. But even if that were correct (and it is not, since the “media” has to be “physically” damaged to trigger coverage), **this definition of “media” cannot be read in isolation from the Data Compromise Endorsement exclusion that prevents coverage for any expenses arising out of a ransomware attack or a data breach.**

*Such reading creates insurance coverage
for which no one has paid and
throws established jurisprudence into disarray*

Reading the plain policy language and the Data Compromise Endorsement as anything other than precluding coverage for a ransomware event “push[es] coverage beyond its terms [and] creates a mismatch, an insurance product that covers something no one paid for...” Judge Tucker’s dissent below at 29, citing *Santo's Italian Café*. Such a reading will **upend both the historical and more recent consensus on the limits of the basic “all risks” property policies** that have been developing both in Ohio and other jurisdictions in response to cyber threats and the recent influx of claims from businesses that suffered business interruption due to the COVID-19 pandemic:

*Cases related to physical damage requirement
for claims based on data and software*

- **Digital information is not tangible and thus cannot sustain physical loss or damage.** *Ward General Ins. Services, Inc. v. Employer Fire Ins. Co.*, 114 Cal.App4th 548, 7 Cal. Rptr 3D 844 (2003);
- **“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. . . software and systems are intangible items stored on a tangible vessel – the computer or a disk.” Harm to “computer data, software” is not covered by traditional property damages policy, but physical damage to tangible computer systems can be. *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 the host drive or computer, there was no “physical damage” to the covered tangible property.** *Seagate Technology, Inc. v. St. Paul Fire and Marine Ins. Co.*, 11 F.Supp.2d 1150, 1155 (N.D. Cal. 1998).
- **Loss of data stored on the computer by itself is not a “physical loss” sufficient to trigger coverage when there is no evidence of physical damage to the computer equipment.** *Greco & Traficante v. Fid. & Guar. Ins. Co.*, App. No. D052179, 2009 Cal. App. Unpub. LEXIS 636, at *14 (Jan. 26, 2009) (unpublished).

***Cases related to physical damage requirement
for claims based on intangible premises contamination***

- **The plain meaning of “physical injury” requires “harm to the property that adversely affects the structural integrity” of the property.** *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App. 3d 23, 2008-Ohio-311, 884 N.E.2d 1130, ¶ 61 (8th Dist.) (presence of mold on the outside of the structure does not amount to physical damage to the structure);
- **There is no “physical injury to property” where there is no “structural or any other tangible damage,” only “intangible harms”** such as strong odors and the presence of mold and/or bacteria in the air and ventilation system. *Universal Image Prods. v. Chubb Corp.*, 703 F.Supp.2d 705, 710 (E.D.Mich. 2010);
- **Asbestos contamination represented an economic loss and not a physical loss, since the building remained physically unchanged** *Great Northern Ins. Co. v. Benjamin Franklin Federal Sav. & Loan Ass’n.*, No. 90-35654, 1992 U.S. App. LEXIS 1593, 1992 WL 16749, *1 (9th Cir. Jan. 31, 1992) (unpublished).

***Cases related to physical damage requirement
for claims based on business interruption***

- **No covered “physical damage” occurred where the pandemic shut down orders did “not tangibly destroy [the property], whether in part or in full . . . and the property exists in the same state as it did before the Orders.”** *Sanzo Ents. v. Erie Ins. Exchange*, 5th Dist. Delaware No. 21-CAE-06, 2021 Ohio App. LEXIS 4161, at *25 (Dec. 7, 2021)

- **When the property is not “materially or perceptibly destroyed, ruined, or harmed [and the owner] remain[s] in possession of it,” any alleged loss of use of the property falls outside the plain meaning of “direct physical loss of or damage to” the property.** *MIKMAR, Inc. v. Westfield Ins. Co.*, 520 F. Supp. 3d 933, 941 (N.D. Ohio 2021)
- **Physical damage to tangible property is required to satisfy the “direct physical loss or damage” requirement; the mere loss of use and purely economic use are not enough.** *System Optics, Inc. v. Twin City Fire Ins. Co.*, No. 5:20-cv-1072, 2021 WL 2075501 (N.D. Ohio, May 24, 2021)
- **Coverage for “direct physical loss of property” only applies to physical property, not the temporary loss of the use of the property for its original purpose.** *Henderson Road Restaurant Systems, Inc. v. Zurich American Ins. Co.*, N.D. Ohio No. 1:20-CV-1239, 2021 WL 5085283 (Nov. 2, 2021)
- **“The company’s inability to use the property in the same way as it did before [the event causing an interruption] in typical use . . . does not satisfy the policy’s [direct physical loss] language.”** *Bridal Expressions LLC v. Owners Ins. Co.*, 6th Cir. No. 21-3381, 2021 U.S. App. LEXIS 35676, at *4-5 (Nov. 30, 2021)
- **“[A temporary] loss of use simply is not the same as a [direct] physical loss [of or direct physical damage to] property.”** *Agilitas USA Inc. v. Hartford Fire Ins. Co.*, M.D.Tenn. No. 3:21-cv-00094, 2021 U.S. Dist. LEXIS 211531, at *16-17 (Nov. 2, 2021)
- **A loss of use or function does not constitute “direct physical loss or damage,”** because such an interpretation would allow coverage to be established whenever property cannot be used for its intended purpose *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141 (8th Cir. 2021)
- **Potential presence of a virus on the property that renders the property temporarily unusable but does not require physical repair or precludes future use does not cause “physical damage or loss to the property.”** *Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Ins. Co.*, 11th Cir. No. 21-11046, 2021 WL 3870697 (Aug. 31, 2021)
- **The phrase “direct physical loss of or damage to” property requires that the insured allege physical alteration of the physical property.** *Mudpie, Inc. v. Travelers Cas. Ins. Co. of America*, 15 F. 4th 885 (9th Cir. 2021)
- **“The inclusion of the modifier ‘physical’ in the phrase ‘physical loss or damage’ unambiguously requires some form of material alteration to the property that has experienced ‘loss or damage’ . . . The term ‘physical,’ as used in the [standard property damage policy], clearly indicates that the damage must affect the good itself, rather than the Plaintiff’s use of that good.”** *Cordish Cos. v. Affiliated FM Ins. Co.*, D.Md. Civil Action No.

ELH-20-2419, 2021 U.S. Dist. LEXIS 164862, at *31 (Aug. 31, 2021) (internal citations omitted).

There is **widespread agreement among the courts that temporary loss of ordinary use of the property and its contents is excluded from coverage** by ordinary first party property loss policies. This strong consensus **makes the Court of Appeals' decision in this case that much more inexplicable and bound to unleash confusion among the courts.**

Of particular relevance here is that after learning that access to its databases had been locked by ransomware and its business had thus been interrupted, EMOI attempted to regain access through its own means and delayed paying the ransom. Only when it failed to unlock the database on its own did EMOI pay the ransom and regained access immediately upon receipt of the decryption key.

EMOI's loss of access to its data due to the ransomware attack that locked the data until EMOI paid for a decryption key was akin to an individual forgetting their bank account or email account password. The money is still in the bank, the emails are still in the account, but they **cannot be accessed until steps are taken to reset/restore the password.**

EMOI suffered no physical damage to its servers or any hardware that contained its data. Ransomware attacks are reprehensible and should be severely punished when the perpetrators are found. Those attacks should also be planned for and robustly insured against with cybersecurity/ransomware riders or separate policies that are tailored to the particular business and can help the business make tough choices between attempting a data restoration or paying a ransom for an encryption key. Here, **the delay in regaining access to the data and any of the attendant loss**

of revenue was EMOI's business decision and does not trigger any "physical damage" coverage any more than do the costs of EMOI's subsequent effort to patch the gaps in its security that allowed the intrusion in the first place and slowdowns in the system caused by that upgrade.

III. PROPOSITION of Law No. III: EXPERTS ARE NOT REQUIRED FOR EITHER COVERAGE DETERMINATIONS OR TO AVOID BAD FAITH CLAIMS.

The Court of Appeals reinterpreted established principles underlying the bad faith standard to require expert involvement in front-end coverage determination, creating unworkable and unnecessarily burdensome new law

Without any explanation or analysis, the **Court of Appeals** fashioned a new theory of insurance bad faith from whole cloth. The Court of Appeals inexplicably **declared that Appellee's failure to "consult with an IT or computer expert while evaluating EMOI's claim"** on "various types of damage that can occur to media such as software" **created a jury question on** whether it met its **duty of good faith**. To arrive at this conclusion, the Court of Appeals cited not a single authority from any jurisdiction in support of the notion that subject matter experts must be involved in initial coverage determinations.

The Court of Appeals' decision raises several questions that **unsettle well-established Ohio law**. If expert involvement in initial coverage determination is to be the new standard, **will it apply only to claims concerning such technical fields as computer systems? Or does it reach further, requiring insurers to consult plumbers on every water damage claim, engineers or architects on structural failure claims, and doctors on personal injury claims, etc. to establish that they acted in good faith in evaluating coverage?** If allowed to stand, the Court of Appeals'

decision will disrupt the bad faith standard this Court has set forth in *Zoppo*: “an insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor.” *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 554, 1994-Ohio-461, 644 N.E.2d 397.

This Court has never required such an added burden

This Court has never said that **to have a “reasonable justification” for denying coverage**, an insurer must first secure an expert opinion on the nuances of the particular technology or industry. To the contrary, “[g]ood faith performance ... of a contract emphasizes **faithfulness to an agreed common purpose and consistency with the justified expectations of the other party** . . . bad faith may consist of inaction, or ... interference with or failure to cooperate in the other party’s performance.” *DiPasquale v. Costas*, 186 Ohio App.3d 121, 2010-Ohio-832, 926 N.E.2d 682, ¶139 (2d Dist.).

If not reversed, the Court of Appeals’ decision will also significantly disrupt the practice of insurance claims adjustment. **Reviewing policy terms and determining coverage are ordinary insurance adjuster tasks**—tasks that no Ohio court has ever before said require specialized industry expertise. Due to insurance laws and regulations, adjusters must often act expeditiously in making coverage decisions. **If they now have to involve experts at every turn to avoid the prospect of bad faith exposure**, claims determinations will take longer and cost more. The resulting **inefficiencies will cause policies to become unduly expensive**.

In the policy at issue, there is **clear policy language requiring physical property damage, and clear exclusion for any ransomware attack coverage.** The **adjuster** was entitled to rely on that language alone to find no coverage. He had **“reasonable justification” to support the denial of coverage.**

In addition, **the body of the case law** addressing limitations on coverage under this standard type of policy **also supported the adjuster’s analysis,** as evidenced by the fact that the Court of Appeals’ decision finding coverage is a case of first impression. **The adjuster’s interpretation met the Zoppo standard.**

By essentially requiring experts to be involved in coverage determinations, the Court of Appeals overruled Zoppo’s direction that ordinary “reasonable justification” is sufficient to avoid a bad faith determination. But **only this Court can overrule itself.** The Court should reject this novel and ill-founded standard and find that while the Trial Court did not reach the bad faith question because it found no coverage, the record is clear that Appellant acted in good faith in considering Appellee’s claim.

CONCLUSION

Consequently, the Court should (1) clarify that an ordinary “risks of direct physical loss” property policy does not cover risks associated with a ransomware attack where the physical computer infrastructure is not damaged in the attacks, especially where, as here, such risks are expressly excluded from coverage, (2) find that expert participation in insurers’ coverage determinations is not required for insurers to establish good faith, and (3) affirm the Trial Court’s ruling.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on all counsel of record by electronic mail.

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