



Insurance Coverage Declination: Great American E&S Insurance Company Letters to American Package

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Partial Disclaimer and Reservation of Rights Letter from Great American E&S Insurance Company

Document Title: Partial Disclaimer and Reservation of Rights Letter from Great American E&S Insurance Company

Date: December 18, 2019

Key Details:

- Claim #: A00253448
- Policy #: PL 5599321-14 (04/05/2019 to 04/05/2020)
- Incident: Sprinkler break on October 14, 2019, at 226 Franklin Street, Brooklyn, affecting units #32, #21, and #22

Coverage Decision:

- Denied coverage for property damage to the premises due to Exclusion j (Damage to Property)
- Reserved rights regarding potential claims from individual tenants

- Recommended policyholder contact Western World Insurance Company (their commercial property carrier) for coverage

Notable Exclusions Cited:

- Organic Pathogens exclusion for any mold/mildew damage
- Contractual Liability exclusion (pending review of lease agreements)
- Damage to Premises Rented to You coverage not applicable as premises are owned, not rented

▼ Letter from Great American to Kofman 12.18.19 (Plain Text Version)

Risk Solutions for the Wholesale Broker Market GAIG.com

Great American Insurance Group Tower

301 E. Fourth St.

Cincinnati, OH 45202

December 18, 2019

SENT BY CERTIFIED MAIL – RETURN RECEIPT REQUESTED

AND EMAIL TO: ampaco@gmail.com

American Package Company, Inc.

Attn: Martin Kofman

226 Franklin Street

Brooklyn, NY 11222

Re: Named Insured: American Package Company, Inc.; American Package and Paper Company, Inc.; Martin & Irene Kofman

Our Claim #: A00253448

Policy #: PL 5599321-14 (04/05/2019 to 04/05/2020)

Date of Loss: 10/14/2019

Loss Location: 226 Franklin Street, Brooklyn, NY 11222

* * * PARTIAL DISCLAIMER AND RESERVATION OF RIGHTS - PLEASE READ CAREFULLY * * *

Dear Mr. Kofman:

Great American E&S Insurance Company ("Great American") acknowledges receipt of the abovereferenced

matter received in our offices on November 18, 2019.

We understand the above-referenced matter has been submitted to Great

American pursuant to the commercial general liability policy (Policy No. PL 5599321-14) (the "CGL Policy") issued to American Package Company, Inc., American Package and Paper Company, Inc., and Martin & Irene Kofman (collectively, "American Package") from April 5, 2019 to April 5, 2020. The following explains in more detail the basis for Great American's reservation of rights and its positions concerning coverage under the CGL Policy for the above-referenced matter.

I. FACTUAL BACKGROUND

Please note we have summarized the facts of this matter solely for the purposes of our coverage analysis; we do not suggest that the allegations are true. If we have misstated any facts, or if you believe additional information might be relevant to our analysis of the potential coverage, please let us know.

American Package Company, Inc.
December 18, 2019

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On October 14, 2019, a sprinkler broke on the second floor of 226 Franklin Street in Brooklyn, NY (the "Premises") which caused water to be released into and to flood the following units: #32; #21; and #22 (collectively, the "Impacted Units").

We understand the Premises is owned by American Package and American Package rented the Impacted Units to individual tenants. We have requested copies of the lease agreements between American Package and the individual tenants, but we have not received them to date to confirm the identity of the individual tenants.

We understand American Package hired a plumber to repair and replace the broken sprinkler. We also understand American Package hired an independent adjuster, Evan Katz, to

evaluate the damage to the Premises and American Package has notified their commercial property insurance carrier (Western World Insurance Company) of the incident. We have requested information related to the repair and replacement of the broken sprinkler, as well as information related to the damage caused by the broken sprinkler, but we have not received this information to date. Finally, we understand there has been no claim presented by the individual tenants in the Impacted Units for damage to their personal property. Should such a claim be presented in the future, please let the undersigned know as soon as possible.

II. THE CGL POLICY

Please note this correspondence is not intended to supplement, amend, supersede or otherwise alter the CGL Policy. Great American does not intend to, and specifically does not, waive any of the provisions of the CGL Policy by virtue of its synopsis here. Please consult your copy of the CGL Policy for a complete listing of all of the terms, conditions, exclusions and definitions contained therein.

The CGL Policy provides a \$1,000,000 each occurrence limit, a \$1,000,000 personal and advertising injury limit, a \$2,000,000 general aggregate limit (other than products-completed operations), and a \$2,000,000 products-completed operation aggregate limit, subject to a \$1,500 per claim deductible.

The CGL Policy is written under coverage form CG 00 01 (Ed. 04 13).

Coverage A under the CGL Policy states, in relevant part:

SECTION I – COVERAGES

COVERAGE A – Bodily Injury and Property Damage Liability

1. Insuring Agreement

a. We will pay those sums that the Insured becomes legally obligated to pay as damages because of ... “property damage” to which this insurance applies. We will have the right and duty

to defend the Insured against any "suit" seeking those damages. However, we will have no duty to defend the Insured American Package Company, Inc.

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against any "suit" seeking damages for ... "property damage" to which this insurance does not apply...

* * *

b. This insurance applies to ... "property damage" only if:

(1) the ... "property damage" is caused by an "occurrence"

(2) The ... "property damage" occurs during the policy period;

...

* * *

2. Exclusions

This insurance does not apply to:

* * *

b. Contractual Liability

"Bodily injury" or "property damage" for which the Insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) that the Insured would have in the absence of the contract or agreement; or

(2) assumed in a contract or agreement that is an "insured contract," provided the ... "property damage" occurs subsequent to the execution of the contract or agreement.

...

* * *

j. Damage to Property

"Property damage" to:

(1) property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement,

American Package Company, Inc.

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enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property; ...

* * *

[Organic Pathogens

a. "Bodily injury," "property damage," or "personal and advertising injury" arising out of any actual, alleged or threatened infectious, pathogenic, toxic or other harmful properties of any "organic pathogen."

b. Any loss, cost or expense arising out of any:

(i) request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of any "organic pathogen," or

(ii) claim or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of any "organic pathogen."]¹

* * *

SECTION V – DEFINITIONS

* * *

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

* * *

17. "Property damage" means:

1 Bracketed language added by endorsement CG 84 81 (Ed. 08 14) entitled, EXCLUSION – ORGANIC PATHOGENS.

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a. physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed

to occur at the time of the physical injury that caused it; or
b. loss of use of tangible property that is not physically injured.
All such loss of use shall be deemed to occur at the time of
the "occurrence" that caused it. ...

* * *

["Organic pathogen" means any:

A. bacteria; mildew, mold or other fungi; other microorganisms;
or mycotoxins, spores or other by-products of any of the
foregoing;

B. viruses or other pathogens (whether or not a
microorganism); or

C. colony or group of any of the foregoing.]²

III. COVERAGE POSITION

There is no coverage under the CGL Policy for "property damage" (i.e.,
physical injury and/or loss of
use) to the Premises - which is owned by American Package - due to exclusion

j. Damage to Property

which states "[t]his insurance does not apply to ... '[p]roperty damage' to ...
property [American

Package] own[s], rent[s], or occup[ies], including any costs or expenses
incurred by [American

Package], or any other person, organization or entity, for repair, replacement,
enhancement,

restoration or maintenance of such property for any reason, including
prevention of injury to a person

or damage to another's property ..." Therefore, there is no coverage available
under Coverage A of

the CGL Policy for any "property damage" to the Premises, including any loss
of use damages related

to the individual tenants of the Impacted Units, any loss of use damages to
American Package, or any

physical injury damages to the Premises.

Great American recommends American Package follow up with their
commercial property insurance

carrier (Western World Insurance Company) regarding any coverage they may
have for damage to the

Premises itself (i.e., water damage repairs, sprinkler repairs, etc.), including any loss of use damages related to the individual tenants of the Impacted Units and/or any loss of use damages to American Package. We previously requested the claim number and contact information for the adjuster handling this matter on behalf of Western World Insurance Company; however, we have not received this information to date.

2 Bracketed language added by endorsement CG 84 81 (Ed. 08 14) entitled, EXCLUSION – ORGANIC PATHOGENS.

American Package Company, Inc.

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The CGL Policy also includes the Organic Pathogens exclusion which excludes coverage for any "property damage" arising out of any "organic pathogen" which includes, but is not limited to, mildew, mold and/or other fungi. Therefore, any "property damage" arising out of any "organic pathogen" would be excluded from coverage under the CGL Policy. We bring this to your attention as we understand immediate repairs occurred following the sprinkler incident which were described to Great American as water remediation, mold remediation, sprinkler repairs, and drywall patching/replacement. This exclusion would also apply to any claim for "property damage" to personal property from the individual tenants of the Impacted Units if the "property damage" arises out of an "organic pathogen".

Great American reserves its rights in regards to exclusion b. Contractual Liability which states there is no coverage under the CGL Policy for any "property damage" American Package is obligated to pay by reason of the assumption of liability in a contract or agreement. We bring this

to your attention for information purposes at this time. We previously requested copies of the lease agreements between American Package and the individual tenants of the Impacted Units. To date, we have not received a copy of the lease agreements to evaluate whether the Contractual Liability exclusion would apply.

While the CGL Policy includes a separate coverage part and limit for Damage to Premises Rented to

You, this coverage would not apply to this matter because the Premises is owned by American Package

and the sprinkler incident was not caused by fire, lightning, or "explosion." For coverage to apply, the

Premises either had to be rented to American Package or temporarily occupied by American Package

– which is not the case here as American Package owns the Premises.

Additionally, the definition of

"explosion" specifically states it does not include the "rupture or bursting of water pipes" – which

appears to be the case here. Therefore, there is also no coverage available to American Package for

any "property damage" to the Premises under the Damage to Premises Rented to You coverage part.

We have attached the Damage to Premises Rented to You coverage part as Exhibit "A".

III. CONCLUSION

In conclusion, Great American is denying coverage under the CGL Policy for any "property damage"

(i.e., physical injury or loss of use) to the Premises and Great American is reserving its rights in regards

to any claims made by the individual tenants of the Impacted Units, as outlined above.

At this time, Great American understands American Package has not received any claim for damages

to the personal property of the individual tenants of the Impacted Units. Should any tenant present a

claim against American Package for damage to their personal property, please let the undersigned know as soon as possible.

The enumeration of specific rights and coverage defenses herein should not be interpreted as a waiver of any other rights or policy defenses which Great American may have or which may become available.

Great American expressly reserves all rights and defenses under the law and under the CGL Policy, including any renewal thereof. There may be other coverage defenses. Great American specifically reserves its right to rely on those exclusions, endorsements and/or any other provisions of the CGL Policy that might apply, to exclude coverage. Great American expressly reserves its rights to invoke American Package Company, Inc.

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and rely upon any other defenses that may prove available, including those based on public policy.

Great American does not intend to waive any of its defenses and shall not be estopped from asserting any applicable defense or denying coverage for this matter.

Great American's observations of, and coverage position regarding these claims is based on the facts

and circumstances presently known to Great American. If you believe that we have misunderstood or inaccurately represented any facts in this letter, please let us know immediately.

Please also bring to our attention any additional facts or other information that you believe may impact

Great American's position or suggest that coverage under the CGL Policy may be implicated. Great

American reserves its right to supplement, amend, or alter its position based on any additional

information, pleadings, amended pleadings, or other material or information

submitted to it.

Should you wish to take this matter up with the New York State Department of Financial Services, you

may file with the Department either on its website at:

<http://www.dfs.ny.gov/consumer/fileacomplaint.htm> or you may write to or visit the Consumer

Assistance Unit, Financial Frauds and Consumer Protection Division, New York State Department of

Financial Services, at: 25 Beaver Street, New York, NY 10004; One Commerce Plaza, Albany, NY 12257;

163B Mineola Boulevard, Mineola, NY 11501; or Walter J. Mahoney Office Building, 65 Court Street, Buffalo, NY 14202.

Should you have any questions, please feel free to contact me.

Sincerely,

GREAT AMERICAN E&S INSURANCE CO.

Haylee McGrath, AIC

Claim Specialist

513.287.8142 Direct

513.412.8435 Fax

hmcgrath@gaig.com

cc: Robert Eisman, HUB International Northwest, LLC (via email only)

Exhibit "A"

Damage to Premises Rented to You

Form: ESG 3206 (Ed. 01/16) – Specialty Plus Endorsement

L . Damage to Premises Rented to You

If Damage to Premises Rented to You is not otherwise excluded from this Coverage Part:

1. Under paragraph 2. Exclusions of SECTION I - COVERAGE A - Bodily Injury and Property Damage

Liability:

3. The last paragraph of paragraph 2. Exclusions is deleted in its entirety and replaced by the

following:

Exclusions c. through n. do not apply to damage by fire, lightning, or "explosion," to

premises while rented to you or temporarily occupied by you with permission of the

owner. A separate Limit of Insurance applies to this coverage as described in SECTION III -

LIMITS OF INSURANCE.

2. Paragraph 6. Under SECTION III - LIMITS OF INSURANCE is deleted in its entirety and replaced by the following:

6. Subject to paragraph 5. Above, the most we will pay under Coverage A for damages because of "property damage" to any one premises, while rented to you, or in the case of damage caused by fire, lightning, or "explosion," while rented to you or temporarily occupied by you with the permission of the owner, for all such damage caused by fire, lightning, or "explosion," proximately caused by the same event, whether such damage results from fire, lightning, or "explosion," or any combination of the three, is the higher of \$500,000 or the amount shown in the Declarations for the Damage to Premises Rented to You Limit.

3. Under SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS, subsection 4. Other Insurance, paragraph b. Excess Insurance item (ii) of the Occurrence Form and item (iii) of the Claims-Made Form where the words, fire insurance, appear they are changed to, insurance for fire, lightning, or "explosion."

4. As regards coverage provided by this provision L. Damage to Premises Rented to You, SECTION

V - DEFINITIONS, paragraph 9. Insured Contract, subparagraph a. is replaced with the following:

a. A contract for a lease of premises. However, that portion of the contract for a lease of

premises that indemnifies any person or organization for damage by fire, lightning, or "explosion," to premises while rented to you or temporarily occupied by you with the permission of the owner is not an "insured contract."

5. As regards coverage provided by this provision L. Damage to Premises Rented to You, SECTION

V - DEFINITIONS is amended by the addition of the following definition:
Exhibit "A"

Damage to Premises Rented to You

Form: ESG 3206 (Ed. 01/16) – Specialty Plus Endorsement

"Explosion" means a sudden release of expanding pressure accompanied by a noise, a bursting forth of material and evidence of the scattering of debris to locations further than would have resulted by gravity alone.

"Explosion" does not include any of the following:

- (a) artificially generated electrical current including electrical arcing, that disturbs electrical devices, appliances or wires;
- (b) rupture or bursting of water pipes;
- (c) explosion of steam boilers, steam pipes, steam engines or steam turbines owned or leased by you, or operated under your control; or
- (d) rupture or bursting caused by centrifugal force.

PDF Archive

[Letter from Great American to Kofman 12.18.19.pdf](#)

Great American Insurance Coverage Declination Letter - Christian Gray v. American Package Co., Inc. - May

26, 2021

Document Title: Great American Insurance Coverage Declination Letter - Christian Gray v. American Package Co., Inc. - May 26, 2021

Date: May 26, 2021

From: Dominic M. Pisani, Tressler LLP, representing Great American E&S Insurance Company

To: Martin Kofman, American Package Company, Inc.

Re: Declination of Coverage for Christian Gray v. American Package Co., Inc. lawsuit

Key Details:

- Incident occurred on October 14, 2019 - pipe burst causing flood damage to Unit G21
- Tenant (Christian Gray) immediately reported flood damage requiring professional cleanup
- No cleanup occurred for 4-6 weeks while Kofman was abroad, leading to extensive mold damage

Legal Claims by Gray:

- \$475,000 - Breach of warranty of habitability
- \$600,000 - Contractual breach
- \$575,000 - Negligence in maintaining premises
- Additional claims for harassment and legal fees

Insurance Decision:

- Coverage denied under both 2019-2020 and 2020-2021 policies
- Primary reason: Organic Pathogens Exclusion due to mold damage

▼ Great American Insurance Coverage Declination Letter - Christian Gray v. American Package Co., Inc. - May 26, 2021 (Plain Text Version)

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York, New York 10119 Main: (646) 833-0900 Fax: (646) 833-0877
www.tresslerllp.com
California | Illinois | New Jersey | New York | Pennsylvania

May 26, 2021

VIA E-MAIL & CERTIFIED MAIL

(ampaco@gmail.com)

American Package Company, Inc.

Martin Kofman

226 Franklin Street

Brooklyn, New York 11222

Re: *Christian Gray v. American Package Co., Inc., et al.*

Named Insureds: American Package Company, Inc.

Martin Kofman

Policy Nos.: PL5599321-14; PL5599321-15

Claim Nos.: A00253448; A00356746

Date of Loss: October 14, 2019

DECLINATION OF COVERAGE

Dear Mr. Kofman:

This law firm has been retained by Great American Risk Solutions to represent the interests of Great American E&S Insurance Company, in connection with the above-referenced property damage action, entitled: *Christian Gray v. American Package Co., Inc., and Martin Kofman* (the "Gray Action"). Great American Risk Solutions and Great American E&S Insurance Company are referred to herein, collectively, as "Great American."

In the *Gray Action*, plaintiff Christian Gray ("Gray") seeks damages for property damage allegedly sustained on October 14, 2019, when a pipe ruptured and caused a flood in his residential loft unit in premises located at 226 Franklin Street, Brooklyn, New York (the "Premises"). Defendant American Package Company, Inc. ("American Package") is the owner of the Premises. Defendant Martin Kofman ("Kofman") is an officer of American Package and is alleged to be the person responsible for management of the Premises.

As you know, prior to the commencement of the *Gray Action*, Great American assigned this claim to Haylee McGrath for claims handling under Claim No.

A00253448. Great American partially disclaimed insurance coverage and reserved rights for this then-pre-suit claim on December 18, 2019. Upon receipt of the Complaint in the *Gray* Action, this claim was re-assigned to Patricia Block for further claims handling under Claim No. A00356746. On behalf of Great American, we are writing to provide you with Great American's supplemental insurance coverage position (declination of coverage) under the above-referenced Great American insurance policies for the *Gray* Action.

American Package Company, Inc. Martin Kofman May 26, 2021 Page 2 of 15
BACKGROUND

The Complaint

The *Gray* Action was commenced on March 16, 2021, in the Supreme Court of the State of New York, County of Kings (Index No. 506171/2021), with the filing of the Complaint.

In the Complaint, Gray alleges, *inter alia*, that the "Premises is an interim multiple dwelling loft building subject to the New York City Loft Law, article 7-C of the Multiple Dwelling Law," and that he is "the tenant of Unit G21 at the Premises (the "Unit") and is the protected occupant of the Unit under the Loft Law." It is further alleged that "[d]uring Columbus Day weekend in 2019, a pipe burst above the Unit, causing a flood into the Unit." According to the Complaint, "[t]here was dirty water several feet deep in the unit."

It is further alleged in the Complaint that Gray "immediately informed defendant's office located at the Premises, that there was a flood of such magnitude that professional cleanup was required," and that Gray "was informed that Mr. Kofman was abroad and that no cleanup would take place until he returned to New York." Gray also alleges that he "attempted to remove and salvage as much of his personal property as he could and to clean up the water to the extent possible without professional equipment" but that much of his "property had to be discarded."

The Complaint also alleges that "[b]y the time Mr. Kofman returned to New York four to six weeks after the flood, the Unit smelled of mold" and that "mold was also visible to the eye." The Complaint further alleges that "Mr. Kofman's delay in attending to the cleanup is undoubtedly responsible for the deterioration of the Unit and its contents." In this regard, Gray alleges that "[w]hile Mr. Kofman was immediately made aware of the mold, no remediation was conducted from the time he was advised of the existence of mold to the present time."

Gray also alleges that "as a Loft Law tenant, plaintiff rented the Unit as raw space and installed at his cost and expense all the residential fixtures in the space: walls, floors; electrical system; washer/dryer; kitchen with stove, refrigerator, cabinets, counters, sink and dishwasher; bathroom with toilet, sink and bathing facilities; living areas; bedrooms; and a home occupation which is permitted for Loft Law tenants, in this case, two recording studios used personally and sometimes professionally by plaintiff." According to Gray, most of these fixtures "have to be torn out and replaced as they are beyond repair." Finally, the Complaint alleges that "Mr. Kofman reported the flood and the damage caused to his insurance carrier, and on information and belief, falsely represented that the fixtures belonging to plaintiff ... belonged to defendants." Moreover, the Complaint alleges that the "defendants have collected on this insurance claim but have not conducted any remediation" and "have not given plaintiff the monies they collected from insurance for plaintiff's fixtures."

American Package Company, Inc. Martin Kofman May 26, 2021 Page 3 of 15

Gray asserts seven causes of action in the Complaint, seeking judgment awarding damages, granting injunctive and declaratory relief, and imposing civil fines and penalties as against American Package and Kofman.

In the First Cause of Action, Gray asserts that "[t]he onset of the mold condition and defendants' protracted failure to remediate constituted a breach of the warranty of habitability provided for in Real Property Law 235-b." Gray seeks judgment on the First Cause of Action awarding him at least \$475,000 plus interest.

In the Second Cause of Action, Gray asserts that "[t]he onset of the mold condition at the Unit and the failure to remediate was a contractual breach of defendants' obligations to plaintiff, their tenant." Gray seeks judgment on the Second Cause of Action awarding him at least \$600,000 plus interest.

In the Third Cause of Action, Gray asserts that "defendants failed to use due care and were negligent in maintaining the Premises, resulting in the flood itself and the onset of the mold condition at the Unit" and that "said failure to use due care and diligence in maintaining the Premises was compounded by said defendants' failure to use due care and diligence in promptly commencing the cleanup from the flood and in promptly remediating the mold conditions that were created at the Unit." Gray seeks judgment on the Third Cause of Action awarding him at least \$575,000 plus interest.

In the Fourth Cause of Action, Gray asserts that he "has been out of

possession of the Unit for more than 18 months; it is uninhabitable due to the failure to eradicate mold; and before it can be occupied, most of the interior contents and fixtures have to be demolished and rebuilt due to water damage and/or mold." Moreover, Gray also asserts that Defendant is not in compliance "with the statutory code complaint timetable of MDL Section 284" of the Loft Law, and "[t]hus, no rent can be collected." Gray seeks judgment on the Fourth Cause of Action fining defendants, as permitted by law, and declaring that the Premises is not in compliance with the Loft Law and that no rent is due. In the Fifth Cause of Action, Gray asserts that "[d]efendants have further harassed plaintiff within the meaning of Section 27-2005(d) of the Administrative Code and also within the meaning of Loft Board harassment regulations codified at 29 RCNY Section 2-02 by reason of the following conduct: a. Refusal to promptly provide professional cleanup of water from the burst pipe; b. Collection of insurance funds for property owned by plaintiff coupled with failure to expend these funds on the Unit or disburse said funds to plaintiff; c. Service of an access notice on plaintiff for legalization work, when no legalization can be performed absent mold remediation and/or complete demolition of the Unit. Gray seeks judgment on the Fifth Cause of Action finding that defendants harassed him within the meaning of the Administrative Code and Loft Board harassment regulation, and fining defendants.

In the Sixth Cause of Action, Gray asserts that, "with respect to the first, third, fourth and fifth causes of action, Kofman exceeded the authority and scope of his duties as an officer of the

American Package Company, Inc. Martin Kofman May 26, 2021 Page 4 of 15 corporate defendant." In addition, Gray asserts that the "handling of the flood as it impacted plaintiff was in direct retaliation for plaintiff's refusal to accept a buyout and vacate the Premises" and that the defendants "did not remediate for mold and rehabilitate the Unit with the specific intent to cause plaintiff to vacate and forfeit his rights as a statutory tenant." Gray seeks judgment on the Sixth Cause of Action finding that Kofman exceeded the scope of his duties as a corporate officer and is personally liable for damages suffered by plaintiff under the First, Second, Third, Fourth and Fifth Causes of Action.

Finally, in the Seventh Cause of Action, Gray asserts that "[a] landlord's entitlement to legal fees and related expenses is reciprocal pursuant to RPL 234" and that he has "incurred legal fees in an amount to be determined, but at

least \$6,000.00 to date." Gray seeks judgment on the Seventh Cause of Action awarding him at least \$10,000 plus interest.

SUPPLEMENTAL INSURANCE COVERAGE POSITION

Great American issued the following Commercial General Liability insurance policies to American Package: (i) Policy No. PL5599321-14, for the policy period April 5, 2019 to April 5, 2020 (the "2019-2020 Policy"); and Policy No. PL5599321-15, for the policy period April 5, 2020 to April 5, 2021 (the "2020-2021 Policy") (collectively, the Great American Policies). American Package and Kofman are both Named Insureds under the Great American Policies. Based upon our investigation of this claim, including but not limited to our review of the Great American Policies, the Complaint and other documentation provided to us, we must advise you that Great American is disclaiming insurance coverage under the Great American Policies for the *Gray* Action. Specifically, no insurance coverage is available under the 2020-2021 Policy because all the requirements of the Insuring Agreement in the 2020-2021 Policy are not satisfied, and no insurance coverage is available under the 2019-2020 Policy and 2020-2021 Policy because the Organic Pathogens Exclusion, Expected or Intended Injury Exclusion and Contractual Liability Exclusion apply to preclude coverage for the *Gray* Action. Additionally, please be advised that Great American reserves all rights to otherwise disclaim insurance coverage for the *Gray* Action based upon all other terms, conditions, limitations, and exclusions of the Great American Policies. The purpose of this correspondence, therefore, is to set forth those provisions of the Great American Policies that preclude any obligation on the part of Great American to defend and/or indemnify American Package and Kofman for their liability, if any, in the *Gray* Action.¹

¹ Great American incorporates by reference its initial insurance coverage position as set forth in its December 18, 2019 letter to American Package and Kofman (a copy of which is attached hereto).

First, we direct your attention to the Insuring Agreement contained in Section I – Coverages, Coverage A – Bodily Injury And Property Damage Liability, of the Great American Policies, which provides as follows, in pertinent part:

American Package Company, Inc. Martin Kofman May 26, 2021 Page 5 of 15

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of ... "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for ... "property damage" to which this insurance does not apply. ...

* * *

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

b. This insurance applies to ... "property damage" only if:

(1) the ... "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) the ... "property damage" occurs during the policy period; and

(3) prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the ... "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the ... "property damage" occurred, then any continuation, change or resumption of such ... "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

c. ... "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under

Paragraph 1. of Section II – Who Is An Insured and no “employee” authorized by you to give or receive notice of an “occurrence” or claim, includes any continuation, change or resumption of that ... “property damage” after the end of the policy period.

American Package Company, Inc. Martin Kofman May 26, 2021 Page 6 of 15
d. ... “property damage” will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim:

(1) reports all, or any part, of the ... “property damage” to us or any other insurer;

(2) receives a written or verbal demand or claim for damages because of the ... “property damage”; or

(3) becomes aware by any other means that ... “property damage” has occurred or has begun to occur.

* * *

And, to Section V – Definitions, of the Great American Policies, which provides as follows, in pertinent part:

SECTION V – DEFINITIONS

* * *

13. “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

* * *

17. “Property damage” means:

a. physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

* * *

The Insuring Agreement is a provisional insurance coverage grant. As such, all the requirements of the Insuring Agreement must be satisfied for the insurance coverage to apply. Pursuant to Paragraph 1.b. of the Insuring Agreement, Great American is obligated (subject to all other terms, conditions, exclusions and limitations of the Great American Policies) to pay those sums that American Package and Kofman become legally obligated to pay as damages because of "property damage" only if: (1) the "property damage" is caused by an "occurrence" that takes place in the "coverage territory;" (2) the "property damage" occurs during the policy period; and (3) prior to the policy period, no insured knew that the "property damage" had occurred, in whole or in part. Moreover, pursuant to Paragraph 1.d. of the Insuring Agreement, "property damage"

American Package Company, Inc. Martin Kofman May 26, 2021 Page 7 of 15 will be "deemed" to have been known to have occurred at the earliest time any insured: (1) reports all, or any part, of the "property damage" to Great American or any other insurer; (2) receives a written or verbal demand or claim for damages because of the "property damage;" or (3) becomes aware by any other means that "property damage" has occurred or has begun to occur. The Complaint alleges that "[d]uring Columbus Day weekend in 2019, a pipe burst above the Unit, causing a flood into the Unit," and that Gray "immediately informed defendant's office located at the Premises, that there was a flood of such magnitude that professional cleanup was required." For this reason, American Package and/or Kofman were aware that the alleged "property damage" had occurred, in whole or in part, prior to the policy period of the

2020-2021 Policy, and the alleged "property damage" is "deemed" to have been known to have occurred no later than October 2019. The Complaint also alleges that "four to six weeks after the flood, the Unit smelled of mold" and "[m]old was visible to the eye." For this reason, the alleged "property damage" occurred during the policy period of the 2019-2020 Policy and not during the policy period of the 2020-2021 Policy. Consequently, all the requirements of the Insuring Agreement in the 2020-2021 Policy are not satisfied, and no insurance coverage is available for the *Gray Action*. Great American, therefore, disclaims insurance coverage under the 2020-2021 Policy for the *Gray Action*. Second, we direct your attention to the Organic Pathogens Exclusion contained in Section I – Coverages, Coverage A – Bodily Injury And Property Damage Liability, Paragraph 2. Exclusions, as modified by the Organic Pathogens Exclusion endorsement to the Great America Policies, which provides as follows, in pertinent part:

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

2. Exclusions

This insurance does not apply to:

* * *

Organic Pathogens

a. ... "property damage" ... arising out of any actual, alleged or threatened infectious, pathogenic, toxic or other harmful properties of any "organic pathogen."

b. Any loss, cost or expense arising out of any:

(i) request [or] demand ... that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of any "organic

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pathogen," or

* * *

The following definition is added to the Definitions Section:

"Organic Pathogen" means any:

A. bacteria; mildew, mold or other fungi; other microorganisms; or mycotoxins, spores or other by-products of any of the following;

- B. viruses or other pathogens (whether or not a microorganism); or
- C. colony or group of any of the foregoing.

* * *

Pursuant to the Organic Pathogens Exclusion, the insurance afforded by the Great American Policies does not apply to "property damage" (i.e., physical injury to, and/or loss of use of, tangible property) arising out of any actual or alleged toxic or other harmful properties of mold. In addition, the insurance does not apply to any loss, cost or expense arising out of any request or demand that American Package and/or Kofman clean up, remove, contain, or in any way respond to mold.

The Complaint alleges that "Kofman was immediately made aware of the mold" and that "Kofman's delay in attending to the cleanup is undoubtedly responsible for the deterioration of the Unit and its contents." In this regard, the First and Second Causes of Action assert that the "onset of the mold condition and defendants' protracted failure to remediate" constituted a breach warranty and a breach of contract and resulted in damage to Gray's property. The Third and Fourth Causes of Action assert that the "failure of defendants to use ... due care and diligence in commencing the cleanup from the flood and eradicating the mold" and that the Unit is "uninhabitable due to the failure to eradicate mold." The Fifth and Sixth Causes of Action assert that "[d]efendants' agenda is clearly to refuse to repair/rebuild/remediate the Unit" and that the "defendants did not remediate for mold and rehabilitate the Unit." And, the Seventh Cause of Action asserts that Gray has incurred legal fees and related expenses, including "having to retain ... a mold expert." Thus, the "property damage" alleged in the Complaint arises out of an actual and alleged toxic and harmful mold condition at the Premises, and the losses, costs and/or expenses alleged in the Complaint arise out of a request or demand that American Package and/or Kofman clean up, remove, contain, or in any way respond to that mold condition. Consequently, the Organic Pathogens Exclusion applies to absolutely preclude insurance coverage for the *Gray* Action. Great American, therefore, disclaims insurance coverage under the Great American Policies for the *Gray* Action.

Third, we direct your attention to the Damage To Property Exclusion contained in Section I – Coverages, Coverage A – Bodily Injury And Property Damage Liability, Paragraph 2. Exclusions, of the Great American Policies, which provides as follows, in pertinent part:

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

2. Exclusions

This insurance does not apply to:

* * *

j. Damage To Property

“Property damage” to:

(1) property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another’s property;

* * *

(4) personal property in the care, custody or control of the Insured;

* * *

Pursuant to the Damage To Property Exclusion, the insurance afforded by the Great American Policies does not apply to “property damage” (i.e., physical injury to, and/or loss of use of) to property owned by American Package and/or Kofman, including any costs or expenses incurred by American Package and/or Kofman, or any other person, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another’s property. In addition, the insurance does not apply to “property damage” to personal property in the care, custody or control of American Package and/or Kofman.

The Complaint alleges that the Premises is “owned” by American Package. The Complaint also alleges that Gray “rented the Unit as raw space and installed at his cost and expense all the residential fixtures in the space,” including the walls, floors, electrical system, kitchen, bathroom, living areas and bedrooms.

The Fourth Cause of Action asserts that Gray “has been out of possession of the Unit for more than 18 months; it is uninhabitable due to the failure to eradicate mold; and before it can be occupied, most of the interior contents and fixtures have to be demolished and rebuilt due to water damage and/or mold.” Thus, the Complaint alleges both physical injury to, and loss of use of, the Premises, which is owned by American Package. Consequently, the Damage To Property Exclusion applies to preclude insurance coverage for all claims for “property damage” to property owned by American Package and/or Kofman, and all claims for “property damage” to property in the care, custody or control of American Package and/or Kofman, in the *Gray* Action. Great American, therefore, disclaims insurance coverage under the Great American Policies for all such claims in the *Gray* Action.

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Fourth, we direct your attention to the Expected Or Intended Exclusion contained in Section I – Coverages, Coverage A – Bodily Injury And Property Damage Liability, Paragraph 2. Exclusions, of the Great American Policies, which provides as follows, in pertinent part:

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

... “property damage” expected or intended from the standpoint of the insured.

...

* * *

Pursuant to the Expected Or Intended Injury Exclusion, the insurance afforded by the Great American Policies does not apply to “property damage” that is expected or intended by American Package and/or Kofman.

The Fifth Cause of Action asserts that the “[d]efendants’ agenda is clearly to refuse to repair/rebuild/remediate the Unit and thereby to encourage plaintiff to waive his rights as a rent regulated tenant and vacate the building.” Similarly, the Sixth Cause of Action asserts that the “handling of the flood as it impacted

plaintiff was in direct retaliation for plaintiff's refusal to accept a buyout and vacate the Premises." In this regard, the Complaint asserts that American Package and Kofman "did not remediate for mold and rehabilitate the Unit with the specific intent to cause plaintiff to vacate and forfeit his rights as a statutory tenant." Thus, the Complaint alleges "property damage" that was both expected and intended by American Package and Kofman. Consequently, the Expected Or Intended Injury Exclusion applies to preclude insurance coverage for the *Gray* Action. Great American, therefore, disclaims insurance coverage under the Great American Policies for all such claims in the *Gray* Action. Fifth, we direct your attention to the Contractual Liability Exclusion contained in Section I – Coverages, Coverage A – Bodily Injury And Property Damage Liability, Paragraph 2. Exclusions, of the Great American Policies, which provides as follows, in pertinent part:

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

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3. Exclusions

This insurance does not apply to:

* * *

c. Contractual Liability

... "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement;
or

(2) Assumed in a contract or agreement that is an "insured contract", provided the ... "property damage" occurs subsequent to the execution of the contract or agreement. ...

* * *

Pursuant to the Contractual Liability Exclusion, the insurance afforded by the Great American Policies does not apply to "property damage" for which American Package and/or Kofman are obligated to pay damages by reason of the assumption of liability in a contract or agreement.

The First Cause of Action asserts that "the onset of the mold condition and defendants' protracted failure to remediate constituted a breach of the warranty of habitability provided for in Real Property Law 235-b." Section 235-b imposes a warranty of habitability on landlords or lessors "[i]n every written or oral lease or rental agreement for residential premises." The Second Cause of Action asserts that "the onset of the mold condition at the Unit and the failure to remediate was a contractual breach of defendants' obligations to plaintiff, their tenant." Thus, the Complaint asserts that American Package and Kofman are liable for alleged breaches of warranty and contract under a written or oral lease or rental agreement. Consequently, the Contractual Liability Exclusion may apply to preclude insurance coverage for the *Gray* Action. To date, Great American has not been provided with a copy of a written lease or rental agreement between American Package and Gray for the Unit. Great American, therefore, reserves the right to disclaim insurance coverage to American Package and Kofman under the Great American Policies for their liability, if any, in the *Gray* Action, on the basis that the Contractual Liability Exclusion contained in the Great American Policies applies to preclude insurance coverage for the *Gray* Action.

Sixth, we direct your attention to the following other Exclusions contained in Section I – Coverages, Coverage A – Bodily Injury And Property Damage Liability, Paragraph 2. Exclusions, of the Great American Policies, which provides as follows, in pertinent part:

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SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

4. Exclusions

This insurance does not apply to:

* * *

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

* * *

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

* * *

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental injury to "your product" or "your work" after it has been put to its intended use.

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

* * *

(3) "Impaired property";

if such ... property is withdrawn ... from use by any person or organization because of a known or suspected ... dangerous condition on it.

* * *

And, to Section V – Definitions, of the Great American Policies, which provides as follows, in pertinent part:

SECTION V – DEFINITIONS

* * *

8. "Impaired property" means tangible property ... that cannot be used or is less useful because:

* * *

b. you have failed to fulfill the terms of a contract or agreement;

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if such property can be restored to use by ... your fulfilling the terms of the contract or agreement.

* * *

Although not fully discussed herein—because insurance coverage for the *Gray* Action is absolutely precluded by the Organic Pathogens Exclusion, Damage To Property Exclusion and Expected Or Intended Injury Exclusion, and may be precluded by the Contractual Liability Exclusion—one or more of the above-referenced Exclusions may otherwise also apply to preclude insurance coverage for the *Gray* Action. Accordingly, Great American reserves the right to disclaim insurance coverage to American Package and Kofman under the Great American Policies for their liability, if any, in the *Gray* Action, on the basis that any Exclusion contained in the Great American Policies applies to preclude insurance coverage for the *Gray* Action.

Finally, we direct your attention again to the Insuring Agreement contained in Section I – Coverages, Coverage A – Bodily Injury And Property Damage Liability, of the Great American Policies, which provides as follows, in pertinent part:

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of ... "property damage" to which this insurance applies. ...

* * *

Pursuant to Paragraph 1.a. of the Insuring Agreement, Great American is only obligated (subject to all other terms, conditions, exclusions and limitations of the Great American Policies) to pay those sums that American Package and Kofman become legally obligated to pay as damages because of "property damage."

In the Complaint, Gray seeks, *inter alia*, injunctive and declaratory relief, which

is not a legal obligation to pay a sum, and the imposition of civil penalties and fines, which are not insurable as a matter of public policy under New York law. The Fourth Cause of Action seeks judgment "declaring that the rent demanded [by defendants] is not payable; restraining defendants from violating Section 27-20059(d) of the Administrative Code and directing them to ensure that no further violations occur; and imposing civil penalties on defendants as set forth in Section 27-2005(d)." Moreover, the Fifth Cause of Action seeks judgment finding that American Package and Kofman "harassed plaintiff within the meaning of Section 27-2005(d) of the Administrative Code and also within the meaning of Loft Board harassment regulations codified at 29 RCNY American Package Company, Inc. Martin Kofman May 26, 2021 Page 14 of 15 Section 2-02," and "fining defendants at the maximum level allowed by law." Consequently, the requirements of the Insuring Agreement in the Great American Policies are not satisfied, and no insurance coverage is available for any claims in the *Gray* Action seeking injunctive and/or declaratory relief, or the imposition of civil penalties and/or fines claims. Great American, therefore, disclaims insurance coverage under the Great American Policies for all such claims in the *Gray* Action.

* * * *

For all of the reasons discussed above, Great American has no obligation under the Great American Policies to defend and/or indemnify American Package and Kofman for their liability, if any, in the *Gray* Action. Accordingly, please be advised that Great American hereby declines insurance coverage under the Great American Policies to American Package and Kofman for the *Gray* Action. **Please also be advised that Great American will withdraw from the defense of American Package and Kofman in the *Gray* Action on June 25, 2021, thirty (30) days from the date hereof.** If American Package and Kofman wish to do so, they may retain the same defense counsel initially assigned by Great American for the limited purpose of protecting American Package and Kofman's interests while Great American conducted its investigation and evaluated coverage for this claim. However, American Package and Kofman will be responsible for the payment of all defense fees and costs incurred after June 25, 2021.

Please be aware that the policy provisions and coverage defenses, questions and/or issues set forth above have been brought to your attention so that American Package and Kofman are informed of the basis for Great American's

coverage position under the Great American Policies. This recitation of policy provisions, coverage defenses, questions and/or issues is not necessarily exhaustive, however, and to the extent that a particular policy term, condition, limitation and/or exclusion has not been referenced herein, or a coverage defense, question and/or issue has not been specifically raised, any such omission is not a waiver of any rights Great American may have under the Great American Policies and/or that may be available at law and/or in equity, all of which rights are reserved.

If you disagree with the insurance coverage position set forth above and wish to discuss this matter with the New York State Department of Financial Services—which has responsibility for the oversight of insurance matters in New York—you may file with the Department on its website (www.dfs.ny.gov/consumer/fileacomplaint.htm) or you may write to or visit the Consumer Assistance Unit, Financial Frauds and Consumer Protection Division, New York State Department of Financial Services, at: 25 Beaver Street, New York, New York 10004; One Commerce Plaza, Albany, New York 12257; 163B Mineola Boulevard, Mineola, New York 11501; or Walter J. Mahoney Office Building, 65 Court Street, Buffalo, New York 14202.

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Thank you for your attention to the foregoing. Please do not hesitate to contact the undersigned if you have any comments or questions concerning the above.

Very truly yours,

Dominic M. Pisani, Esq.

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Attachment
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PDF Archive

[Letter from Pisani to Kofman declining coverage 5.26.21.pdf](#)

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