

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

CARLEX GLASS AMERICA, LLC,)	
)	
Plaintiff,)	
)	
v.)	Case No. 3:24-cv-00695
)	Crenshaw/Holmes
SOMPO AMERICA INSURANCE)	
COMPANY,)	
)	
Defendant.)	
)	

PLAINTIFF’S PRE-TRIAL BRIEF

In this action, Carlex Glass America, LLC (“Plaintiff”), seeks insurance coverage for its damages resulting from the March 2020 tornado to its Nashville glass manufacturing facility under an all-risk property policy issued by Sompo America Insurance Company (“Defendant”). As discussed in this pre-trial brief, (1) Plaintiff has already demonstrated to the Court—which will be further supported by evidence at trial—that the policy was triggered. Having satisfied its modest burden, it thus shifts to the Defendant to establish any limitations to coverage under exclusions or other terms, including terms defining how damages should be calculated. However, (2) Defendant should be estopped from making any arguments at trial with respect to the “Loss Due To Virus Or Bacteria” exclusions, as well as the suit limitation provision in the at-issue policy, both of which Defendant has indicated it wishes to present to the jury at trial. At no point during the life of the insurance claim—whether prior to litigation or in its answer, discovery, or summary judgment—did Defendant inform Plaintiff that it would rely on these particular provisions to limit coverage. Pursuant to the “mend the hold” and waiver doctrines recognized in Tennessee, Defendant should be estopped from presenting these provisions at trial.

1. Plaintiff's Satisfaction Of Its Burden Under An All-Risk Property Policy.

An all-risk property policy, which is a common property form offered by the insurance market, provides broad coverage to policyholders. “[A]n all-risk insurance policy ‘automatically covers any loss unless the policy contains a provision expressly excluding the loss from coverage’ and generally covers against all fortuitous losses.” *Southeast Mental Health Center, Inc. v. Pacific Ins. Co., Ltd.*, 439 F.Supp.2d 831, 835 (W.D. Tenn. July 20, 2006) (hereinafter “*Southeast*”). This is in contrast to the other common property form, which limits coverage to only specified or named perils. *See* 10A Couch on Ins. § 148:4, *Categories of policies* (Dec. 2025 update). There is no dispute that the at-issue policy is on an all-risk form. The “Insuring Agreement” states that “[t]his policy insures against risks of direct physical loss or damage to covered property while at an Insured Location ... unless otherwise excluded or subject to limitations elsewhere in this policy....” *See* Doc. 1-1 at 38 (“Policy”).

In line with its broad coverage offerings, a policyholder’s burden to initially trigger an all-risk property policy is a modest one. As articulated by the Court of Appeals of Tennessee, “[u]nder an all-risks policy the plaintiff need only prove that a fortuitous event caused the loss.” *HCA, Inc. v. American Protection Ins. Co.*, 174 S.W.3d 184, 187 (Tenn. Ct. App. Jan. 24, 2005) (internal citation omitted). Critically, the court held that “[i]t is not necessary for the plaintiff to show how the property came to be lost or the methods or means by which the property came to be lost. It is sufficient if the plaintiff shows the property is lost and covered by the physical loss provision of the contract of insurance.” *Id.* at 188. In other words, “[t]he burden on an insured to establish a prima facie case to recover under an all-risk policy by showing that the loss was fortuitous is fairly light; an insured does not have to prove the precise cause of the loss.” *See* 10A Couch on Ins. § 148:52, *Burden of proof* (Dec. 2025 update). Coverage under this all-risk Policy is triggered by

“physical loss or damage” caused by an “occurrence,” defined as “the sum total of all loss or damage of the type insured ... arising out of or caused by any one disaster, ‘accident’, loss or series of disaster, accidents or losses, arising out of the same or similar causes” *See* Doc. 1-1 at 39.

The Court has already acknowledged that the information Plaintiff has presented in the case satisfies this burden, including that there was an occurrence that caused damage. In the Court’s recent opinion denying Defendant’s motion for summary judgement, the Court stated that “[o]n March 3, 2020, Carlex’s glass manufacturing facility suffered damage from a tornado,” and that “[t]he tornado constituted such an occurrence under the Insurance Agreement.” *See* Doc. No. 94 at 2. The Court acknowledged that the key elements to trigger coverage of a physical loss or damage caused by an occurrence had been established. Plaintiff expects that evidence at trial will further support that it has more than satisfied its modest burden of proof under the Policy.

2. Defendant Should Be Estopped From Raising Exclusions Under Mend The Hold Doctrine.

Once a policyholder carries its initial burden, then “the burden is upon the insurer to show that an exclusion applies which precludes recovery.” *Southeast*, 439 F.Supp.2d at 835 (internal citations omitted). This standard is not disputed and applies to both exclusions (labeled as such) and provisions that act to limit or preclude coverage for the policyholder.

Plaintiff has previously argued to the Court that the Defendant should be precluded from presenting any evidence at trial relating to Policy exclusions. The Court held in its pre-trial order that the jury may consider the Policy as a whole, including “any” policy exclusions. *See* Doc. No. 165 at 6. Plaintiff respectfully requests that the Court limit this order to those exclusions Defendant had purportedly identified in its first interrogatory responses, which the Defendant also listed in its response to Plaintiff’s motion in limine #7. *See* Doc. No. 136 at No. 4.

Notably, that list does not include the “Loss Due To Virus Or Bacteria” exclusion or the “Dishonesty” exclusion. Defendant has recently suggested to Plaintiff that it would present excerpted Policy documents to present those two exclusions to the jury at trial. Defendant also intends to raise the suit limitation provision in the Policy in trial, which it alerted Plaintiff of, for the first time, in its December 12, 2025 supplemental interrogatory responses. Permitting Defendant to introduce any of these provisions would be prejudicial to Plaintiff, who had no prior notification that they would be relied upon and to develop arguments in discovery,¹ and inequitable under the “mend the hold” and waiver doctrines recognized under Tennessee law.

As described by Judge Posner, the “mend the hold” doctrine is a “common law doctrine that limits the right of a party to a contract suit to change his litigating position.” *Harbor Ins. Co. v. Cont'l Bank Corp.*, 922 F.2d 357, 362 (7th Cir. Dec. 17, 1990) (hereinafter “*Harbor*”). The doctrine can be understood “as a corollary of the duty of good faith that the law of ... states imposes on the parties to contracts,” because when “[a] party who hokes up a phony defense to the performance of his contractual duties and then when that defense fails (at some expense to the other party) tries on another defense for size can properly said to be acting in bad faith.” *Id.* at 363. It has been considered in insurance cases, including *Harbor*, where the insurer had shifted its position during the litigation to identify new positions to preclude coverage. Tennessee courts have long recognized the “mend the hold” doctrine, though not always by name, including in insurance cases. *See, e.g., Loftis v. Stuyvesant Ins. Co.*, 390 S.W.2d 722 (Tenn. Ct. App. Dec. 31, 1964). In that case, the Tennessee Court of Appeals denied the insurer’s attempt to file an amended answer after an appeal was filed. *Id.* at 381-82. Tennessee courts hold litigants to high standards, opining

¹ Though, Defendant’s corporate representative, Michael Sweeney, testified in his April 3, 2025, deposition that Defendant did not reserve rights as to the “Loss Due To Virus Or Bacteria” exclusion.

that “[p]arties must be prepared to meet their adversaries’ case” and litigant’s “oversights during the discovery process” did not provide a basis for re-opening the proof and amending its case. *Nashville Marketplace Co. v. First Capital Institutional Real Estate, Ltd.*-2, 1990 WL 33373, at *7 (Tenn. Ct. App. Mar. 28, 1990).

Defendant waived its ability to rely on these provisions and should be estopped from doing so. The Tennessee Supreme Court has stated that “an insurer may be estopped to deny coverage for any loss by the misrepresentations of its agent upon which the insured reasonably relies.” *Bill Brown Const. Co. v. Glens Falls Ins. Co.*, 818 S.W.2d 1, at *12 (Tenn. Oct. 7, 1991). The court affirmed “the long-standing rule in Tennessee that any contractual provision of a policy of insurance, whether part of an insuring, exclusionary, or forfeiture clause, may be waived by the acts, representations, or knowledge of the insurer’s agent.” *Id.* at *13.

Here, Plaintiff reasonably relied on the representations by Defendant’s agents in the pre-litigation coverage letters, in interrogatory responses, and in deposition testimony, that these two exclusions and suit limitation provision was not a basis upon which Defendant had denied coverage, let alone upon which the insurer had reserved its rights. By failing to adequately raise these Policy provisions in its pre-litigation coverage determination letters, dating to November 2023, or even in Defendant’s initial interrogatory responses, Defendant has waived its ability to present them at trial and should be estopped from doing so. Permitting Defendant to introduce any of these provisions on the eve of trial would be prejudicial to Plaintiff and an inequitable result given that Plaintiff had no prior notice of Defendant’s intent to rely on these particular provisions in its case and therefore no opportunity to develop evidence in discovery. Indeed, pursuant to the “mend the hold” doctrine, Defendant’s attempt to do so at the 11th hour is simply bad faith.

CONCLUSION

Plaintiff respectfully submits this pre-trial brief for the Court's consideration, and requests that the Court hold that the Defendant is estopped from raising the "Loss Due To Virus Or Bacteria" exclusion, the "Dishonesty" exclusion, or the suit limitation provision at trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2026, a true and exact copy of the foregoing has been served via electronic mail and/or the Court's CM/ECF system on the following:

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