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IN SEARCH OF COVERAGE IN CYBERSPACE: WHY THE COMMERCIAL GENERAL LIABILITY POLICY FAILS TO INSURE LOST OR CORRUPTED COMPUTER DATA

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William T. Barker

LONG before the “Internet” was invented, or the world had ever heard of cyberspace, computer viruses, hackers and e-mail, a group charged with guiding insurers in the buying and selling of risk added a simple new word to the standard form liability insurance policy that would prove to be prophetic almost forty years later.¹ In defining “property damage” for the first time, it inserted the word “tangible” to make it clear that the standard liability policy covered only damage to *physical* property—in other words, property that is perceptible to the senses, and thus capable of being touched, felt and seen. With this definition (“‘property damage’ means injury to or destruction of *tangible* property”),² there would be no argument that the commercial general

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1. The organization that made these changes was the National Bureau of Casualty Underwriters (“NBCU”). The functions of this entity were later assumed by the Insurance Services Office, Inc., or ISO, which was founded in 1971 with the merger of 11 insurance rating bureaus (including the NBCU). ISO is a nationwide, for-profit association consisting of more than 1,400 property and casualty insurers, and like its predecessor, drafts standard forms for its member companies, collects loss data, estimates risks and provides pricing relevant to the standardized forms it disseminates. See *In re Ins. Antitrust Litig.*, 938 F.2d 919, 923 (9th Cir. 1991); *United States Fid. & Guar. Co. v. Employers Cas. Co.*, 672 F. Supp. 939, 940 n.6 (E.D. La. 1987).

2. Norman Nachman, *The New Policy Provisions for General Liability Insurance*, 18 CPUC ANALYSIS 197, 200 (Fall 1965). The revisions were adopted and circulated in 1965, and

liability policy, or CGL as it is commonly known,³ was designed to insure the intangible, ephemeral or purely economic. Until now.

We now live in a virtual world. The electronic collection, maintenance and storage of data is both essential and routine, and data itself is an extremely valuable business asset whose loss or corruption can lead to both lost profits and liability to others. Not surprisingly, attorneys for policyholders are arguing that computerized "data" that is lost or tainted falls within the meaning of "property damage" under the standard CGL form. The word "tangible," however, added to the policy in 1965, poses a formidable barrier to that effort. In the face of dictionaries defining "tangible" as that which is "capable of being touched"⁴ and "tangible property" as property "having physical substance apparent to the senses,"⁵ it is obviously difficult to argue that data is "tangible" under an insurance contract. To date, courts have generally honored the plain meaning of the word "tangible" in their interpretation of insurance contracts, finding that project designs,⁶ movies or film presentations,⁷ and telephone numbers⁸ are not "tangible" for purposes of coverage. Thus, unless courts are willing to rewrite the terms of the contracts between insurer and insured, they should find no coverage under standard CGL policies for liability flowing from the loss or corruption of data in cyberspace.⁹

There are ominous signs that some courts may be willing to depart from the age-old principles governing contractual interpretation—namely, that the plain meanings of words control—to find that data is "tangible" or that its loss or damage can be "physical." In a decision that made headlines last year,¹⁰ a federal district court held that computer data lost during a power outage constituted "direct physical loss or dam-

they became effective in February 1966. After adding the word "tangible" to the definition in 1965, ISO thereafter twice amended the definition, in 1973 and again in 1986, to clarify the scope of "property damage" coverage. See *infra* note 45. The word "tangible," however, has remained a constant.

3. In 1965, "CGL" stood for Comprehensive General Liability Policy. To make it clear that the standard CGL was not an all-risk policy but one designed to cover certain specified risks, the title was changed in 1986 to *Commercial* General Liability Policy.

4. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, 2337 (Merriam Webster, Inc. 1993).

5. *Id.*

6. Lucker Mfg. v. Home Ins. Co., 23 F.3d 808 (3d Cir. 1994).

7. Schaefer/Karpf Prod. v. CNA Ins. Co., 76 Cal. Rptr. 2d 423 (1998); Gulf Ins. Co. v. L.A. Effects Group, Inc., 827 F.2d 574 (9th Cir. 1987).

8. Peoples Tel. Co., Inc. v. Hartford Fire Ins. Co., 36 F. Supp.2d 1335 (S.D. Fla. 1997).

9. "Cyberspace" was first coined by William Gibson, in his popular science fiction novel *Neuromancer*. The word was used "to describe the real and cultural dynamics of people and machines working within the confines of computer-based networks." Alexander C. Gavis, *The Offering and Distribution of Securities in Cyberspace: A Review of Regulatory and Industry Initiatives*, 52 BUS. LAW. 317, 319 n.6 (1996) (quoting G. BURGESS ALLISON, *THE LAWYERS GUIDE TO THE INTERNET* 331 (1995)).

10. See Wim Mostert, *Physical Damage Finds Broader Meaning*, BUS. DAY, June 22, 2000, available at 2000 WL 20229763; *Arizona Judge Finds 'Physical Damage' Applies To Loss of Data Functionality*, MEALEY'S YEAR 2000 REP. 16 (June 2000); John Leming, *E-Coverage Alert: Ingram Micro Court Decision Sets New Precedent*, RISK MGMT., Aug. 1, 2000, available at 2000 WL 8276993; see also John P. Mello Jr., *Virtually Physical*, CFO, Sept. 22, 2000 ("Shock waves rippled through the insurance industry this summer when a

age from any cause” under an insurance policy. While *American Guar. & Liab. Ins. Co. v. Ingram Micro, Inc.*,¹¹ involved coverage for losses under a first-party policy insuring business interruption (as opposed to coverage for liability under a CGL), the case is significant. The court acknowledged that it found coverage because the claim arose “[a]t a time when computer technology dominates our professional as well as personal lives.”¹² To reach this result, the court simply read the word “physical” out of the contract, looking far afield to various federal and state statutes dealing with liability for “computer damage.”¹³ The decision is flawed in both reasoning and result, but it provides a foreboding example of how far a court will go to find coverage where none exists.

The focus of this article is the non-existence of insurance coverage for lost or corrupted data under the “traditional” or standard CGL. It shows that lost or corrupted data cannot constitute “property damage,” as defined by such policies, for the simple reason that data is not “tangible.” And it explains that courts seeking guidance on this issue should disregard *Ingram Micro* as an anomaly supported by neither the plain meaning of the policy nor existing precedent.

The judiciary may be tempted to shift cyber-losses onto insurers who never accepted such risks and never received a premium for them, particularly where policyholders face catastrophic financial losses and/or liability caused by lost or corrupted data. Yet, the courts, bound by settled rules of contractual interpretation, should refrain from such intellectual adventures unless specific policy language, not present in the standard form policies, allows for such expansive coverage. The rules governing the interpretation of insurance contracts are bedrock: When the terms of an insurance contract are plain and explicit, courts should never indulge in a forced construction to cast liability upon an insurer that it never assumed.

Insurance is not intended to solve all the problems of the world. Insurance contracts are not “living and breathing” documents, like constitutions, whose provisions might be said to evolve with changing times and the needs of policyholders or society. Rather, an insurance policy is a contract in which the parties have allocated risk, limiting and defining their respective obligations. Like any contract, it derives its force from the consent of the parties when it was entered. It is a product whose reach is limited by its terms. There may be coverage gaps, and if there are, policyholders are free to fill them, or not, as they deem necessary. Indeed, the insurance industry already offers a variety of products specifically designed to cover financial losses or liability flowing from lost or

U.S. District Court ruled that property policies covering physical damage must also honor claims stemming from the loss of computer data.”).

11. *Am. Guar. & Liab. Ins. Co. v. Ingram Micro, Inc.*, 2000 WL 726789 (D. Ariz. Apr. 18, 2000).

12. *Id.* at *1.

13. *Id.*

tainted data.¹⁴ But, the insurance industry's failure to keep pace with a technological revolution that gave rise to unexpected "cyber-risks" virtually overnight¹⁵ provides no basis to hoist upon insurers obligations they never assumed. Courts should decline the inevitable invitations to disregard the language of insurance contracts in an effort to find coverage where none exists and fulfill "expectations" never contemplated.

I. THE EMERGENCE OF RISK IN A WIRED WORLD

In just a few years, the Internet dramatically changed the world. While the first computer was invented 60 years ago,¹⁶ and computers came into

14. Some insurers have responded to the new cyber-risks by issuing policies specifically targeted to cover losses or liability caused by data eaten or corrupted by computer viruses or bugs. See, e.g., Mary Christine Convey, *Safeco Looks to Cover "Love Bug" Losses*, NAT'L UNDERWRITERS PROP. & CASUALTY-RISK & BENEFITS MGMT., June 26, 2000 at 10, available at 2000 WL 10593519 (detailing available first-party coverages); Anne Gonzales, *Hackers and Viruses Spur Interest in Internet Insurance*, BUS. J., 22, June 16, 2000, at 22, available at 2000 WL 16159513 (noting "cyber insurance policies" for third party liability "have been around for a couple of years"); Greg Nelson, *Exposed on the Net: A Comparison of Internet Business Exposures with Standard Business Policies* 53, CPCU JOURNAL, 106-21 (Summer 2000) (identifying and outlining new policies directed to covering Internet-related risks); Robert L. Carter, Jr. & Donald O. Johnson, *Keep on Top of Insurance Coverage to Help Combat Computer Viruses*, 15 CORP. COUNS. 3, at 1 (Aug. 2000) (noting that many policies contain language that expressly insures the "destruction, distortion or corruption of any computer data, coding, program, or software except as hereinafter excluded.").

15. See Emily Canelo, *Getting Wired: Internet Risks*, 629 PLI/LIT 569, 571 (2000) (stating that "[n]ew loss exposures that can impact insurers seem to appear overnight," and "[t]he birth of the World Wide Web is revolutionizing communication and commerce at such breakneck speeds that existing business protocols are becoming antiquated."). Although a number of insurers have provided a variety of new products (see *supra* note 14), the industry has been criticized for moving too slowly. Some in the industry say this can be attributed to a lack of demand due to a failure by risk managers to appreciate the need for targeted coverage as well as the difficulty of underwriting an area with virtually no claims history and a risk that "changes every day." Barbara Bowers, *Getting a Grasp on E-Commerce Risks*, Best's Review, p. 57, Mar. 2001. This unpredictability is critical to understanding the difficulty of writing cyber-coverage. To insure a particular type of exposure, an insurer must be able to establish premiums that will pay losses and expenses and also provide a reasonable profit. To accomplish this end, the insurer must estimate the expected losses during the next policy period for each group to be charged a particular rate. To satisfy this criterion, the underlying conditions must remain the same during the next policy period as in the past, or the insurer must be able to predict the change in the underlying conditions. Thus, the ability to appropriately price a policy (enabling the insurer to pay losses on that policy)" favors an exposure where changes occur slowly and in predictable ways or not at all." C. Arthur Williams, Jr., et al., *Principles of Risk Management and Insurance*, 2d ed. p. 237 CPCU vol. 1 (Amer. Inst. For Prop. and Liability Underwriters (1981).

16. There exists a heated debate as to who should be credited with inventing the first "computer," and when that actually occurred. Maurice Wilkes, a professor, invented ED-SAC, which has been called "the world's first modern, working stored-program computer," in May 1949. John W. Machly and Presper Eckert, professors at University of Pennsylvania, built the Electronic Numerical Integrator and Computer ("ENIAC"), which first became operational in 1946, as a weapon for war, and it has been called the "first general-purpose, electronic computer." Mathematician John von Neumann (who worked on the Manhattan Project) worked with Machly and Eckert on ENIAC, contributed ideas for ENIAC's successor, EDVAC (Electronic Discrete Variable Calculator) and wrote a widely distributed paper on those ideas. Iowa State University professor John Atanasoff invented the first digital calculating machine in early 1941. Howard Aiken built an electromechani-

common use in the workplace in the 1980s, it was not until the Internet first came “on line” for use by the general public, in the mid 1990s,¹⁷ that computers would become so deeply integrated into the way people in the developed world work, live and play. Capable of collapsing both time and distance at minimal cost, the Internet is now the preferred method of communication, surpassing even the telephone in workplace usage (as of 1998, approximately 50 million people used “e-mail” in the United States, sending an estimated 500 million messages per day—or 23.5 *quadrillion* messages in that year alone)¹⁸; it is the preeminent research tool and source of information (a role that is facilitated with its search engines, “metatags,” and “hyperlinks”),¹⁹ soon to render the *Yellow Pages* and encyclopedia obsolete; and, it is fast becoming *the* “place” to do business, already having spawned a virtual gold-rush as companies, new and old, rushed to gain a presence in cyberspace with beguiling domain names and eye-catching web pages.

More than 259 million people use the global computer network today.²⁰ If it is “the information superhighway,” as world leaders have dubbed it,²¹ then commerce is the fuel for its traffic. Businesses have flocked to the World Wide Web²² to transact with both businesses

cal calculator for I.B.M. in the early 1940s. British Maurice Colossus created Colossus, which was comparable to ENIAC and which was operational in 1943. German Konrad Zus is credited with creating the first working program-controlled digital computer called the Z3 in 1943. Sir Freddy Williams and Professor Tom Kilburn built the SSEM (small-scale electronic machine), which first ran in 1948, to which all modern computers assertedly “come back.” See Christopher Lehmann-Harupt, *Creating a Giant Brain, And Not Getting Credit*, N.Y. TIMES ABSTRACTS, June 14, 1999, at 7, available at 1999 WL 30528070; Sharon Smith, *Clash of the Titans*, COMPUTER WKLY. Mar. 7, 1996, at 30, available at 1996 WL 9061809.

17. John Engstrom, *Gore Backs More Competition on the Road to Superhighway*, SEATTLE POST-INTELLIGENCER, Jan. 12, 1994, at A1, available at 1994 WL 6141283 (noting that Clinton administration has “kick-started” Internet with legislation allowing general public access to Internet); Denise Pelissier, *The Internet: Journey Into Cyberspace*, UNESCO COURIER, Feb. 1, 1995, at 19, available at 1995 WL 12597287 (noting that “people all over the world are taking their first steps on the information superhighway by joining the Internet.”).

18. David E. Kalish, *Employers’ E-Mail Monitoring Surges*, ARIZ. REPUBLIC, Mar. 5, 1999, at E1 (citing Forrester Research Inc. estimates for 1994, 1998 & 2002).

19. The Internet is also noteworthy for its creation of an entirely new lexicon, consisting of new words and acronyms (e.g., “metatags”, “B2Bs”) and old words with new prefixes (e.g., “e-” and “cyber-”).) A “metatag” is a hidden code on a Web page; invisible to Internet users, the words within metatags can be found by search engines. A “hyperlink” provides the ability to move from one’s website directly to that of another by clicking on a logo or icon.

20. The World’s Online Population, available at http://cyberatlas.internet.com/big_picture/geographics/article/1,1323,5911_151151,00 (last modified July 28, 2000).

21. Barry McCall, *Business This Year 2*, THE IRISH TIMES, Dec. 23, 1997, at 63, available at 1997 WL 16329590 (crediting Al Gore with coining phrase “information superhighway”); Noor Amal, *Getting Into the 12 Bandwagon*, THE NEW STRAIGHTS TIMES, Nov. 3, 1997, at 34, available at 1997 WL 15072579 (same).

22. The World Wide Web is not a database of information, but is a reference to a service that uses a basic type of language to browse Internet sites. It is a “web” of many sites linked together that users can access by clicking on hyperlinks. J. Look, *The Virtual Wild, Wild West (WWW): Intellectual Property Issues in Cyberspace—Trademarks, Service Marks, Copyrights and Domain Names*, 22 U. ARK. LITTLE ROCK L. REV. 49, 51 n.7

("B2Bs") and consumers ("B2Cs"), and revenues from the deals consummated there are exploding—exponentially so. It is predicted that e-commerce revenues will skyrocket worldwide from a "mere" \$50 billion in 1998 to an estimated \$3 trillion by 2003.²³ Retail sales to consumers were said to exceed \$29.3 billion in 2000, a 75 percent increase over 1999 revenues.²⁴ To be sure, there have been some bumps along the way in this "Kitty Hawk Age of e-commerce,"²⁵ with the market weaning out innumerable "dot.com" companies whose ill-conceived business models cannot survive. But, because the benefits of doing business digitally are major (the Internet eliminates significant transaction costs, allowing companies to electronically order goods and services, and share data, without "the middleman" and at huge savings),²⁶ cyber-markets will continue to thrive. As businesses realize the value of transacting commerce in a digital world, they will continue to flock to it—in droves. Indeed, Intel Corporation's chairman has gone so far as to predict that "in five year's time, all companies will be Internet companies or they won't be companies at all."²⁷

This new electronic network has certainly created new opportunities for business. It has also created new risks. In the frenzy to secure a presence on the Web, many businesses have failed to properly evaluate the risks they face, and those risks are not insignificant. Indeed, if you were a plaintiff's lawyer in search of a moniker for the Internet, you might call it "virtual heaven." With the click of a few computer keys, a company's employees can transmit—all too easily and quickly—material that is defamatory, offensive, obscene, personally invasive or owned by others. And, as any lawyer knows, such on-line transmissions can—and often do—injure reputations, inflict distress, violate personal privacy rights, vi-

(1999). Linking is the practice of providing a connection from one's website directly to that of another.

23. Maryann Jones Thompson, *Tracking the Internet Economy: 100 Numbers You Need to Know* (citing International Data Corp., (<http://www.thestandard.com>)).

24. "ECommerce Growth Predicted for North America" available at http://cyberatlas.internet.com/markets/retailing/article/0,1323,6061_408451,00.html#table (last modified Aug. 8, 2000).

25. *Getting Wired: Internet Risks*, *supra* note 16 (quoting Amazon.com chief executive officer Jeff Bezos).

26. The Internet has transformed the way business is conducted, allowing businesses to take advantage of its speed and ease of communication by using "just in time" inventories and eliminating the middleman (and costs) that typically separates many buyers and sellers. With the Internet's elimination of transaction costs, Cisco Systems reports that it has shaved \$363 million in costs for technical support, distribution and marketing simply by booking orders via cyberspace. General Electric estimates that it will save \$550 million in the course of three years simply by purchasing goods and services by way of an extranet site that it has created. *Getting Wired: Internet Risks*, *supra* note 16 (citing *Log On, Link Up, Save Big*, *Bus. Wk.*, June 22, 1998, at 132, 134, 136).

27. Matthew Symonds, *The Net Imperative: Within a Few Years, the Internet Will Turn Business Upside Down. Be Prepared—or Die*, *ECONOMIST*, June 26, 1999, at 5, available at 1999 WL 7363579. As of 1998, it was estimated that 300,000 businesses had opened web sites on the Internet, and that 95 percent of the Fortune 500 companies had done so. *Exposed on the Net*, *supra* note 15, at 108 (citing Iconoclast, *Profile of a U.S. User: Business User of the Internet*, (<http://www.headcount.com/globalsource/profile> 1998)).

olate trademarks and infringe copyrights. In short, the opportunities to commit torts electronically are as boundless as cyberspace.²⁸

The possibility of huge economic losses—caused by the deletion or corruption of valuable business data—is also vast. In a digital economy in which information is the new currency, businesses are increasingly dependant upon their ability to access, store and transmit computerized data, both quickly and easily. Any interference with that ability can, and does, translate into titanic financial losses. This is no overstatement, as demonstrated by a series of hacker attacks that shut down the Internet's most popular websites in February 2000²⁹ and a series of viruses whose benign names (Melissa, Herbie, and Pretty) provide no hint of the harm they left in their wake.³⁰ The most notorious of the quickly-spreading viruses was the so-called Love Bug, which coursed through computer systems throughout the world in May 2000, erasing data in its path and causing billions of dollars in losses by the time it was done.³¹ Sent by e-mail to an estimated 45 million computers in May 2000,³² the so-called Love Bug seduced e-mail users with an alluring subject line, "ILOVEYOU" and an enticement to "kindly check the attached LOVELETTER coming from me." When the attached "love letter" was opened, the virus contained there coursed through computer systems by self-replicating, stealing passwords, crashing systems, and deleting files containing valuable data. In less than one day, the Love Bug had caused more than \$15 billion in losses worldwide, most of it uninsured.³³

28. See G. Hernandez, et al., *EBUSINESS AND INSURANCE: A LEGAL GUIDE TO TRANSACTING INSURANCE AND OTHER BUSINESS ON THE INTERNET*, § 8.01, at 21,005 (CCH 2001); see also *Old Torts Never Die—They Just Adapt to the Internet*, NAT'L L. J. (Sept. 2000).

29. See Nick Wingfield & Scott Thurm, *The Internet Under Siege: Stalking the Hackers*, WALL STREET JOURNAL, Feb. 10, 2000, at B-1, available at 2000 WL 3017448.

30. Greg Chang, "Herbie" Virus is Contained," THE ORANGE COUNTY REGISTER, May 20, 2000, at C1, available at 2000 WL 4833615; Mark Mueller & Kevin Coughlin, *E-Mail Virus Jolts Agencies Around the Globe*, THE STAR-LEDGER, May 5, 2000, at 1, available at 2000 WL 20203092 (noting that Melissa caused about \$300 million in damage); see generally Izhar Lev & Michael Knights, *Computer Viruses: e-Biological Warfare*, JANE'S INTELLIGENCE REVIEW, Mar. 1, 2001, available at 2001 WL 10122068.

31. Charles Piller & Greg Miller, *Fast-Moving Virus Hits Computers Worldwide: Internet: "Love Bug" Infects Millions of Machines, Destroying Files and Inflicting Costly Damage*, LOS ANGELES TIMES, May 5, 2000, at A1, available at 2000 WL 2237858; Mark Mueller & Kevin Coughlin, *E-mail Virus Jolts Agencies Around The Globe—Words "I Love You" Bring Heartache From Trenton to House of Commons*, THE STAR-LEDGER, May 5, 2000, at A1, available at 2000 WL 20203092; *Virus Underscores Risks in E-Commerce*, J. COM. ABSTRACTS 12, May 18, 2000, available at 2000 WL 4188456; see also David Higgins, "Love Bug" Cost May Hit Billions, SYDNEY MORNING HERALD, May 6, 2000, at 1, available at 2000 WL 18233307 (noting that Love Bug "bigger than Melissa" virus, "making it the deadliest computer virus so far.").

32. Emma Conners, *Love Hurts . . . And Outlook Dims*, AUSTRALIAN FIN. REV., May 8, 2000, at 31, available at 2000 WL 20840740.

33. *Virus Underscores Risks*, supra note 32 (putting damage caused by virus at \$15.3 billion, but noting most of it is uninsured, quoting Julian James, managing director of Lloyds in North America); "Love Bug," supra note 32, at 1; see also Reuters Eng. News Serv., May 8, 2000, available in WESTLAW ALLNEWSPLUS ("Insurers won't be footing the bill for the estimated \$10 billion of damage caused by the 'Love Bug' virus and its variations, they said on Friday, because most companies don't have special coverage");

With the promise of more viruses, bugs and hackers to come,³⁴ and the prediction by Lloyds of London that “e-commerce will emerge as the single biggest insurance risk of the 21st century,”³⁵ Internet businesses are scrambling to evaluate their exposure to such risks and gauge whether they are adequately protected. The insurance industry has responded to these new risks with products specifically designed to insure losses and liability flowing from computer crashes and the loss of data.³⁶ But Internet companies that have already sustained losses (or that decline to purchase applicable coverage) will surely try to secure reimbursement under the “traditional” or standard form policies they already possess. These would include those policies designed to cover “direct physical loss or damage” to covered property (first-party property policies) as well as those designed to insure liability to third parties flowing from such losses (the third party liability policies, or CGL). While it remains to be seen how the judiciary will approach this effort, there is no doubt that its response will be of momentous economic importance. Because of the nature of the losses caused by computer viruses and hackers, there is also no doubt that the language of the traditional standard form insurance policies, and that of the CGL in particular, poses a significant barrier to policyholders seeking to secure windfalls in the form of a coverage the policies fail to provide.

II. EVOLUTION OF AN INSURANCE POLICY: HOW AND WHY THE CGL CAME TO REQUIRE THAT PROPERTY BE “TANGIBLE”

Standard CGL policies were developed and promulgated by insurance industry trade organizations in the 1940s, and periodically revised during the following decades.³⁷ Most CGL insurance today is written on standardized forms issued by the Insurance Services Office, Inc. (“ISO”), a for-profit, rating organization.³⁸ Although each insurer is free to formu-

Joseph B. Treaster, *Companies Won't Say if They Were Insured for Net Attacks*, NEW YORK TIMES, Feb. 10, 2000, at C6 (“The cyberattack is not covered under the standard business interruption policy” according to an insurance company spokesman).

34. Peter Svensson, *Bigger, Nastier “Love Bug” On Loose, New Virus Changes Its Name, Erases Files*, THE COLUMBIAN, May 19, 2000, at A1, available at 2000 WL 19277428 (noting that new virus “was not spreading as fast as the ‘Love Bug,’ but could cause” more damage “because the new virus erases more files and crashes computers.”); Peter Svensson, *New Virus, Less Damage*, PORTLAND OREGONIAN, May 20, 2000, at E1, available at 2000 WL 5404209 (noting that “‘NewLove’ computer bug is nastier than its predecessor but that it caused less damage because network administrators were prepared.”).

35. *Virus Underscores Risks*, supra note 32; Tom McLaughlin, *Hackers Attacking Internet Sites with Impunity*, BOSTON HERALD, Feb. 10, 2000, at 16, available in 2000 WL 4316669.

36. See supra note 14.

37. *Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.*, 607 N.W.2d 276, 283 n.3 (Wis. 2000) (citing Laurie Vasichek, Note, *Liability Coverage for “Damages Because of Property Damage” Under the Comprehensive Liability Policy*, 68 MINN. L. REV. 795, 798-99 n.14 (1984)).

38. *Wisconsin Label*, 607 N.W.2d at 283 n.3 (citing *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 772 (1993)).

late its own CGL policy, the policy structure developed by ISO is widely employed.³⁹ ISO is able to provide its member companies detailed statistical information about risk, claims and pricing as it relates to specific language drafted by ISO. Most insurers do not have the resources to offer insurance coverage on terms other than those detailed in ISO-promulgated CGL forms, meaning ISO's standard forms play a central role in insurance underwriting.

The CGL has been described by one court as an insurance policy designed "to offer insureds a buffet of standard business liability coverages,"⁴⁰ allowing each policyholder to select "the types and amounts of coverage that are suitable to its business." Although insurers can and do offer special endorsements designed to provide specific protection required by clients,⁴¹ the buffet offered by the CGL is not unlimited, and typically consists of four specific coverage grants, only one of which is relevant here: The insurer's promise to defend and indemnify a policyholder in lawsuits seeking damages caused by an "occurrence" resulting in "property damage."⁴² An "occurrence" encompasses an accident,⁴³ and while the definition of "property damage" has been refined over the years, it is typically defined as "physical injury to or destruction of tangible property, including loss of use resulting therefrom" and "loss of use of tangible property which has not been physically injured."⁴⁴

39. *Reliance Nat'l Ins. Co. v. Hatfield*, 228 F.3d 909, 911 (8th Cir. 2000) (citing *Fresard v. Michigan Millers Mut. Ins. Co.*, 327 N.W.2d 286, 287-88 (Mich. 1982)).

40. *Reliance*, 228 F.3d at 911.

41. *Heritage Mut. Ins. Co. v. Advanced Polymer Tech., Inc.*, 97 F.Supp.2d 913, 916 (2000) ("While some insurers may alter the forms they receive from ISO and tailor the standard language based upon the unique coverages requested by their insureds, insurers often adopt the ISO forms verbatim.").

42. The other standard coverage grants are for "bodily injury," "advertising injury," and "personal injury." "Bodily injury" is typically defined as "bodily injury, sickness or disease sustained by one person." DIMUGNO & GLAD, CALIFORNIA INSURANCE LAW HANDBOOK, § 44.01(4) at 763 (West 2000). "Advertising injury" is typically defined as injury arising out of certain enumerated offenses (e.g., "oral or written publication of material that slanders or libels a person or organization," "oral or written publication of material that violates a persons' right of privacy," "misappropriation of advertising ideas or style of doing business", "infringement of copyright, title or slogan") and "occurring in the course of the insured's advertising activities." *Id.* § 47.01 at 975. "Personal injury" typically refers to liability arising from a specific set of acts, such as false arrest, detention, imprisonment; wrongful entry or eviction, or other invasion of the right of private occupancy; publication or utterance of defamatory or disparaging material. *Id.* § 48.01 at 991-92.

43. The definition of "occurrence" in the 1986 form is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." DIMUGNO & GLAD, *supra* note 42, at § 44.01(4).

44. The original "property damage" definition added to policies in 1966 was amended in 1973 and 1986 to clarify that "tangible property" need not be physically injured to implicate coverage; so long as an "occurrence" results in the loss of use of tangible property, and that loss of use forms the basis of the plaintiff's grievance and the insured's liability, there is coverage. The definition in the 1973 form thus stated that "property damage" means (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period." The 1986 amendments were minor,

The CGL's core purpose is to protect the policyholder against liability for damages the insured's negligence may cause to third parties. Among other specifically identified risks,⁴⁵ the CGL covers the possibility that the products or work of the insured will physically damage the property of another, creating liability for the insured. As a source of those goods or work, an insured may be responsible as a matter of contract law to make good on its defective work or products. This may even extend to an obligation to completely replace or rebuild a deficient product. This liability, however, is not what CGL coverage is intended to insure.⁴⁶ Liability insurance is not product warranty insurance. Nor does it not cover purely economic loss, such as loss and liability that results when the insured's work or product is not that for which the plaintiff had bargained. Likewise, it does not cover lost profits, loss of goodwill, lost productivity or loss of an investment.⁴⁷ Rather, it covers the insured for liability it may face for physical damage or loss to the property of others.⁴⁸ Thus, only those losses that constitute a "measure of damages to physical property" are recoverable.⁴⁹

The CGL's limitation on recovery of economic loss is critical to understanding the meaning of "property damage" and how the term came to be incorporated into the policy. It was *precisely because* the CGL was never intended to insure economic losses—a fact that some courts had previously failed to appreciate—that led ISO's predecessor group to amend the standard form liability policy in 1965. That year, because of "adverse court decisions," the National Bureau of Casualty Underwriters ("NBCU") sought to eliminate any confusion by adding an explicit provision limiting liability coverage to damages caused by "property damage"—which it then defined as "physical injury to or destruction of tangible property."⁵⁰ Norman Nachman, the manager of the NBCU's

deleting the phrase "destruction of" from the definition. DiMUGNO & GLAD, *supra* note 43, at §§ 44.01(2)-(4), at 761-63.

45. See *supra* note 42.

46. This distinction between what is covered, and what is not, is nicely illustrated by *Jacob v. Builders*, 592 N.W.2d 271, 276 (Wis. 1999). There, a contractor's defective masonry work led to the leakage of water into the plaintiff's home. The court held the policy covered the cost of repairing the water damage to the property of the plaintiff, but did not cover the cost of repairing the contractor's defective work, which constituted economic loss based solely upon the contractor's contractual liability.

47. *Wisconsin Label*, 607 N.W.2d at 283-84 (citations & quotations omitted); *Waller v. Truck Ins. Exch., Inc.*, 900 P.2d 619, 626-27 (Cal. 1995); *Giddings v. Indus. Indem. Co.*, 169 Cal. Rptr. 278, 281-82 (Ct. App. 1980).

48. *Wisconsin Label*, 607 N.W.2d at 283-84; *Waller*, 900 P.2d at 626-27; *Giddings*, 169 Cal. Rptr. at 281-82. See also *Md. Cas. Co. v. Reeder*, 270 Cal. Rptr. 719, 723-24 (Ct. App. 1990) (citing *Geddes & Smith, Inc. v. St. Paul-Mercury Indem. Co.* 334 P. 2d 881 (Cal. 1959)).

49. *Waller*, 900 P.2d at 627 (citing *Giddings*, 169 Cal. Rptr. at 281-82); see also *Lucker Mfg v. Home Ins. Co.*, 23 F.3d 808, 818 n.12 (3d Cir. 1994) (noting that economic loss "is recoverable if it provides a measure of damage to the tangible property.").

50. As noted in 1965 by Norman Nachman, the manager of the National Bureau's Casualty Insurance (other than Automobile) and Multiple Line Insurance Division, "there were many factors which initiated revisions of the general liability policies," the "most important" constituting "adverse court decisions" in which courts were "finding it all too

general liability division, explained nearly 35 years ago that this new language would make it clear that the CGL “is not intended to cover intangible losses such as loss of profits from an unsuccessful business venture.”⁵¹ Although the definition has since been amended to clarify that it is intended to also cover “loss of use” of tangible property “not physically injured,” the tangibility requirement remains in the CGL today.

The fact that insurers have declined to cover liability arising out of intangible injuries makes eminent sense. As an actuarial matter, underwriting risks of liability flowing from damage to intangible interests is difficult at best. Because risks of damage to intangible interests are impossible to predict and properly price, the premiums a rational insurer would have to charge for such coverage would be prohibitively high, as at least one federal circuit court has recognized:

Insurance companies reasonably might want to exclude coverage for damage to such intangible interests because estimating the potential liability for purposes of setting the premium might be very difficult, or even if the premium could be calculated, insuring against such liability might expose the company to such increased costs because of a great variance in liability that a CGL policy might become prohibitively expensive.⁵²

Therefore, when carving out the risks to be covered (and not covered) by the CGL, it was sensible for insurers to presume that purchasers of liability policies—who are principally concerned with the more conventional forms of tort damage that they may cause a third party—would be willing to bear the risk of loss to traditionally intangible interests in exchange for lower premiums. The emergence of new risks that failed to exist, and that no one contemplated, when the CGL was born more than 50 years ago hardly alters that result.

Nonetheless, in the face of Internet-related liability for the loss or corruption of computer data, policyholders will no doubt argue that the requirements of the standard CGL are satisfied by their particular claims. Whether or not the computer data is lost to a hacker, virus, “worm,” or “bug,” the question is the same: Whether the loss or corruption of data constitutes “physical injury to,” or “loss of use of,” “tangible property.” To answer that question affirmatively, one must be able to conclude that data is “tangible.” As shown below, it simply is *not*.

easy to adopt hypercritical attitudes towards the ‘complex’ policy format. . . “ *The New Policy Provisions*, *supra* note 2, at 197-98 & n.1, 2 (quoting *Maretti v. Midland Nat’l Ins. Co.*, 190 N.E.2d 597 (Ill. 1963) and *Peerless Ins. Co. v. Clough*, 193 A.2d 444 (N.H. 1963)). The revisions “not only reflect material changes of substance but also changes in form.” *Id.* One of the more dramatic changes to the policies was the introduction of the “occurrence” as the basis for liability coverage, which was designed to “embrace a broader sweep of casualties” as compared to the policies they replace, but which “is not intended to cover intangible losses. . .” *Id.* at 199-200, 207; *see also* John J. Tarpey, *The New Comprehensive Policy: Some of the Changes*, INS. COUNSEL J. 223 (April 1966).

51. *The New Policy Provisions*, *supra* note 2, at 200.

52. *Lucker*, 23 F.3d at 819 n.13.

III. IS DATA TANGIBLE? CAN IT BE PHYSICALLY DAMAGED? COMMON SENSE AND ESTABLISHED LAW SAY "NO"

Like any contract, an insurance contract must, if possible, be construed to give effect to the parties' intent.⁵³ Such intent is to be inferred, if possible, solely from the written provisions of the contract, considering the policy as a whole, and giving effect to the words in the policy, as they would ordinarily be used by a layperson.⁵⁴ This means the court must take language in its plain, ordinary and popular sense, and not strain to find ambiguity.⁵⁵ In other words, the court "must enforce the contract as made, and not make another contract for the parties."⁵⁶ This objective theory of contract interpretation is necessarily based upon the following generally accepted principles: 1) the judiciary's goal is to enforce the parties' contractual intent; 2) words have meaning; and 3) requiring courts to apply the ordinary meaning of words is, in most cases, the best way to effectuate the parties' contractual intent.⁵⁷

53. *Home Indem. Co. v. Hyplains Beef, L.C.*, 893 F.Supp. 987, 990 (D. Kan. 1995); *Wisconsin Label*, 607 N.W.2d at 282 ("[i]nsurance policies are contracts and are governed by the same rules that govern interpretation of contracts in general," and "[t]he primary goal in interpreting a contract is to determine and give effect to the parties' intention.").

54. *Bank of the West v. Super. Ct.*, 833 P.2d 545, 552 (Cal. 1992); *Waller v. Truck Ins. Exch.*, 900 P.2d 619, 627 (Cal. 1995); *see also Bentz v. Mut. Fire, Marine & Inland Ins. Co.*, 575 A.2d 795, 798 (Md. App. 1990) ("[i]nsurance policies, being contractual, are construed as other contracts," with words being "given their customary and normal meaning."). The exception to this general rule is where the parties intended to attach special meanings to particular words, *e.g.*, through custom and usage, and there is evidence of such intent. *See Fryar v. Currin*, 312 S.E.2d 16, 18 (S.C. 1984) (where particular custom or usage attaches special meaning to words or terms in any particular trade or business, parties can show peculiar meaning of words to elucidate meaning, however, not to alter, add to, or contradict the contract); *see also Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc.*, 131 Cal. Rptr. 183, 189 (Ct. App.1976); *Della Ratta v. Am. Better Cmty. Devs., Inc.*, 380 A.2d 627, 635 (Md. App. 1977).

55. *McKinney v. Allstate Ins. Co.*, 722 N.E.2d 1125, 1127 (Ill. 1999) (noting that if terms of policy are clear and unambiguous, they must be given their plain and ordinary meaning); *Bank of the West*, 833 P.2d at 552 (same); *Quality Oilfield Prods., Inc. v. Michigan Mut. Ins. Co.*, 971 S.W.2d 635, 637 (Tex. App. 1998) (same); *see also ACL Technologies, Inc. v. Northbrook Prop. and Cas. Ins. Co.*, 22 Cal. Rptr. 2d 206, 214 (Ct. App.1993) ("the flaw" in the insured's proposed construction "is that it strains the word accidental, wrenching the word from its natural embrace of the concept of unexpectedness."). In addition, simply because a term is undefined, or there is a dispute as to its meaning, does not mean an ambiguity exists, or that it is automatically construed against the insurer. If the insured's proposed construction is inconsistent with its reasonable expectation of coverage, it is *not* construed in favor of coverage. *See ACL*, 22 Cal. Rptr. 2d at 215; *cf. Hanneman v. Cont'l W. Ins. Co.*, 575 N.W.2d 445, 450 (N.D. 1998) ("merely because a contract term is undefined, disputable, or vague does not mean the issue is automatically resolved in favor of the insured"); *see infra* notes 126, 127 and accompanying text.

56. *Hyplains*, 904 F.Supp. at 990; *see also Kimber Petroleum Corp.v. Travelers Indem. Co.*, 689 A.2d 747, 754 (N.J. Super. Ct. App. Div. 1997) ("words in an insurance policy should be interpreted according to their plain and ordinary meaning," and while ambiguities are construed in favor of the insured, courts "should not write for the insured a better policy of insurance than the one purchased"(citations omitted)); *Wisconsin Label*, 586 N.W.2d at 33 ("We refuse to rewrite the policy by construction to bind Northbrook to a risk the parties did not contemplate.").

57. *Santos v. Dean*, 982 P.2d 632, 635 (Wash. Ct. App. 1999).

The plain and ordinary meaning of “tangible” is enough to dispose of any argument that corrupted data constitutes damaged “tangible property” covered by liability insurance. According to the dictionary, an obvious starting point in any analysis of the meaning of words, “tangible” means “capable of being touched: able to be perceived as materially existent esp. by the sense of touch; palpable, tactile. . . .”⁵⁸ “Tangible property” is defined as “property (as real estate) having physical substance apparent to the senses.”⁵⁹ Black’s Law Dictionary—a source frequently cited in insurance coverage decisions⁶⁰—contains similar definitions, defining “tangible” as “[h]aving or possessing physical form,” and “[c]apable of being touched and seen; perceptible to the touch”⁶¹ Black’s defines “tangible property” as “that which may be felt or touched, and is necessarily corporeal, although it may be either real or personal,”⁶² and “tangible personal property” as “property such as a chair or watch which may be touched or felt in contrast to a contract.”⁶³

The common thread throughout these dictionary definitions is the requirement that “tangible” is that which is capable of being touched. That this meaning is found in every definition of the word “tangible” is hardly surprising when one considers its etymology. The word “tangible” derives from the Latin word “tangibilis,” which is an adjective meaning “that may be touched,” and a Latin (and French) verb, “tangere,” which means “to touch.”⁶⁴

It seems obvious, therefore, that information and ideas—whether they be manifested in letters or numbers on a piece of paper or in a stream of bytes and bits in cyberspace—are simply not “tangible” or “tangible property” as those words are used and commonly understood. Information and ideas themselves, *however they may be memorialized*, are not “capable of being touched” and have no “physical substance.” This seems particularly true of data in cyberspace, which can be transmitted and stored in many ways, none of which renders the data capable of being touched; for example, computer data is transmitted by electronic impulse, microwaves, or light pulses, and it is typically stored as an imperceptible

58. WEBSTER’S, *supra* note 4, at 2337; *see also* AMERICAN HERITAGE DICTIONARY 1242 (2d College ed. 1982) (“tangible” is “a. Discernable by the touch; capable of being touched; palpable; b. Capable of being treated as fact; real; concrete: tangible evidence.”).

59. WEBSTER’S, *supra* note 4.

60. *See Lucker*, 23 F.3d at 819 n.13 (“The distinction between tangible and intangible property made by [the cited insurance coverage] cases tracks the definitions found in Black’s Law Dictionary.”).

61. BLACK’S LAW DICTIONARY 1306 (5th ed. 1979).

62. The word “corporeal” “denotes the nature or physical existence of a body” and is said to be “a term descriptive of such things as have an objective, material existence; perceptible by the sense of sight and touch; possessing a real body.” WEBSTER’S, *supra* note 4, at 310.

63. BLACK’S, *supra* note 61, at 1305.

64. *See* THE OXFORD ENGLISH DICTIONARY 610 (Clarendon Press 1989); Dr. Ernest Klein, A COMPREHENSIVE ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 1570 (Elsevier Publishing Co. 1967).

“bit” on a computer disk or within its hard drive.⁶⁵ While the dictionary definitions of tangibility would seem to easily negate arguments that insurance coverage exists for liability flowing from the loss of, or damage to, data or other intangibles, counsel for policyholders have nonetheless advanced them. Not surprisingly, they have done so without much success.

Indeed, while no court has ever squarely held that data alone is “tangible” for purposes of insurance coverage, at least two courts have stated it is not.⁶⁶ A litany of decisions in varied contexts demonstrate a similar, singular theme: that injury to, or loss of, ideas, information, designs, and concepts—without actual damage to the medium in which they are conveyed—is insufficient to support liability coverage because there is no damage to, or loss of, tangible property. A few of these decisions deserve close discussion.

*Schaefer/Karpf Prods. v. CNA Ins. Cos.*⁶⁷ addressed the tangibility of a movie for purposes of liability coverage. In that case, the policyholder was sued for copying a children’s Christmas program onto videocassettes containing pornographic material. The plaintiff (Schaefer) had produced a television special called “The Best Christmas Pageant Ever,” and thereafter sold the program on videotapes to schools, religious and civic organizations. Schaefer had contracted with The Video Company (“TVC”) to duplicate the pageant onto 32,500 videotapes, and TVC, then proceeded to copy the program onto used videotapes which it had obtained from another company and which, unbeknownst to TVC, contained pornographic movies. As fate would have it, the children’s movie was shorter than the pornography. So, thereafter, in schools across the country, children were exposed to sexually graphic material at the end of the “The Best Christmas Pageant Ever.” Schaefer, the owner of the children’s movie, sued TVC, won a \$1 million judgment, and thereafter sought pay-

65. Some commentators have gone to great lengths to argue that the electronic pulses in which computer data is embodied is “tangible” under an insurance contract. Said one: [I]t can be argued that computer data is tangible property because data on programs are coded pulses of electricity which flow through the computer’s circuits. . . . A read-write head, like a phonograph needle, in the computer’s disk drive creates an electromagnetic field. . . [e]ach iron particle has its own north and south pole, and the patterns formed by the north and south poles are a code that represents the information being stored. There is then a physical character to the information, which is apparent to the computer but not our senses.

Lorelie S. Masters, *Did A Bug Eat Your Data? Insurance Protection in the Information Age*, 1 No. 2 E-COMMERCE L. REP. 7, Nov. 1998 (quoting Garrett L. Joest, III, *Insure Your Computer Software*, N.J. LAW. p. 24, Mar. 1, 1993). The commentator’s explanation as to how data exists in cyberspace is itself enough to defeat his own argument that computerized data is “tangible.” While electronic impulses may be capable of being “felt” (assuming the right conditions), data itself has no such traits, and can hardly be said to be tangible as the word is commonly understood. Indeed, the commentator admits computerized data “is apparent to the computer but not our senses”—*te sine qua non* of tangibility.

66. *St. Paul Fire Marine Ins. Co. v. Nat’l Computer Sys.*, 490 N.W.2d 626, 631 (Minn. Ct. App. 1992); *State Auto Prop. & Cas. Ins. Co. v. Midwest Computer & More*, 147 F. Supp. 2d 1113, 1116 (W.D. Okla. 2001).

67. 76 Cal. Rptr. 2d 42 (Ct. App. 1998).

ment from TVC's liability insurer. The question was whether TVC's conduct caused the production company to suffer physical injury to, or the loss of use of, "tangible property" as its insurance contract required. Schaefer argued to the court that its children's program was injured, and that such injury provided a basis for coverage. The court disagreed, concluding that the program itself was not "tangible property."

Indeed, the only tangible property involved, said the court, was the videotapes themselves, but they could not support coverage. This was because the damage was caused by the existence of the pornographic material on the tapes, and the tapes were already defective when Schaefer purchased them from TVC. In short, TVC had caused no damage to any tangible property of Schaefer's, a requirement for coverage.⁶⁸ The court reasoned that damage to the children's program itself failed to satisfy the policy's requirements because "tangible property," "for purposes of a CGL policy," is property "having physical substance apparent to the senses," and a "concept is something invisible and incorporeal, having no substance or body until it is transmitted onto a medium. It is the medium which is the tangible property, not the concept."⁶⁹

The court then proceeded to acknowledge—and dismiss—the argument that the Christmas program itself was "tangible" because it was "apparent to the senses:"

Yet, one might argue, when we speak of a painting, Van Gogh's "Starry Night" for example, we are not speaking about the paint or the canvas on which the paint sits; we are speaking about Van Gogh's concept or presentation of a starry night which to us has a physical substance apparent to our senses separate and apart from the paint and the canvas. Likewise, when we speak about the program "The Best Christmas Pageant Ever," we are not speaking about a black plastic box with a reel of tape inside; we are speaking about Schaefer's concept of a story about a Christmas pageant that has taken on a form, a substance, apparent to our senses. Here, the medium is not the message.

Whatever might be said of this argument in the world of art or philosophy, we are dealing in this case with the world of insurance—a practical and prosaic world more Philistine than philosophical, more artisan than artistic. It is a bedrock principle of this world that the provisions of insurance contracts are interpreted in their ordinary and popular sense.⁷⁰ In this world, videotapes are tangible, concepts are intangible.⁷¹

Other courts have agreed with *Schaefer/Karpf*, finding that injury to movies, design plans and data, without more, fails to constitute damage to "tangible property" as those words are used in an insurance contract. For example, in *Gulf Ins. Co. v. L.A. Effects Group, Inc.*,⁷² a special effects

68. *Id.* at 46.

69. *Id.* at 47.

70. *Stamm Theatres, Inc. v. Hartford Cas. Ins. Co.*, 113 Cal. Rptr. 2d 300, 305 (2001).

71. 76 Cal. Rptr. 2d at 47.

72. 827 F.2d 574 (9th Cir. 1987).

production company had been sued for failures that allegedly harmed the artistic value of the movie *Aliens*. The court held that the complaint failed to support coverage, reasoning that there is no argument that "the film's artistic value has *physical substance* apparent to the senses."⁷³ In *Johnson v. Amica Mut. Ins. Co.*,⁷⁴ "bank account funds [were] not 'tangible property' because they have no physical presence" and "merely represent, or are evidence of, value." In *Peoples Telephone Co., Inc. v. Hartford Fire Ins. Co.*,⁷⁵ the court held that a misappropriated list of mobile telephone numbers was not "tangible" and thus not covered.⁷⁶ And, in *Lucker Mfg. v. Home Ins. Co.*,⁷⁷ the Third Circuit held that a design for a particular project—rendered less valuable by the discovery of a defect in one of its planned components—failed to constitute "tangible property" for purposes of insurance coverage. The court reasoned that "we are bound by the language of the policy," and to "stretch it to include non-tangible property like the LMS design . . . would require too great a departure from the meaning of 'tangible.'"⁷⁸

The result in each of the above cases might have been different if the medium on which the movie, the telephone numbers and the design had been stored or conveyed was actually damaged. Even then, had damage to the physical medium occurred, the policyholder's (or plaintiff's) recovery would have been limited to the value of the damaged medium itself, not the diminished value of the represented intangible. The courts have carefully and appropriately drawn this distinction, finding a basis for coverage where the recovery is "for the value of a tangible medium storing ideas," and no coverage where the recovery is "for the ideas themselves."⁷⁹ Where the damage is merely to the value of an idea, it simply fails to constitute property that can be fairly said to be "tangible."

This distinction can be gleaned from the case law, and indeed, is the only way to explain *Retail Sys., Inc. v. CNA Ins. Cos.*⁸⁰ There, the court considered "whether computer tapes and data are tangible property under an insurance policy." Without much analysis, the court concluded that "at best, the policy's requirement that only tangible property is covered is ambiguous," and proceeded to find coverage because "[t]he data on the tape was of permanent value and was integrated completely with the physical property of the tape."⁸¹

73. *Id.* at 578 (emphasis added).

74. 733 A.2d 977, 979 (Me. 1999).

75. 36 F. Supp. 2d 1335 (S.D. Fla. 1997) (involving a property policy covering "tangible property with intrinsic value."). Although *Peoples* involved first-party coverage, it is significant because the courts properly attached the plain and ordinary meaning to the word "tangible" in the context of an insurance contract.

76. 36 F.Supp.2d at 1338.

77. 23 F.3d 808, 820 (3d Cir. 1994).

78. *Id.* at 821.

79. *Id.* at 820.

80. 469 N.W.2d 735, 737 (Minn. Ct. App. 1991).

81. *Id.* *Retail Systems* was not the first time a Minnesota court faced the question of whether lost information constituted "tangible property" under an insurance policy. In *Magnetic Data, Inc. v. St. Paul Fire & Marine Ins. Co.*, 430 N.W.2d 483 (Minn. Ct. App.

Not surprisingly, policyholder lawyers and commentators frequently invoke *Retail Systems* as “support” for an argument that computer data is “tangible” under a CGL.⁸² The argument is misplaced. Only a year after *Retail Systems* was issued, the same court returned to the question of whether data is tangible, and proceeded to clarify that *Retail Systems* was a case in which “both the information and the medium on which the information was stored were lost.”⁸³ Unlike *Retail Systems*, the issue in *St. Paul Fire Marine Ins. Co. v. Nat’l Computer Sys.* was the existence of liability coverage for misappropriated proprietary data. Addressing whether the information alone constituted “tangible property,” the court held that it did not. It explained that “the information was in a tangible form: it was put on paper,” however, “the information itself was not tangible.”⁸⁴ The plaintiff’s grievance was not that the medium containing the proprietary information (in this case, paper contained in three-ring binders) was damaged or lost, but that the information itself (which was previously subject to the plaintiff’s exclusive use) had been taken. Therefore, because data is not tangible, there was no liability coverage for its misappropriation.⁸⁵

Notwithstanding the reasoning and result in *Retail Systems*, the intangibility of computer data was apparent to the court in *Retail Systems*, which was why (as the Third Circuit aptly notes in *Lucker*) that court “limited the coverage to the considerable value of the computer tape as a storage medium, disallowing recovery for the value of the data it stored.”⁸⁶ Likewise, *State Farm Fire & Cas. Ins. Co. v. White*⁸⁷ held that architectural

1988), the Minnesota appellate court expressly bypassed the question of whether the magnetically encoded computer data was tangible property. That court’s decision in favor of coverage was thereafter reversed by the Supreme Court of Minnesota. In explaining its reasons for reversal, the high court expressly stated that the determination of whether the computer data was tangible would not be reached because it was not necessary for its decision. *Magnetic Data, Inc. v. St. Paul Fire & Marine Ins. Co.*, 442 N.W.2d 153, 156 (Minn. 1989).

82. See, e.g., David R. Cohen & Roberta D. Anderson, *Insurance Coverage for “Cyber-Losses”*, 35 TORT & INS. L.J. 891, 898 & n.27, 30, 31 (Summer 2000); Robert L. Carter Jr. & Donald O. Johnson, *Keep on Top of Insurance Coverage to Help Combat Computer Viruses*, 15 No. 3 CORP. COUNS. 1, Aug. 2000; Leonard D. DuBoff & Scott G. Garvey, *Stay on Guard: Are You Insured For Computer Virus Damage?*, 60-SEP OR. ST. B. BULL. 29, 29, Aug./Sept. 2000; Lorelie S. Masters, *Did a Bug Eat Your Data? Insurance Protection in the Information Age*, 1 No. 2 E-COMMERCE L. REP. 7, Nov. 1998.

83. *St. Paul Fire Marine Ins. Co. v. Nat’l Computer Sys.*, 490 N.W.2d 626, 631 (Minn. Ct. App. 1992) (emphasis added).

84. *Id.* at 631.

85. The reasoning of *St. Paul v. Network Computer Sys.* is entirely consistent with settled law concerning the meaning of tangible. See *Gunderson v. Fire Ins. Exch.*, 44 Cal. Rptr. 2d 272, 281 (Ct. App. 1995) (“tangible property” means property “having physical substance apparent to the senses”); *United States Fid. & Guard. Co. v. Barron Indus., Inc.*, 809 F.Supp. 355, 360 (M.D. Pa. 1992) (the term tangible in a CGL covers things which are physical—“capable of being touched and objectively perceivable”); *Lucker Mfg., Inc. v. Home Ins. Co.*, 23 F.3d 808, 818 (3d Cir. 1994) (“tangible property is property that can be felt or touched, or property capable of being possessed or realized”); *Hommel v. George*, 802 P.2d 1156, 1157 (Colo. App. 1990) (“[t]angible property is that which is capable of being handled, touched, or physically possessed.”).

86. *Lucker*, 23 F.3d at 820.

87. 777 F. Supp. 952 (N.D. Ga. 1991).

plans in blueprint form were tangible property covered under a CGL policy, but limited recovery to the “value of the paper and ink, and not the value of the ideas the paper and ink embodied.”⁸⁸ These distinctions seem to be lost on counsel for policyholders, who frequently and incorrectly cite *Retail Systems* and *White* for the principle that data alone is tangible property, and its damage or loss provides a basis for insurance coverage. As a close analysis of these decisions reveal, they are simply not authority for that principle.

Another decision frequently cited by attorneys for policyholders is *Centennial Ins. Co. v. Applied Health Care Sys. Inc.*,⁸⁹ a case in which the Seventh Circuit Court applied California law to find that an insurer owed a duty to defend the insured against a lawsuit claiming damages caused by faulty computer equipment sold by the insured. The defective equipment had resulted in the loss of data, the only alleged injury. As shown below, *Centennial* is incorrect, primarily because the court failed to properly understand, and apply, the standards governing an insurer’s duty to defend.

In *Centennial*, the plaintiff had purchased from the insured, pursuant to contract, four controllers for its data processing system. Thereafter, the plaintiff sued, contending “the controllers were defective in that each of them had a wiring-connection defect that caused them to consistently malfunction through the random loss of customer billing and patient care information that had been stored in the system.”⁹⁰ In the subsequent coverage action, the court held that the insurer must defend, reasoning that the complaint alleging computer malfunction and lost data created at least the possibility of “property damage” and thus triggered a duty to defend.⁹¹

The Seventh Circuit rejected the tangible-versus-intangible analysis found in *St. Paul v. Computer Network Computer Sys.*, stating that it was premature at the duty to defend stage. In particular, the court noted that the parties “devote considerable attention to whether information stored in a data processing system may be fairly characterized as tangible property.”⁹² The court explained that “[t]he resolution of this question, whatever its intrinsic interest, is not necessary to the decision in this case. Accordingly, we decline to address it.”⁹³

The decision is wrong. Whether lost information constitutes tangible property, and thus “property damage,” is not merely of “intrinsic interest”; it is vital to evaluating the insurer’s defense obligation at the outset. If lost data—the only injury claimed by plaintiffs—is not tangible property, then the plaintiff in *Centennial* could not be alleging “property damage,” the only basis upon which a defense would be owed. The court in

88. *Id.* at 954-55.

89. 710 F.2d 1288 (7th Cir. 1983).

90. *Id.* at 1290.

91. *Id.* at 1291.

92. *Id.* at n.7.

93. *Id.*

Centennial clearly seemed confused about the standards governing an insurer's duty to defend.

The duty to defend, like the duty to indemnify, is predicated upon the assertion of a claim seeking damages covered by the terms of the policy.⁹⁴ While insurers have a duty to defend lawsuits creating the *potential* for covered damages, this "potentiality" simply refers to the possibility that, based upon the nature of the plaintiff's allegations against the insured, the insured could be liable for damages actually (as opposed to possibly) covered by the policy.⁹⁵ In other words, the duty to defend turns upon the *potential for liability* on a covered theory, not the *potential* that allegations *may be covered*. This itself is a legal question.⁹⁶ The allegations (assuming their truth) are either covered or they are not. If they fall within the scope of coverage, the insurer owes a defense. If they do not, the insurer owes no defense. It is that simple.

Therefore, where the plaintiff's only basis for damages is lost data, the policyholder could not be *potentially* liable on a covered theory—*i.e.*, for "property damage"—if data is not "tangible property." This is a question of law⁹⁷ that had to be resolved by the Seventh Circuit to properly ascertain Centennial Insurance Company's duty to defend. It is the critical legal question, however, that the court simply declined to answer.

Thus, notwithstanding the efforts of some courts to justify *Centennial*,⁹⁸ the decision cannot be rationalized and is incorrect. Accordingly, reliance upon the decision by policyholders seeking a defense in lawsuits al-

94. *Gunderson v. Fire Ins. Exch.*, 44 Cal. Rptr. 2d 272, 277 (Ct. App. 1995); *Olympic Club v. Certain Underwriters at Lloyd's*, 991 F.2d 497, 503 (9th Cir. 1993); *State Farm Fire & Cas. Co. v. Drasin*, 199 Cal. Rptr. 749, 751 (Ct. App. 1984).

95. *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 276 n.15 (Cal. 1966). The duty to defend, which is evaluated at the outset of the case and based upon the factual allegations advanced by the plaintiff, is broader than the duty to indemnify. This is because an insurer may owe a duty to defend even when it ultimately has no duty to indemnify, which can result "either because no damages are awarded in the underlying action against the insured or because the actual judgment is for damages not covered under the policy." *Borg v. Transamerica Ins. Co.*, 54 Cal. Rptr. 2d 811, 814 (Ct. App. 1996) (citations omitted).

96. See *Centennial*, 710 F.2d at 1291 (noting that duty to defend exists "if any of the allegations in that action *state facts even potentially within the coverage* of [the] policy" (emphasis added)).

97. See *Old Republic Ins. Co. v. Super. Ct.*, 77 Cal. Rptr. 2d 642, 659 (Ct. App. 1998) (noting that whether complaint alleges covered damages is a legal question).

98. The Third Circuit was clearly concerned in *Lucker*, with trying to explain the decisions it considered aberrational. It tried to rationalize the result in *Centennial* on the ground that "[a] minority of courts have held that where the question of coverage is an open question the insurer has a duty to defend." *Lucker*, 23 F.3d at 814 n.5. In fact, that is not the standard governing an insurer's duty to defend under California law. Where there is no factual dispute as to the nature of the claims alleged by the plaintiff (as was the case in *Centennial*, where the plaintiff alleged a faulty computer system resulted in lost data), the question of whether the lawsuit seeks covered damages is a question of law. *Old Republic Ins. Co.*, 77 Cal. Rptr. 2d at 659. The fact that this legal question is unresolved at the time the plaintiff sues hardly gives rise to a duty to defend. See *Peerless Lighting Corp. v. Am. Motorists Ins. Co.*, 98 Cal. Rptr. 2d 753, 759 (Ct. App. 2000) (holding that unresolved legal question relevant to insurer's duty to defend does not give rise to duty to defend). Rather, when faced with unsettled legal questions relevant to the insurer's duty to defend, it is the duty of the court to resolve them, not sidestep them.

leging lost data is simply misplaced. Moreover, there appears to be no case that squarely holds that faulty computer code, and the resulting loss of data, gives rise to "property damage" as that term is defined by a CGL. Given the policy requirement that the property that is damaged (or whose use is lost) be *tangible*, this is hardly surprising.⁹⁹

If the litany of cases finding that information and ideas are intangible are not enough to convince policyholders that no liability coverage exists for causing the loss of data, a decision recently issued in the Western District of Oklahoma should suffice. Employing a *correct* analysis of the duty to defend, the federal district court in *State Auto Property and Casualty Ins. Co. v. Midwestern Computers & More*¹⁰⁰ addressed whether an insurer owed a duty to defend a policyholder in a lawsuit alleging that its negligent performance of service work on a computer system caused data loss. Looking to dictionary definitions for the ordinary meaning of the word "tangible," the court held that the alleged loss of electronic data could not support a defense under the liability policy because data, by itself, is not perceptible to the human senses:

Although the medium that holds the information can be perceived, identified or valued, the information itself cannot be. Alone, computer data cannot be touched, held or sensed by the human mind; it has no physical substance. It is not tangible property.¹⁰¹

The *Midwestern Computers* case could hardly be described as revolutionary. To the contrary, it simply embraces the obvious, holding that the ordinary meaning of the word "tangible" cannot be stretched to include that which cannot be humanly perceived. It is, however, significant because it is among the first decisions to squarely hold that computer data itself is not tangible property, such that its loss (or corruption) will not

99. Policyholders have also argued that the incorporation of defective software into a computer system, thereby resulting in lost or tainted data, constitutes "property damage" under a CGL policy, on the theory that the tangible computer network is physically damaged. A district court in the Northern District of California rejected that argument in *Seagate Technology v. St. Paul Fire & Marine Ins. Co.*, 11 F.Supp.2d 1150, 1154-55 (N.D. Cal. 1998), holding that the installation of a defective disk drive did not physically injure the host computer, and instead, only resulted in an intangible injury, namely, the loss or corruption of data. *See also* *New Hampshire Ins. Co. v. Vieira*, 930 F.2d 696, 697 (9th Cir. 1991) (holding that installation of defective drywall in homes did not constitute "physical damage to tangible property"); *Golden Eagle Ins. Co. v. Travelers Co.*, 103 F.3d 750 (9th Cir. 1996) (holding that faulty workmanship in construction of building failed to raise the possibility of coverage for "physical injury" to the property). The answer is different if the defective product or part that is incorporated actually causes physical injury to the property into which it is incorporated. *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 93 Cal. Rptr. 2d 364, 376-77 (Ct. App. 2000); *see, e.g., Eljer Mfg., Inc. v. Liberty Mut. Ins. Co.*, 972 F.2d 805 (7th Cir. 1992) (defective plumbing that caused water leakage to houses and apartments into which it was installed constituted "property damage"). The courts have applied this rule to hold that parts that are inherently dangerous and that must be removed, such as asbestos, constitute property damage. *See Armstrong World Indus., Inc. v. Aetna Cas. & Surety Co.*, 52 Cal. Rptr. 2d 690 (Ct. App. 1996) (holding that the presence of asbestos constituted injury to building "because the potentially hazardous material is physically touching and linked with the building" and had to be removed, thereby causing loss to the products in which it is incorporated).

100. 147 F. Supp. 2d 1113 (W.D. Okla. 2001)

101. *Id.*, at 1116.

support property damage coverage under a liability policy.¹⁰²

In sum, tangibility is the touchstone of “property damage” coverage under a CGL. Because words are to be given their ordinary meaning, and because information and ideas cannot be “touched or felt,”¹⁰³ information and ideas—however, memorialized—are not “tangible property” and no coverage will flow from their loss or corruption. The answer may be different if the physical medium on which information or ideas is stored or conveyed—*e.g.*, the computer tape or disk itself—is actually lost or damaged, *and the damaged medium forms part of the plaintiff's grievance against the insured*. Any recovery, however, is necessarily limited to the value of the damaged media. The contract simply provides for nothing more.

IV. AMERICAN GUARANTEE & LIABILITY INS. CO. V. INGRAM MICRO, INC.: AN OMINOUS ANOMALY

In the face of dictionary definitions and case law confirming that “tangible” property is that which has “physical substance” and that can be “touched, seen and smelled,”¹⁰⁴ one might easily conclude that arguments of coverage under standard form insurance contracts for lost or tainted data are doomed to fail. It would be a conclusion supported by common sense, but not recent history. In a decision that made news in the insurance industry last year, a federal district court held that lost computer data constituted “physical loss or damage” under a first-party property policy. The court’s reasoning violated fundamental principles governing contract interpretation (namely that the ordinary meanings of words in a contract control), and as one would expect, was incorrectly decided. Although the case involved the meaning of “physical” under a first-party property policy (and not “tangible” under a CGL), it is relevant to coverage under a CGL because the meaning of “physical” and “tangible” are closely intertwined. Accordingly, if a court can conclude that the loss of data is a “physical” loss, it can just as easily conclude that data itself is “tangible” under a liability policy.¹⁰⁵ The case provides a

102. The court did go on to note that the claimant’s inability to use its computer as a result of the insured’s negligence would support a defense, on the theory that the ability to use the computer, which itself was tangible, had been lost. This allegation fell within the coverage for “loss of use of tangible property.” In the end, however, the court found no defense was owed due to the applicability of an exclusion that eliminated any possibility of coverage. 147 F. Supp. 2d at 1117-18.

103. See *supra* notes 4, 5, 61, 62, 64 & 66 and accompanying text.

104. See *Kazi v. State Farm Fire & Cas. Co.*, 15 P.3d 223, 229 (Cal. 2001) (holding that “‘tangible property’ is not ambiguous,” and “[c]onsistent with an insured’s reasonable expectations, ‘tangible property’ refers to things that can be touched, seen, and smelled” (citing *Warner v. Fire Ins. Exch.*, 281 Cal. Rptr. 635 (Ct. App. 1991))).

105. Although wrong, one can be sure policyholder lawyers arguing in favor of expansive coverage, without regard for the policy’s terms, will seek to use *Ingram Micro* in an effort to create coverage for liability flowing from the loss of data caused by electronic glitches. See, *e.g.*, David R. Cohen & Roberta D. Anderson, *Insurance Coverage for “Cyber-Losses”*, 35 TORT & INS. L.J. 891 (2000) (arguing for the existence of insurance coverage for “cyber-risks” under standard liability policies, and noting significance of *In-*

disturbing example of how far a court will go to create coverage for an intangible loss, and thus deserves discussion.

In *American Guar. & Liab. Ins. Co. v. Ingram Micro, Inc.*,¹⁰⁶ a power outage had rendered the insured's computer systems inoperable for a period of time, resulting in the erasure of programming data within the computer's random access memory.¹⁰⁷ The data had to be re-entered, and the insured sought coverage for losses flowing from this event under a first-party policy that protected the insured's "[r]eal and personal property, business income and operations in the world wherever situated" against "[a]ll risks of direct physical loss or damage from any cause."¹⁰⁸ The issue was whether the computer system's loss of data constituted a "physical loss or damage." The court held that it did.¹⁰⁹

Although Ingram's policy was a first-party property policy and did not cover an insured's liability to third parties for "property damage," the court concluded that Ingram "does allege property damage—that as a result of the power outage, Ingram's computer system and world-wide network physically lost the programming information and custom configurations necessary for them to function."¹¹⁰ It so found even though the computer network had no difficulty accepting the data when it was re-entered, operated precisely as it had before it lost the data, and thus was not itself actually damaged.¹¹¹ The court reasoned, however, that Ingram's mainframes were "physically damaged" during the one and one half hours that it took Ingram employees to manually reload the lost programming information. In addition, the court reasoned, the insured's computer network called "Impulse" was also "physically damaged" by its loss of data, because employees were required to electronically bypass the system for eight hours. Calling the electronic loss of data a *physical*

gram Micro decision); Dawn Dinkins, *Internet Liabilities: A Look at Coverage Under the Traditional Commercial General Liability Policy*, 16 No. 6 CORP. OFFICERS & DIRS. LIAB. REP. (Andrews 2001) (noting, without analysis, that CGL's definition of "property damage" "may also provide coverage for computer related property loss," and stating that the *Ingram Micro* case supports the position that the loss of data, without more, supports a claim that "physical damage" has occurred); compare Walter J. Andrews & Edward J. Grass, *Curing the Fever for Virus Coverage Under Traditional Property Policies*, MEALEY'S CYBER TECH REP. 2, No. 6, 20-24 (2000) (explaining why *Ingram Micro* was incorrectly decided).

106. 2000 WL 726789 (D. Ariz. April 18, 2000).

107. *Id.* at *1-2.

108. *Id.* at *1.

109. An earlier court had faced, but declined to reach, the question of insurance coverage for lost electronic data under a first-party policy insuring "direct physical loss." In *Home Indem. Co. v. Hyplains Beef*, 893 F.Supp. 987 (D. Kan. 1995), the insured had sought insurance coverage under a first-party policy for the loss of data caused by the failure of its computer systems. The court never reached the question of whether lost data constituted a "physical loss" under the business interruption policy because it found no coverage on the ground that the operations were not suspended as the policy required.

110. *Ingram Micro*, 2000 WL 726798, at *3 (emphasis in original).

111. On that basis, the insurer argued that the computer system was not "physically damaged" because its capability to perform its intended functions remained intact. The insured countered that the fact that the mainframe computers and matrix switch retained the ability to accept the restored information and operate as before did not mean that they did not undergo physical damage. *Id.* at *2.

loss, however, does not make it one.¹¹²

Critical to determining whether coverage existed under Ingram Micro's policy is the meaning of the word "physical," which modified the words "loss" or "damage" "from any cause." In short, the word described the nature of the risks the policy covered. When used as an adverb, "physically" means "in respect to *the body*"¹¹³ and, when used as an adjective, "physical" means "of or relating to *natural or material things* as opposed to things mental, moral, spiritual or imaginary."¹¹⁴ According to Black's Law Dictionary, "physical" means "relating or pertaining to *the body*, as distinguished from the mind or soul or the emotions."¹¹⁵ The legal dictionary explains that "physical injury" means "*bodily* harm or hurt, excluding mental distress, fright, or emotional disturbance," and that "physical harm" is "used throughout the Restatement of Torts to denote the physical impairment of the *human body, or of land or chattels.*"¹¹⁶

As the above definitions illustrate, along with those that explain the meaning of both "tangible" and "tangible property," the word "physical" is closely linked with tangibility, which requires a "*physical* substance apparent to the senses" and which is "capable of being touched."¹¹⁷ In other words, to be capable of physical injury, the thing that is injured must be material, or tangible. By definition, viruses, computer bugs or an electronic glitch that corrupts or erases data—*i.e.*, intangibles—cannot cause *physical* loss to that data. Likewise, that which supposedly caused "physical loss or damage" to the computers in *Ingram Micro*—the loss of data—was not a tangible, or material, thing. The fact that the erased data was restored from purely intangible sources—with the manual re-entry of *data* itself, or by downloading such from the *memory* of another computer—further underscores the absence of any "physical" loss or damage to a tangible thing.¹¹⁸

112. The court's result-driven approach is reminiscent of a riddle with which Abraham Lincoln is credited: "How many legs does a dog have if you call a tail a leg? Five? No, calling a tail a leg don't make it a leg." *Bank One Dayton, NA v. Limbach*, 533 N.E.2d 624, 627 n.5 (Ohio 1990) (citing Morley, *The Shorter Bartlett's Familiar Quotations* (1953), at 218(d)).

113. WEBSTER'S, *supra* note 4, at 1707.

114. *Id.* at 1706.

115. BLACK'S LAW DICTIONARY, *supra* note 61, at 1032.

116. *Id.*

117. See *supra* notes 4, 5, 61-67 and accompanying text; see also *United States Fid. & Guar. Co. v. Barron Indus. Inc.*, 809 F. Supp.355, 360 (M.D. Pa. 1992) (term tangible in a CGL covers things which are "physical"); *Kazi v. State Farm Fire & Cas. Co.*, 15 P.3d 223, 229 (Cal. 2001) (noting that an easement is "an incorporeal or intangible property right that does not relate to physical objects"); *Geddes & Smith, Inc. v. Saint Paul Mercury Indem. Co.*, 334 P.2d 881, 885 (Cal. 1959) (treating the terms "physical" and tangible" synonymously, by stating in its interpretation of a policy that covers "injury to or destruction of property," "it is clear that the word property refers to physical or tangible property.")

118. See Walter J. Andrews & Edward J. Grass, *Curing the Fever for Virus Coverage Under Traditional Property Policies*, MEALEY'S CYBER TECH REP. 2, No. 6, 20, (Aug. 2000) (hereinafter "Curing the Fever").

Instead of giving effect to the word “physical” as it is ordinarily used, the *Ingram Micro* court simply read it out of the contract, asserting that the claim at issue involved “physical damage” without any analysis of the words themselves. Indeed, the district court never even addressed the significance, let alone the meaning, of the word “physical” in the context of the policy. It simply stated that it had to “side with” the insured’s broader definition of “physical damage” given that the claim arose “[a]t a time when computer technology dominates our professional as well as personal lives.”¹¹⁹ In a veritable intellectual frolic and detour, it then proceeded to cite a variety of federal and state criminal laws addressing the meaning of “computer damage” (as opposed to “physical loss or damage”) in the context of statutes enacted to codify the loss of computer data as an injury that may result in criminal and civil liability.¹²⁰ The court worked hard to justify this creative approach to construing contracts:

The Court is mindful that these definitions appear not in insurance coverage cases, but in the penal codes of various states. Their relevance, however, is significant. Lawmakers around the country have determined that when a computer’s data is unavailable, there is damage; when a computer’s services are interrupted, there is damage; and when a computer’s software or network is altered, there is damage. Restricting the Policy’s language to that proposed by American would be archaic.¹²¹

Of course, the issue was not whether there was “damage” but whether that “damage,” was “physical.” Whatever politicians may have decided about what conduct should subject persons to criminal or civil liability has nothing to do with whether a particular loss falls within a contract’s terms. While a legislative decision to pass statutes creating new civil liabilities may motivate insurers to sell products insuring those liability risks, it fails to answer whether the terms of a contract, as written, actually insure that risk.¹²² This was the question with which *Ingram Micro* was faced, but it was a question to which the court had little interest in answering, at least pursuant to the settled rules governing the manner in which contracts (including insurance contracts) are to be construed.¹²³

119. *Ingram Micro*, 2000 WL726798, at *2.

120. See *Curing the Fever*, *supra* note 118, at 21 (arguing that the statutes cited by the court actually supported a finding that the loss of data was intangible, on the theory that existing laws were insufficient to deal with the theft of intangible property, requiring the passage of statutes designed to deal with the intangible nature of injuries caused by computer theft).

121. *Ingram Micro*, 2000 WL726798, at *3.

122. Nonetheless, this is an approach that is frequently advocated by those seeking to establish coverage in spite of, as opposed to based upon, the plain meaning of a policy’s terms. See, e.g., *Insurance Coverage for “Cyber-Losses,” supra* note 105, at 900 (seeking to draw significance to meaning of “tangible” from federal wire fraud statute criminalizing the theft of a “good, wares or merchandise,” and the federal copyright statute.)

123. See *Curing the Fever*, *supra* note 118, at 21 (noting that the *Ingram Micro* court reached its decision “based on a stated perception of what traditional property policies should cover rather than what their terms actually provide.”). The insurer in *Ingram Micro*

Equally misguided are efforts by courts and commentators to glean significance from tax cases in their effort to evaluate the tangibility of data.¹²⁴ Property must be “tangible” to be taxable under various state statutes, requiring courts construing those statutes to evaluate the meaning of the word “tangible.” However, the tax cases, as they are called, are of little or no significance. First, they are inconsistent.¹²⁵ More fundamentally, the standards governing statutory construction fail to coincide with those governing the interpretation of contracts. In construing tax statutes, courts are guided by their perceptions of the policy embodied in the statute and considerations of equity among taxpayers. They also look to legislative history, which may show the legislature intended “X” to mean “Y.” But regardless of the correctness of these decisions as a matter of tax law, reasons of that sort have nothing to do with construing insurance policies.

In ascertaining the meaning of words of an insurance contract, the plain and ordinary meaning of the words, as used in the context of the policy, must control. And, while the *Ingram Micro* court may consider this approach to construing contracts “archaic,”¹²⁶ it is more accurately described as “fair.” Courts are not entitled to question the wisdom of policy provisions, but must apply contracts as written. Where a contractual term has a literal meaning, the judiciary is not free to construe it differently:

[W]e do not rewrite any provision of any contract, including the standard policy underlying any individual policy, for any purpose. To do so . . . might have untoward effects generally on individual insurers and individual insureds and also on society itself. Through the standard policy, individual insurers made promises, and individual insureds paid premiums, against the risk of loss. To rewrite the provision . . . might compel insurers to give insureds more than they promised and might allow insureds to get more than they paid for, thereby denying their “general[] freedom to contract as they

filed an interlocutory appeal, which was rejected by the Ninth Circuit. *Ingram Micro* remains unpublished.

124. See Spencer M. Taylor & Sean W. Shirley, *Insurance and Cyber-Losses: Coverage for Downloading Disaster*, 62 ALA. LAW., 192, 196 (2001); Gary J. Valeriano, *Pitfalls in Insurance Coverage for “Computer Crimes,”* 59 DEF. COUNS. J. 511, 517 (1992); see, e.g., *Scottsdale Ins. Co. v. Int’l Protective Agency, Inc.*, 19 P.3d 1058 (Wash. App. 2001) (in evaluating whether a license is intangible under insurance contract, noting that it is intangible for tax purposes); *Retail Sys., Inc. v. CNA Ins. Cos.*, 469 N.W.2d 735, 738 (Minn. App. 1991) (in evaluating coverage for lost data and damaged computer tape, noting that “the majority of tax decisions find that computer tapes are intangible property for tax purposes”).

125. Compare *Texas Instruments v. U.S.*, 551 F.2d 599, 611 (5th Cir. 1977) (information stored on computer tapes “tangible property” for tax purposes); *S. Cent. Bell Tel. v. Barthelemy*, 643 So.2d 1240, 1241 (La. 1994) (holding computer software to constitute taxable tangible personal property) with *Ronnen v. Comm’r*, 90 T.C. 74, 100 (1988) (information stored on duplicate computer disks not tangible property); *Dist. of Columbia v. Universal Computer Assocs., Inc.*, 465 F.2d 615, 617 (D.C. Cir. 1972) (computer tapes are intangible property); *Fingerhut Prods. Co. v. Comm’r of Revenue*, 258 N.W.2d 606, 610 (Minn. 1977) (characterizing marketing information as intangible property).

126. *Ingram Micro*, 2000 WL 726789 at *3.

please[.]”¹²⁷

Applying the literal meaning of words, without consideration of the results, furthers the goals of insureds and insurers alike by recognizing “bright line rules” capable of simple application: “It has a tendency to promote fairness and efficiency in the judicial sphere. By increasing certainty and decreasing uncertainty about the duty to indemnify, it serves to deter some litigation on the issues and to conclude what it does not deter expeditiously and soundly.”¹²⁸

Policyholders are sure to argue that the absence of a policy definition for a particular word—whether it be the word “tangible” or “physical”—renders the word ambiguous, requiring the courts to construe the contracts in favor of coverage.¹²⁹ This argument should fail. Critical terms are frequently undefined in the policy.¹³⁰ “Likewise, disagreement concerning the meaning of a phrase, or the fact that a word or phrase isolated from its context is susceptible of more than one meaning,” hardly renders it ambiguous.¹³¹ This has been reaffirmed in too many cases to count.¹³² A rule requiring every policy term to be defined would be impossible,

127. *Certain Underwriters at Lloyds of London, v. Super. Ct.*, 16 P.3d 94, 108 (Cal. 2001); *see also* *Cont'l Cas. Co. v. Gilbane Bldg. Co.*, 461 N.E.2d 209, 212 (Mass. 1984) (“We read the policy as written. We are not free to revise it or change the order of the words.”).

128. *Lloyds of London*, 16 P.3d at 107 (citations omitted).

129. *See, e.g.*, *Lorelie S. Masters, Did A Bug Eat Your Data? Insurance Protection in the Information Age*, 1 No. 2 E-COMMERCE L. REP. 7, Nov. 1998 (“In an insurance context, courts have found undefined terms to be ambiguous, and define it in favor of coverage.”).

130. *See, e.g.*, *Bank of the West v. Sup. Ct.*, 833 P.2d 545, 552 (Cal. 1992) (rejecting bank’s claim that undefined term ‘unfair competition’ was ambiguous, for terms “cannot be found to be ambiguous in the abstract”); *Foster-Gardner, Inc. v. Nat’l Union Fire Ins. Co.*, 959 P.2d 265, 272 (Cal. 1998) (“fact that a term is not defined in the policies does not make it ambiguous”); *Ctr. Mut. Ins. Co. v. Thompson*, 618 N.W.2d 505, 510 (N.D. 2000) (“absence of definition in and of itself does not establish ambiguity”) (quoting *Fireman’s Fund Ins. Co. v. Ex-Cell-O Corp.*, 702 F.Supp. 1317, 1323 n.7 (E.D. Mich. 1988)).

131. *Foster-Gardner*, 959 P.2d at 272 (quoting *Castro v. Fireman’s Fund Am. Life Ins. Co.*, 253 Cal. Rptr. 833, 836 (Ct. App. 1988)); *see also* *Carey Canada, Inc. v. Columbia Cas. Co.*, 940 F.2d 1548, 1556 (D.C. Cir. 1991) (“neither the mere absence of a policy definition nor the presence of a dispute as to meaning of the provision necessarily renders the policy or term ‘ambiguous’”); *Smith v. Neumann*, 682 N.E.2d 1245, 1250 (Ill. App. 1997) (“the absence of a definition does not render a policy term ambiguous, nor is it ambiguous simply because the parties can suggest creative possibilities for its meaning”).

132. *See supra* note 130; *Lititz Mut. Ins. Co. v. Steely*, 746 A.2d 607, 612 (Pa. Super. 1999) (differing interpretations of insurance policy provision does not render it ambiguous, and superior court would be “abdicating” its role if it decided case “by the purely mechanical process of searching the nation’s courts” for conflicting decisions); *Powell v. Alemaz, Inc.*, 760 A.2d 1141, 1147 (N.J. App. 2000) (“An insurance policy is not ambiguous merely because two conflicting interpretations of it are suggested by the litigants. Rather, both interpretations must reflect a reasonable reading of the contractual language”); *Wickland v. Am. Travelers Life Ins. Co.*, 513 S.E.2d 657, 664 n.11 (W.Va. 1998) (“Although we have recognized that the parties to this appeal have advanced conflicting interpretations of the long-term care policy language at issue herein, such disagreement does not automatically render the policy language ambiguous so as to preclude our resort to the plain, ordinary meaning of the constituent terms”); *Lemars Mut. Ins. Co. v. Joffer*, 574 N.W.2d 303, 307 (Iowa 1998) (“a mere disagreement between the parties regarding the meaning of undefined terms does not automatically establish an ambiguity”); *see also* *Sullins v. Allstate Ins. Co.*, 667 A.2d 617, 624 (Md. App. 1995) (“conflicting interpretations of policy language in judicial opinions is not determinative of, but is a factor to be considered in determining the existence of ambiguity”).

because the defining terms would have to be defined, leading to an unintelligible morass.

Indeed, any rule that rigidly presumed ambiguity from the absence of a definition would be illogical and unworkable. To avoid the ambiguity perceived by the Court of Appeal, an insurer would have to define every word in its policy, the defined words would themselves then have to be defined, their defining words would have to be defined, and the process would continue to replicate itself until the result became so cumbersome as to create impenetrable ambiguity.¹³³

V. "LOSS OF USE" OF TANGIBLE PROPERTY: WHERE THE COVERAGE BATTLES MAY BE FOUGHT

Because the loss or corruption of "data" cannot be fairly characterized as "*physical injury to tangible property*," the best argument for CGL coverage is found in the second prong of the CGL's "property damage" definition. That provision defines "property damage" as "loss of use of tangible property which is not physically injured." The argument is not that the loss of data itself constitutes the "loss of use of tangible property" (obviously because data is not tangible), but that the computer's use is lost if one is unable to retrieve data from it. In other words, the computer network itself—the only tangible property—is useless, and coverage is thus implicated.¹³⁴

The argument has some appeal, but the appeal is largely superficial when one considers the hurdles (and case law) standing in its way. First of all, the argument can only succeed if the inability to use the computer hardware itself, and not simply the inability to retrieve or access data, constitutes the basis for the plaintiff's claimed injury.¹³⁵ In addition, the computer network—the tangible property purportedly lost—must itself be rendered inoperable by an unexpected event, and its actual functions

133. *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 855 P.2d 1263, 1270 (Cal. 1993) (citations omitted).

134. See, e.g., *Internet Liabilities*, *supra* note 105; Michael P. Murphy & Aidam P. McCormick, *Challenging Insurance Coverage for Year 2000 Computer Failure Claims*, 34 TORT. & INS. L.J. 883, 896 (1999); Scott P. Devries et al., *Insurance Coverage for Y2k Expense Under First Party "All Risk" Policies*, 5 No. 7 DERIVATIVES LITIG. REP. 15 (Andrews 1999); Robert L. Carter, Jr. & Donald O. Johnson, *Keep on Top of Insurance Coverage To Help Combat Computer Viruses*, 15 No. 3 CORP. COUNS. 1 (Aug. 2000). At least one court has accepted this theory of coverage, where the insured's negligent work on a computer rendered it inoperable. In *Midwestern Computers*, *supra*, the district court found the CGL's "property damage" requirement was satisfied where the claimants "plainly allege[d] in their state court petition that defendant's negligence caused a loss of use of their computers." 147 F.Supp. 2d at 1116. The court further noted that pre-litigation correspondence supported the allegation that the plaintiffs "were left without the use of their computers" as a result of the insured's negligence. *Id.*

135. See, e.g., *Horace Mann Ins. Co. v. Maine Teachers Assoc.*, 449 A.2d 358, 361 (Me. 1982) (where facts that may have supported coverage were not part of plaintiff's complaint against the insured, such facts could not "constitute a basis for a determination that coverage exists"); *Michigan Ed. Employees Mut. Ins. Co. v. Karr*, 576 N.W.2d 728, 730 (Mich. App. 1998) (whether duty to defend exists depends upon the allegations of the complaint, and "it is necessary to focus on the basis for the injury and not the nomenclature of the underlying claim in order to determine whether coverage exists").

truly adversely affected by the loss of data (which was not the case in *Ingram Micro*). This is because, although some courts have held that tangible property rendered “useless” can qualify as a “loss of use” for purposes of coverage, this “uselessness” refers to property that is rendered completely inoperable.¹³⁶ The courts have squarely rejected arguments that the standard CGL policy only requires “some loss of use” as opposed to “complete uselessness.”¹³⁷ Thus, unless a computer virus crashes the computer hardware, rendering it completely inoperable, there are not sufficient facts to support a “loss of use” claim.¹³⁸

Even assuming the above requirements can be met, this argument for coverage will probably fail in many contexts involving lost or corrupted data, primarily because the nature of any resulting injuries are likely to be purely economic, including, for example, lost productivity (represented by employees’ inability to retrieve data), lost profits (represented by the employees’ inability to use data), increased operating costs (represented by the cost of manually retrieving data or re-inputting data into the computer) and lost goodwill (represented by the loss of business from disappointed or concerned customers).¹³⁹ Such purely economic losses are not insurable, even if cast as “property damage.”¹⁴⁰ The “loss of use” provision is particularly susceptible to being invoked as a basis for coverage where the nature of the plaintiff’s alleged injury is economic. For this reason, courts are resistant to efforts by policyholders (or plaintiffs) to characterize an economic loss as a “loss of use,” critically examining the

136. *Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.*, 586 N.W.2d 29, 35 (Wis. Ct. App. 1998) (identifying source of “uselessness” standard, and holding that where the “products themselves were still entirely useable,” the policyholder “fails to meet the uselessness requirement”); *see also* *Trio’s Inc v. Jones Sign Co.*, 444 N.W.2d 443, 444-45 (Wis. Ct. App. 1989) (no “loss of use” where malfunctioning sign did not render part of the building “useless” and distinguishing case in which products “were rendered unusable.”).

137. *Wisconsin Label*, 586 N.W.2d at 35.

138. The inability to operate the computer networking systems is apparently key to securing coverage on this basis, as the analysis in several cases makes clear. *See, e.g.,* *McDowell-Wellman Eng’g Co. v. Hartford Accident & Indem.*, 711 F.2d 521 (3d Cir. 1983) (finding no “loss of use” for purposes of “property damage” coverage on ground that furnaces at issue were still operable); *Sola Basic Indus. v. United States Fid. & Guar. Co.*, 280 N.W.2d 211 (Wis. 1979) (finding loss of use to be basis for coverage where insured’s removal of transformer had rendered plaintiff’s “furnaces inoperable until the transformer was replaced”); *USX Corp. v. Adriatic Ins. Corp.*, 99 F.Supp.2d 593 (W.D. Pa. 2000) (no basis for “loss of use” coverage where the “steel companies were at all times able to use their production equipment and merely sought lost savings from the reduced prices which competition would have produced”); *see also* *Lucker Mfg. v. Home Ins. Co.*, 818 F.Supp. 821, 827 (E.D. Pa. 1993) (“*McDowell-Wellman* plainly illustrates what is meant by ‘loss of use’ in a CGL policy. Both the district court and the Third Circuit found that there was no ‘loss of use’ because the blast furnaces were capable of operating and producing steel as intended, despite the collapse of the ore bridge.”), *aff’d on other grounds*, 23 F.3d 808 (3d Cir. 1994).

139. *See, e.g.,* *Keep on Top of Insurance Coverage*, *supra* note 14, at 1 (noting that Love Bug’s \$10 billion in damages included “lost business, the cost of eliminating the virus from computer systems and the cost of repairing, to the extent possible, damaged computer files”).

140. *See supra* note 48.

nature (and source) of the underlying injury.¹⁴¹

This is why there was no coverage for the inability to sell herring due to the insured's alleged price-fixing (resulting in lost profits),¹⁴² the inability to sell real estate due to the interference with an easement by a neighbor,¹⁴³ a contractor's failure to adequately maintain public streets, requiring their closure and resulting in the loss of access (and thus profits) to businesses,¹⁴⁴ and the inability to sell condominiums lost to foreclosure by the insured's negligence (resulting in investment losses).¹⁴⁵ All were held to be outside the scope of "property damage" coverage, notwithstanding the insureds' claims of lost use of real estate, businesses, and fish—all tangible property. Thus, while some courts have stated that the "loss of use" provision can implicate "property damage" coverage where the tangible property was "made useless,"¹⁴⁶ those same courts have rejected efforts by policyholders to re-cast their economic claims as "prop-

141. See, e.g., *Kazi v. State Farm Fire & Cas. Co.*, 15 P.3d 223 (Cal. 2001) (although landowner claimed that insured obstructed an implied common easement with the construction of improvements onto property, court found no "loss of use" of tangible property to support liability coverage because "[i]t is the nature of the easement right that was at issue, not the physicalities that may relate to it"); *Gunderson v. Fire Ins. Exch.*, 44 Cal. Rptr. 2d 272 (Ct. App.1995) (interference with, or the right to use an easement, concern interference with economic interest in property, and fail to support claim for "loss of use" of "tangible property").

142. *L. Ray Packing Co. v. Commercial Union Ins. Co.*, 469 A.2d 832, 834-35 (Me. 1983) (holding that fishermen's "inability to sell the herring in a free market [due to the insured's alleged price-fixing] is [not] a loss of use of the herring" for purposes of "property damage" coverage because the nature of the underlying action seeks lost profits).

143. *Kazi*, 15 P.3d at 223.

144. *Gibson & Assocs., Inc. v. Home Ins. Co.*, 966 F. Supp. 468, 473-74 (N.D. Tex. 1997) (responsibility for profits lost to denial of physical access by shop owners' to their businesses "represents neither physical injury to tangible property nor loss of use of tangible property that is not physically injured; rather, it constitutes purely economic loss."); *but see Cont'l Cas. Co. v. Gilbane Bldg. Co.*, 461 N.E.2d 209, 214 (Mass. 1984) (finding damages flowing from physical obstruction to stores, resulting in lost profits, to be covered as "loss of use" within CGL's property damage provision).

145. *Hommel v. George*, 802 P.2d 1156, 1157-58 (Colo. Ct. App. 1990) (insured's failure to complete construction of condominium units, resulting in their foreclosure, did not support "loss of use" claim by investors, who in actuality, were complaining about a loss on their investment, which is an economic, and thus uninsured, injury); *see also Liberty Bank of Montana v. Travelers Indem. Co. of Am.*, 870 F.2d 1504, 1509 (9th Cir. 1989) (rejecting plaintiff's argument that economic losses which resulted from loss of right to claim security interest in certain property constituted a loss of use of tangible property).

146. See *L. Ray Packing*, 469 A.2d at 835 (citing *Western Cas. & Surety Co. v. Polar Panel Co.*, 457 F.2d 957 (8th Cir. 1972) (loss of use of farm land due to defective seed constitutes "loss of use" of tangible property)); *Pittway Corp. v. Am. Motorists Ins. Co.*, 370 N.E.2d 1271, 1274 (Ill. App. 1977) (recognizing, but not applying, rule allowing insurance coverage where tangible property has been diminished in value or made useless without actual physical injury to the tangible property, but denying coverage for losses caused by defective valve assemblies in aerosol cans on basis of policy exclusion and failure to give timely notice); *Hauenstein v. St. Paul-Mercury Indem. Co.*, 65 N.W.2d 122 (Minn. 1954) (finding that application of plaster that shrunk and cracked after being applied supported "loss of use" claim for purposes of liability coverage); *see also Hendrickson v. Zurich Am. Ins. Co. of Ill.*, 85 Cal. Rptr. 2d 622, 626-27 (Ct. App.1999) ("loss of use of tangible property" found to exist to support liability coverage where insured provided defective strawberry plants to growers, and growers lost use of their land, and lost profits from lost strawberry production constituted measure of damages as a result of "property damage").

erty damage” claims in an effort to secure CGL coverage.¹⁴⁷

Finally, without regard to the nature of the plaintiff’s alleged injury, some courts will reject a “loss of use” theory of recovery if there is no causal link between physical damage to tangible property and the resulting loss of use. This is particularly true if the insured is seeking to secure liability coverage under an older ISO policy (issued before 1973),¹⁴⁸ or a customized policy, in which the “physical injury” and “loss of use” prongs of the modern definition are not separately set forth—providing instead, for example, that “property damage” means “physical injury to tangible property *including loss of use resulting therefrom.*” In this context, courts have held that no coverage exists unless the “loss of use” is “causally related to damage to tangible property.”¹⁴⁹ The rationale is that, notwithstanding any subsequent efforts by ISO to amend and clarify the scope of coverage for “property damage” in its standard CGL, those clarifications did not change the basic expectation of the parties—in place when the contracts were entered—that the lost use must be caused by some physical damage to tangible property.¹⁵⁰ Because the intent of the parties at the time the contract was formed controls, that intent, and the parties’ expectations based upon the words used, “provides the relevant focus” in the context of “loss of use” claims.¹⁵¹ Thus, putting aside the difficulty of trying to characterize injuries flowing from lost or corrupted data as non-economic, those policies with older (or customized) language may provide additional hurdles to coverage, particularly where the “loss of use” provision is not made distinct from the requirement that physical injury occur to tangible property.

VI. CONCLUSION

The fact that the terms of an insurance policy fail to support coverage for cyber-liability simply means the insurer has not provided it and the

147. See *L. Ray Packing*, 469 A.2d at 835, holding that “loss of use” provision “does not include mere economic damage in the nature of loss of investments, anticipated profits, and financial interests” and (citing *Lowenstein Dyes & Cosmetics, Inc. v. Aetna Life & Cas. Co.*, 524 F. Supp. 574 (E.D.N.Y. 1981)); *Geddes & Smith, Inc. v. St. Paul-Mercury Indem. Co.*, 334 P.2d 881 (Cal. 1959); *Johnston v. Tally Ho, Inc.*, 303 A. 2d 677 (Del. Super. 1973); *Ludwig Candy Co. v. Iowa Nat’l Mut. Ins. Co.*, 396 N.E.2d 1329 (Ill. Ct. App. 1979).

148. See *supra* note 44 concerning ISO’s standard form “property damage” definition in 1966, 1973 & 1986.

149. *USX Corp. v. Adriatic Ins. Co.*, 99 F.Supp.2d 593, 615-16 & n.16 (W.D. Pa. 2000); *McDowell-Wellman Eng’g Co. v. Hartford Accident & Indem. Co.*, 711 F.2d 521, 526 (3d Cir. 1983); *Yakima Cement Prod. Co. v. Great Am. Ins. Co.*, 608 P. 2d 254, 258-59 (Wash. 1980); *Imperial Cas. & Indem. Co. v. High Concrete Structures, Inc.*, 858 F.2d 128, 136 (3d Cir. 1988); *compare Borg v. Transamerica Ins. Co.*, 54 Cal. Rptr. 2d 811, 816 & n.2 (Ct. App.1996) (holding that policy covering “physical injury to, destruction of, or loss of use of tangible property” insured “loss of use” without any requirement of physical damage to tangible property) *with Gunderson v. Fire Ins. Exch.*, 44 Cal. Rptr. 2d 272, 279-80 (Ct. App.1995) (holding that policy insuring “physical injury to or destruction of tangible property, including loss of its use” provided no coverage for lost use of property in the absence of physical injury to it).

150. *USX Corp.*, 99 F. Supp.2d at 615 n.16.

151. *Id.* at 615.

policyholder has not paid for it. That the standard liability insurance policy fails to protect against this new risk is hardly astounding. Purchasers of CGL coverage vary greatly in terms of their exposure to risk, and CGLs are typically designed to insure the type of risks against which *most* policyholders need protection. Even today, many policyholders face little or no risk of liability due to the loss or corruption of computer data, and such policyholders obviously have no desire to pay additional premiums to subsidize those who do. Accordingly, businesses seeking coverage for this risk should seek special endorsements or any of the policies now available specifically providing such. For its part, the judiciary should decline the inevitable invitations to find “property damage” coverage under the standard liability policy for the loss or corruption of computer data. To do otherwise would be tantamount to reading the word “tangible” right out of the contract.

Essays

