

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MAINE

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<b>In re:</b>	)	
	)	<b>Chapter 11</b>
<b>Montreal Maine &amp; Atlantic Railway Ltd.,</b>	)	<b>Case No. 13-10670</b>
	)	
<b>Debtor.</b>	)	<b>Related to D.E. 473 &amp; 550</b>
	)	

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**WHEELING & LAKE ERIE RAILWAY COMPANY’S MEMORANDUM OF LAW  
REGARDING THE DISTINCTION BETWEEN “RIGHTS TO PAYMENT” AND  
“CLAIMS” IN RESPECT OF THE INSURANCE POLICY ISSUED BY TRAVELERS  
CASUALTY COMPANY OF AMERICA, FILED PURSUANT TO THE COURT’S  
ORDER DATED MARCH 13, 2014**

**INTRODUCTION**

1. Following a hearing before the Court held on March 13, 2014, with respect to the Chapter 11 Trustee’s Motion for Order Approving Compromise and Settlement with Travelers Property Casualty Company of America [D.E. 473] (the “Motion”) and Wheeling & Lake Erie Railway Company’s (“Wheeling”) Objection thereto [D.E. 514] (the “Objection”), the Court invited the parties to submit further memoranda of law on the following limited issues:

- (a) whether there is a distinction between a “right to payment” pursuant to an insurance policy, and a “claim” under an insurance policy and, if so, when does each arise; and
- (b) if there is such a distinction, what is its significance in terms of the validity, enforceability and perfection of Wheeling’s security interests in the Settlement Payment, under the Maine UCC.<sup>1</sup>

2. Briefly stated, there is a well-recognized distinction between a “right to payment” and a “claim” under an insurance policy, such as the Policy at issue here. As commonly used

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<sup>1</sup> Capitalized terms not defined herein shall have the meaning set forth in Wheeling’s Memorandum of Law In Support Of Enforcement Of Its Interest In All Proceeds Of The Insurance Policy Issued By Travelers Casualty Company Of America, Filed Pursuant To The Court’s Order Dated December 24, 2013 (“Wheeling’s Memorandum”) [D.E. 706].

and understood in the insurance field and applicable case law, a “right to payment” under an insurance policy is an economic right to receive money under the contractual terms of a policy. It arises upon delivery of the policy, although at that stage, it is conditional and contingent. It remains conditional and contingent until a loss occurs, and the insured complies with the terms of the policy by completing a “proof of loss,” among other things.

3. A “claim” in insurance parlance is not a right to receive money, it is the process that an insured must undertake in order to satisfy policy conditions to receipt of money. Thus, in order for the conditional insurance payment right to become fixed, several conditions need to be satisfied. First, there must be a “casualty” or other insured event, *i.e.* a covered loss, and second, there must be compliance by the insured with the policy terms regarding proof of the loss. The insured’s compliance duties typically include the filing a document called a “proof of loss,” usually under oath, and other steps. This is what is referred to, in the insurance world, as a “claim.” It is a process by which an insured seeks to obtain performance from an insurer under a contract of insurance, which performance may include payment for covered loss.

4. The “right to payment” and the “claim” are thus two separate and distinct concepts. Sometimes, for example, an insured makes a “claim” under a policy, but has no payment right. This arises in indemnity policies. In such policies, an insured who commits a tort may make a claim against an insurer, but the claim is not for payment of money, it is for indemnity. Payments, if any, go to the victim of the tort and perhaps counsel retained by the insurance company. In other circumstances, an entity might have a payment right under a policy, but no right to make a claim. This would be the case where, for example, a mortgagee is a “loss payee.” In such cases, it is the insured who has the right to make a claim, but the payment is

directed to a third party, such as the mortgagee. The central point is that in insurance parlance, claims and payment rights are separate concepts.

5. Article 9 excludes from its coverage an assignment, or a security interest, in the right to make a claim; it does not exclude assignments or security interests in the right to a payment. Indeed, under Article 9, contractual rights to payment under all contracts, including insurance contracts, are expressly included as categories of permitted collateral, typically as “accounts” or “payment intangibles.” These categories of collateral have no exclusions based on the type of contract.

6. This is not an oversight by the drafters of the UCC. In the 2000 amendments, the term “account” was amended and broadened, and the term “payment intangible” was added. The purpose of these amendments was to facilitate commercial trade in money obligations, *i.e.* payment rights, even when the underlying asset generating the payment is not within the direct purview of the UCC. The classic example, of course, is the securitization of mortgages, where payment rights can now be validly securitized, assigned, and pledged. But these concepts are not limited to the mortgage industry. The intent of the amendments, as discussed in more detail below, was broader; it was to facilitate commerce in all kinds of payment rights, including the financing and sale of these rights. And this is precisely what Wheeling and the Debtor did when executing the Security Agreement in 2009. In order to facilitate and secure a line of credit, the Debtor granted Wheeling a security interest, under the Maine UCC, in all accounts and rights to payment, including payment intangibles.

7. In this case, the Court should interpret “accounts” and “payment intangibles” in their broadest sense, as encompassing payment rights from any asset, because it is this interpretation that will effectuate the intent of UCC, which is to encourage and foster commerce

in payment obligations without regard to the nature of the asset generating those obligations. Put another way, there is no valid reason to hold that one particular type of payment obligation, payments arising out of insurance contracts, should be excluded from the purview of the UCC, when such exclusion is neither express, nor implied by any known purpose of the UCC.

### **ARGUMENT**

#### **I. The Right To Payment From Travelers Is Not A “Claim” Under The Policy; In Insurance Parlance, A Claim Is An Insured’s Demand For Contractual Performance By The Insurer—The Claim Is Not Itself A Right To Payment.**

8. The Maine UCC excludes from the scope of Article 9 coverage assignments or security interests in a “claim” under an insurance policy. 11 M.R.S.A. § 9-1109(4)(h). A “right to payment” under a contract—any contract—is an “account” or a “payment intangible” as those terms are defined in the Maine UCC, and security interests in such rights to payment are clearly covered by Article 9 regardless of the type of contract. There is nothing in the Maine UCC that excludes from its coverage accounts, payment intangibles and other rights to payment that arise from insurance contracts.

9. The question at hand, then, is whether, for the purpose of applying the Maine UCC, the exclusion of assignments or security interests in “insurance claims” also applies with respect to “accounts,” “payment intangibles” and other rights to payment that arise under a policy of insurance. Or, to put it another way, are the terms “accounts” and “payment intangible,” when used in conjunction with insurance policies, the equivalent of “claims” for the purpose of the exclusion set forth in § 9-1109(4)(h) of the Maine UCC? If they are, then such rights would be excluded from the scope of Article 9 of the Maine UCC. If they have a separate and distinct meaning, then the exclusion of claims under policies of insurance from the scope of

Article 9 would not mean the exclusion of accounts, payment intangibles or other rights to payment.

10. A review of the text of the Policy, applicable Maine law, the purpose and intent of the law, and custom and usage demonstrate that the terms “claim” and “right to payment” are separate and distinct concepts in the context of § 9-1109(4)(h) of the Maine UCC and insurance contracts. As such, the exclusion of “claims” from the coverage of Article 9 is not tantamount to the exclusion of accounts, payment intangibles or other rights to payment. Thus, Wheeling has a valid, enforceable, and perfected security interest in all rights to payment under the Policy at issue in this case and proceeds thereof, including the Settlement Payment.

**A. State Law Definitions Apply With Respect To The Definitions of Claim and Payment Rights.**

11. At the outset, it is important to note that the definitional issues at hand are not questions of federal bankruptcy law. Rather, they are questions of Maine law, specifically, the proper interpretation of the Maine UCC. If they presented questions of federal bankruptcy law, then the Bankruptcy Code’s definition of “claim” in § 102(5) would apply, and a “claim” so defined would include a “right to payment.” The inquiry might end at this point; however, for the purpose of determining the validity, extent, enforceability and perfection of a security interest in personal property, bankruptcy law defers to state law, and in this case, the Maine UCC. *E.g.*, *In re Price*, 562 F.3d 618 (4<sup>th</sup> Cir. 2009) (*citing Butner v. U.S.*, 440 U.S. 48, 57 (1979) (“when determining the substance of property rights and security interests in bankruptcy, the basic federal rule is that state law governs.”)). So the question for the Court is whether, under applicable Maine law, a “claim” under an insurance policy is the same as, or something different from, a right to payment under the Policy. The Bankruptcy Code’s definitions are irrelevant.

**B. Rights To Payment Under The Policy Are Accounts Or Payment Intangibles Governed By The Maine UCC; Article 9's Exclusion Of Assignments Of "Claims" In Insurance Policies Does Not Change This Result.**

**1. Rights To Payment Under The Policy Are Accounts Or Payment Intangibles.**

12. Traveler's contractual obligation under the Policy to pay the Debtor up to \$7.5 million for a covered loss and upon satisfaction of the conditions specified in the Policy is clearly an "account" or a "payment intangible" as those terms are defined in the Maine UCC:

"Account," except as used in "account for," means a right to payment of a monetary obligation, **whether or not earned by performance**: (a). For property that has been or is to be sold, leased, licensed, assigned or otherwise disposed of; (b). For services rendered or to be rendered; [or] (c). For a policy of insurance issued or to be issued . . . "Account" includes health-care-insurance receivables.

"Payment intangible" means a general intangible under which the account debtor's principal obligation is a monetary obligation.

11 M.R.S.A. § 9-1102(2) & (61) (emphasis added).<sup>2</sup>

13. Indeed, the Debtor's rights to payment under the Policy are squarely within the definitions of "account" or "payment intangible" whether the rights are earned or unearned, contingent, or conditional. In fact, by definition, an "account" includes "a right to payment of a monetary obligation, whether or not earned by performance[.]" 11 M.R.S.A. § 9-1102(2). It also includes a right to payment "for a policy of insurance issued or to be issued[.]" 11 M.R.S.A. § 9-1102(2)(c). Scholars also note that "a beneficiary's rights to receive payments under an annuity"—which, under Maine law, is a form of insurance<sup>3</sup>—"could be a payment intangible[.]"

1-1A Secured Transactions Under the UCC § 1A.03.

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<sup>2</sup> A "general intangible" is "any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. 'General intangible' includes payment intangible and software." 11 M.R.S.A. § 9-1102(42).

<sup>3</sup> The Maine Insurance Code defines "insurance" as including "a contract under which one undertakes . . . to pay or grant a specified amount or determinable benefit or **annuity** in connection with ascertainable risk contingencies[.]" 24-A M.R.S.A. § 3 (emphasis added).

14. In either case, “accounts” and “payment intangibles” include conditional payment rights:

Although both old and Revised Article 9 speak of a “right to payment,” it is clear that the debtor’s interest need not be matured or fixed in amount. The account can exist “whether or not it has been earned by performance.” **The account arises when a contract is entered into, not when the debtor performs the contract.**

1C-19 Secured Transactions Under the UCC § 19.02[2][b] (emphasis added). The “same rules apply to accounts both before and after performance.” *In re Patio & Porch Sys, Inc.*, 194 B.R. 569, 573 (Bankr. D. Md. 1996) (*quoting* Official Comment to former § 9-106, which, like Revised § 9-102(3), defined an “account” in relevant part as a “right to payment . . . whether or not it has been earned by performance.”). Moreover, there is nothing in the definition of payment intangible that provides that the right to payment must be “earned” or unconditional. A payment intangible is simply a payment obligation that arises under a contract, and the obligation may be matured or unmatured, conditional or unconditional. As such, the right to payment of an insurance benefit pursuant to an issued insurance contract is either an account or a payment intangible, even if the benefit is conditional and unearned.

15. As discussed herein, *see infra* § I.C.1, the Debtor’s rights to payment arose upon Travelers’ issuance of the Policy to the Debtor. At that point in time, the payment rights were conditional; they had not been earned by any performance. Nevertheless they are accounts or payment intangibles within the meaning of the Maine UCC.

2. **A “Claim” Under § 9-1109(4)(h) Is Not An Account Or Payment Intangible.**

16. The remaining question, then, is whether § 9-1109(4)(h)’s exclusion from the scope of Article 9 of “claims” arising under an insurance policy from the scope of Article 9 changes this result and takes accounts, payment intangibles or other rights to payment, insofar as

they relate to an insurance policy, outside of the coverage of Article 9. That would only be the case if an account or payment intangible related to an insurance contract is legally the same as a “claim” as that term is used in § 9-1109(4)(h).

17. They are not the same. Although neither Article 1 nor Article 9 of the Maine UCC define the term “claim,” the term has a distinct meaning within the context of an insurance policy. As discussed herein, *see infra* §§ I.B.2.ii & II.C.2, a “claim” under an insurance policy, such as the Policy in question in this case, is a device, a mechanism, or a process by which an insured, such as the Debtor, demands performance from the insurance company following the occurrence of a covered loss. That performance sought might be payment in the case of a casualty policy, or it might be indemnity but not payment, as in the case of a liability policy. In any event, the making of a claim under an insurance policy is the device by which a condition precedent to payment or other performance by the insurer is satisfied, in whole or in part. While the process of making a claim under the Policy and the difference between that process and a right to payment under the Policy are discussed below, it is important to first begin by analyzing the difference between a “claim,” on the one hand, and an “account,” “payment intangible” or other right to payment, on the other hand, under the Maine UCC.

**i. Rules Of Construction For The Maine UCC.**

18. While the terms “accounts” and “payment intangibles” are statutorily defined in the Maine UCC, the term “claim” is not so defined, either in Article 1 or Article 9 of the Maine UCC. As such, this Court will need to determine what that term means under applicable rules of statutory construction, including the Maine UCC’s own internal rules of construction.

19. As a general rule, in defining statutory terms, the Court’s duty is to effectuate the intent of the Legislature based on upon the language of the statute. *Stone v. Bd. of Registration*



*in Med.*, 503 A.2d 222, 226 (Me. 1986). “Words must be given meaning and not treated as meaningless and superfluous.” *Stromberg-Carlson Corp. v. State Tax Assessor*, 2001 ME 11, ¶ 9, 765 A.2d 566, 569. The Court must “consider the entire statutory scheme so that a harmonious result can be achieved.” *Wister v. Town of Mount Desert*, 2009 ME 66, ¶ 17, 974 A.2d 903, 909. “In the absence of a legislative definition, the term must be given a meaning consistent with the overall statutory context and must be construed in the light of the subject matter, the purpose of the statute and the consequences of particular interpretation.” *Regan v. Racal Mortgage, Inc.*, 1998 ME 188, ¶ 8, 715 A.2d 925, 928.

20. Moreover, the Maine Legislature has enacted a general rule of construction providing that “[t]echnical words and phrases and such as have a peculiar meaning convey such technical or peculiar meaning.” 1 M.R.S.A. § 72(3). See *Cobb v. Bd. Of Counseling Prof. Licensure*, 2006 ME 48, § 12, 896 A.2d 271, 275 (applying § 72(3) and stating that “technical or trade expressions should be given a meaning understood by the trade or profession.”). This is consistent with the First Circuit’s mandate that “where the applicable [statutory] section deals with a particular trade or business, **as insurance**, the **technical insurance terms must be considered to be used in the sense in which such terms are generally used or understood in the insurance business.**” *Mass. Prot. Ass’n v. U.S.*, 114 F.2d 304, 311 (1<sup>st</sup> Cir. 1940) (emphasis added).

21. Section § 72(3) is also consistent with the Maine UCC’s own internal rules of construction which require the Court to construe the Maine UCC liberally to promote its underlying purposes of streamlining commercial practices, including through custom, usage and

agreement of the parties.<sup>4</sup> See 11 M.R.S.A. § 1-1103(1). This includes by application of other principles of law when a term such as “claim” is not defined by the Maine UCC. See 11 M.R.S.A. § 1-1103(2) (providing a non-exhaustive list of supplemental areas of law).

22. What this boils down to is that, in the absence of any other statutory definition, the term “claim” in § 9-1109(4)(h), must be construed in a manner that is consistent with the insurance industry and insurance law. See 1 M.R.S.A. § 72(3); *Cobb*, 2006 ME 48, ¶ 12, 896 A.2d at 275; *Mass. Prot. Ass’n*, 114 F.2d at 311. Thus, as one bankruptcy court applying the UCC aptly observed, “[w]here language is susceptible of two reasonable meanings, a court, **in the commercial field, should choose the interpretation which comports with current universal practices in the business world.**” *In re Hoepfner*, 49 B.R. 124, 129 (Bankr. E.D. Wis. 1985) (emphasis added). “The UCC provides the guidelines by which commercial activity occurs and the code is applied continually by non-lawyers in commercial activities. The UCC should be interpreted with that underlying practical fact in mind.” *First Nat. Bank of Steepleville, N.A. v. Erb Equip. Co., Inc.*, 921 S.W.2d 57, 62 (Mo. Ct. App. 1996).

ii. **A “Claim” Under § 9-1109(4)(h) Is The Process By Which An Insured Demands Contractual Performance From An Insurer.**

23. It is beyond dispute that the term “claim” in the area of insurance and insurance law means the process by which an insured demands contractual performance under an insurance contract. For example, one authority on insurance cited by many other courts has defined the term “claim” under a policy of insurance as:

**claim** a demand, request or notice submitted to an insurance company by an insured person or company. The claim asks for benefits under the terms of a policy when a loss has been suffered. The insurance contract specifies that covered losses are either paid or reimbursed by the company.

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<sup>4</sup> Moreover, Official Comment 1 to § 1-1103 directs the Court to engage in a holistic interpretation but that “application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.”

MICHAEL C. THOMSETT, INSURANCE DICTIONARY 27 (1989).<sup>5</sup>

24. The definition of Thomsett and others, including Appleman, *see supra* n.5, are clearly ubiquitous in insurance (they literally wrote the dictionaries) and reflects a usage that this Court has the authority to recognize as a matter of law in supplementing not only § 9-1109(4)(h) but also the Policy. *See Cobb*, 58 Me. at 328. *Accord* 11 M.R.S.A. §§ 1-1103(1)(b) & 1-1303(3) (defining a “usage of trade” as “any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.”); § 9-1303(4) (a “usage of trade . . . of which they are or should be aware is relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement and may supplement or qualify the terms of the agreement.”).

25. Not only do these authorities in the insurance field assign to the term “claim” a meaning that is distinct from a right to payment, but also the conclusion that a “claim” is different from a “right to payment” is recognized in the Maine UCC, even though the term “claim” is not expressly defined. For example, on one hand, under § 9-1109(4)(h), the Maine UCC excludes from Article 9 “assignment of a claim under a policy of insurance[.]” Yet, on the other hand, under § 9-1109(4)(f), the Maine UCC excludes from Article 9 “[a]n assignment of a **right to payment** under a contract to an assignee that is also obligated to perform under the contract[.]” (Emphasis added.) Under § 9-1109(4)(f), the “[r]ight to payment under a contract” is broad enough to embrace assets qualifying as accounts, chattel paper, general intangibles

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<sup>5</sup> With minor variations, Thomsett’s definition is in accord with other authorities: “**CLAIM** request by an insured for indemnification by an insurance company for loss incurred from an insured peril.” HARVEY W. RUBIN, DICTIONARY OF INSURANCE TERMS 82 (5<sup>th</sup> ed. 2008) (1987). “**Claim.** An insured’s request to an insurer for payment of a loss under an insurance policy.” 1-1 *New Appleman Insurance Law Practice Guide* 1.07.

[which includes payment intangibles], investment property or promissory notes.” 1-3 Secured Transactions Under the UCC § 3.08.

26. Moreover, as noted by scholars such as James J. White and Robert S. Summers in their leading treatise on the Uniform Commercial Code, UCC § 9-109(d)(4) through (7) (§ 9-1109(4)(d) through (g) in the Maine UCC) actually contains several express exclusions of “transfers in accounts or other intangibles from Article 9.” JAMES J. WHITE AND ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE: SECURED TRANSACTIONS § 21-6, p. 734 (5<sup>th</sup> ed. 2000) (1995) (hereinafter “WHITE AND SUMMERS”). More specifically, § 9-1109(4)(d) through (g) expressly exclude certain transactions involving accounts, chattel paper, payment intangibles, promissory notes, or, more generally, rights to payment. These exclusions show that when the Legislature intended to exclude accounts, payment intangibles or other rights to payment from coverage under Article 9, it knew how to do so. It did not do so in the case of accounts, payment intangibles and other rights to payment related to insurance policies.

27. As the text of § 9-1109(4)’s various exclusions make clear, the Legislature’s use of the terms accounts, payment intangible, and “right to payment”—which includes accounts, general intangibles, and payment intangibles— as well as “claim,” “indicates that the Legislature intended those words to mean different things.” *State v. Moulton*, 1997 ME 228, ¶ 16, 704 A.2d 361, 365. This is entirely consistent with commercial reality: these terms mean different things in the context of an insurance policy. A right to payment, including an account or payment intangible, arises upon delivery of the policy; it is contingent and conditioned upon satisfaction of policy terms, but it is, nevertheless, a right to payment. On the other hand, in the insurance world, a “claim” is not a right to payment; rather it is the device or process that an insured must

follow to demand performance from its insured in order to satisfy a condition to payment under the policy.

28. Given these well-established concepts in insurance practice and insurance law, a conclusion that a “claim” is the same as a “right to payment” would not only run counter to the express language in § 9-1109(4) and accepted rules of statutory construction, but it would also run counter to commercial reality and, therefore, conflict with Maine law, First Circuit authority, and the Maine UCC’s directive that it be interpreted consistent with its purposes, including streamlining commercial transactions and permitting commerce to expand through custom, usage, and agreement of contract parties. 11 M.R.S.A. § 1-1103(1)(a)-(b).

29. Indeed, a conclusion that a “claim” is the same as a “right to payment” would run counter to many every-day circumstances in which the difference between a claim and a right to payment in the insurance context is well defined. For example, on one hand, there are circumstances under which an insured under a policy of insurance holds a right to payment but has no right to make a claim. This occurs when the right to payment is conditional but no covered loss has occurred. Similarly, a mortgagee who is a “loss payee” under a policy of insurance has the right to receive payment, but it does not have the right to make a claim—that belongs to the insured. Conversely, on the other hand, an insured may hold a claim under an insurance policy but no right to payment. This would arise under an indemnity policy, whereby the insured may claim a right to indemnity by the insurer, but no right to any payment. Any payment would go to a third party in satisfaction of that third party’s claim against the insured. Similarly, an insured may have a claim against an insurer to provide a defense to asserted liability, but no right to payment to cover any loss.

30. These varying circumstances demonstrate that in the insurance business, a claim is not a right to payment. A claim is a device or mechanism by which an insured can trigger the obligation of an insurer to comply with the terms of an insurance policy, which may or may not result in a payment to the insured. Thus, an insured may have a claim, but no right to payment (indemnity); or conversely an insured (loss payee) may have a right to payment, but no right to make a claim. This business distinction between claims and payment rights must be respected by consistent statutory interpretation. The Maine UCC recognizes the distinction in the terms, and the Court must also recognize the different meaning ascribed to these terms in business practice. Any other conclusion would violate applicable rules of statutory construction and would make a mockery out of the stated intention of the Maine UCC to conform the legal rules of commerce with accepted business practices.

**3. The 2000 Amendments To Article 9 Were Designed To Facilitate Expanded Trade In Payment Rights; Payment Rights From Insurance Contracts Must Be Interpreted As Distinct From “Claims” To Facilitate These Revisions.**

31. It is clear from the 2000 revisions to Article 9 that one central purpose of the revisions was to facilitate expanded trade and commerce in payment rights and to give greater certainty to these types of transactions to lower their cost. *See* 1-1A Secured Transactions Under the UCC § 1A.03. The amendments accomplished this by, among other things, expanding the definition of “accounts,” adding a new category of collateral called “payment intangibles,” and adjusting the various scope and exclusionary provisions in § 9-1109.

As noted by the American Bar Association’s advisor to the Article 9 Drafting Committee:

Revised Article 9 brings into its scope several kinds of property and transactions that had previously resided outside of Article 9. The application of non-Article 9 common law rule, rules to these transactions made the results of these transactions uncertain and more expensive. This is particularly true for securitization transactions.

Steven O. Weise, *An Overview of Revised UCC Article 9*, included in THE NEW ARTICLE 9 UNIFORM COMMERCIAL CODE 2 (2d ed. 2000 (1999) (hereinafter, “THE NEW ARTICLE 9”). *See also id.*, pp. 2-3 (discussing the expanded definition of “account” and addition of “payment intangible”). In point of fact, as noted by WHITE AND SUMMERS, the expanded definition of account and the addition of the term payment intangible, among other changes in the 2000 revisions, “brings almost all securitization within Article 9.” WHITE AND SUMMERS, § 21-6, p. 733. *See also* THE NEW ARTICLE 9, pp. 2-3. This includes bringing all payment rights for a policy of insurance under Article 9’s scope through the broader definition of the term account, which now expressly applies to payments for a policy of insurance, and addition of the term payment intangible. “These results show how far the revisers are prepared to push their policy of free and easy security interests.” 1-1A Secured Transactions Under the UCC § 1A.03 (noted with respect to the breadth of “payment intangible” and that it could include payments from annuities). Doing so brings certainty to these transactions. *See* THE NEW ARTICLE 9, p. 3 (discussing increased certainty arising from bringing the sale of payment intangibles within the scope of Article 9). Reduced to its essence, “the determination [of whether Article 9 applies] is based on the economic reality of the transaction”—not the labels parties give to the form of the transaction. Edwin E. Smith, *An Introduction To Revised UCC Article 9 (1999)*, included in THE NEW ARTICLE 9, p. 19.

32. The Court must interpret the term “claim” consistent with these efforts and with the purpose of facilitating commercial transactions in payment rights. This requires ascribing to the term “claim” the meaning given to it in the insurance business, and at the same time, recognizing that where accounts and payment intangibles are not expressly excluded from the scope of Article 9, they are included in its scope. Thus, the Court must conclude that the term

“claim” in the insurance exclusion of § 9-1109(4)(h) does not include rights to payment under an insurance policy.

33. In sum, it is clear that there is no plausible interpretation of § 9-1109(4)(h) that could reasonably equate “claims” with respect to insurance policies with the statutorily distinct terms “accounts” and “payment intangibles” and thereby cause the exclusion of these types of collateral from coverage under Article 9. Indeed, the only plausible conclusion is that the drafters of the 2000 revisions to Article 9 intended to broaden the types of payment rights that could be assigned or collateralized and specifically intended to cover all types of payment rights, except those expressly excluded. Their purpose was to expand, facilitate, and lower the cost of trade and commerce in payment rights. And this is exactly what Wheeling and the Debtor did when they entered into a secured loan transaction in 2009: The Debtor collateralized its payment rights under all of its contracts, including its insurance policies, in order to induce Wheeling to grant it a large line of credit. The Maine UCC was intended to facilitate this kind of transaction, and the Court would err in adopting an interpretation of the UCC that pointed in the opposite direction.

**C. The Right To Payment Under The Policy Arises when the Policy is Issued. This May Precede the Making of A Claim.**

34. As discussed above, in the insurance field, and under a policy of insurance, a claim is legally distinct from a right to payment. The Court also asked the parties to address when rights to payment and claims arise under the Policy. When the plain text of the Policy is considered, it is clear that the Debtor held a right to payment upon Travelers’ issuance of the Policy on April 19, 2013, even though that right to payment was conditional and even though the Debtor could not make a “claim” until a loss occurred.



1. **The Right To Payment Arose Upon Issuance Of The Policy Or Earlier.**

35. It is generally held that an insured holds a conditional right to payment (an account or payment intangible) under a contract of insurance once the policy is issued, even before contractual conditions fixing the right to payment are satisfied. For example, by way of illustration, the *Restatement (Second) of Contracts* provides as follows: “A holds an **insurance policy** in which the insurer promises to pay him \$1000 at the end of twenty years if A makes specified payments of premiums. A can assign his conditional right.” *Restatement (Second) of Contracts*, § 320 Illustration 3 (emphasis added). Thus, under the Restatement, a conditional right to payment exists under an insurance policy even before the conditions to payment have been satisfied, and this right to payment can be assigned. The Law Court has cited § 320 of the *Restatement (Second) of Contracts* favorably. *DiPietro v. Boynton*, 628 A.2d 1019, 1023 (Me. 1993) (citing *Restatement (Second) of Contracts* § 320).

36. The *Restatement* reflects the general view that a right to payment, albeit conditional, arises under a policy of insurance once the policy is issued and even before there is an event that gives rise to a covered loss and a fixed right to payment. *See Compton v. Powers (In re Powers)*, 112 B.R. 178, 180 (Bankr. S.D. Tex. 1989) (“Furthermore, it is the insurance contract between the insured individual and insurer which is the basis for a right to payment and not the mere occurrence of an accident.”) (citing 10 Couch, *Cyclopedia of Insurance Law* § 41:3 (rev. 2d ed. 1982)); *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 617 (Minn. 2012) (“The holder of a liability insurance policy has a contractual right to payment—and an insurer the corresponding duty to indemnify the insured—when it is established that the insured’s liability to a third party is within the scope of the insurance policy.”); *DiMarzo v. Am. Mut. Ins. Co.*, 389 Mass. 85, 95, 449 N.E.2d 1189, 1196 (Mass. 1983)

(“The purchaser of an insurance policy acquires a contractual right to payment, a form of personal property.”); *Dodd v. Commercial Union Ins. Co.*, 373 Mass. 72, 81, 365 N.E.2d 802, 807 (Mass. 1977) (“Insurance policies are contracts in which the insurer promises to pay money to the insured or to third parties on the happening of a specified event. This contractual right to payment is a recognized property right. 1 Couch, Insurance 2d s 1.11 (1959). 44 C.J.S. Insurance s 223, at 932 (1945).”).<sup>6</sup> See also *In re Simpson*, 238 B.R. 776, 779 (Bankr. S.D. Ill. 1999) (“A debtor’s interest in insurance proceeds is a species of property in and of itself, a right to payment from the insurance company pursuant to the terms of the parties’ contract.”).

37. Recognizing that a right to payment arises under an insurance contract upon execution of the contract is entirely consistent with the Maine UCC’s definitions related to rights to payment. Whether working under the definition of an “account” or a “payment intangible,” it is clear that these terms cover payment rights that arise under contracts, whether or not the payment right has been earned by performance, or is conditional or contingent. See, *supra*, § I.B.1.

38. Moreover, this conclusion is also consistent with the text of the Policy, which shows that a right to payment arose upon the effective date of the Policy, even if that right was conditional at the time. In this case, the Policy is dated April 19, 2013, but was effective as of April 1, 2013. It includes (a) certain Common Policy Conditions—Deluxe, attached hereto as **Exhibit A**; (b) a Deluxe Property Coverage Part and certain general conditions and endorsements and forms attached thereto; and (c) a Commercial Inland Marine Coverage Part. Under the Commercial Inland Marine Coverage Part, there are Commercial Inland Marine

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<sup>6</sup> *Dodd* addressed the availability of relief under Massachusetts’ unfair trade practices act and was subsequently overruled by that state’s legislature. But, as in *De Marzo*, the Massachusetts Supreme Judicial Court has affirmed the principal that an insurance contract gives rise to a contractual right to payment that is a form of property.

Conditions, attached hereto as **Exhibit B**; a Railroad Rolling Stock Coverage Form (the “**Rolling Stock Form**”), attached hereto as **Exhibit C**; an endorsement thereto which provides coverage for damage to track and roadbed due to a derailment (the “**Track Endorsement**”), attached hereto as **Exhibit D**; and another endorsement that provides business interruption coverage (the “**BI Endorsement**”), attached hereto as **Exhibit E**. As indicated in the Declarations to the Policy and Declarations to the Rolling Stock Form, which are collectively attached hereto as **Exhibit F**, Travelers issued the Policy to the Debtor and its Affiliates on April 19, 2013, with an effective date of April 1, 2013, and a policy period of April 1, 2013, to April 1, 2014, at 12:01 a.m. For the purpose of this case, and under the authorities cited above, upon issuance of the Policy (or perhaps as early as its effective date), the Debtor had a conditional right to payment under the Policy but, that at this time, it had no made no “claim.”

39. It seems that the parties agree that the Settlement Payment was paid pursuant to the Commercial Inland Marine Coverage Part, the Rolling Stock Form (as modified by the Track Endorsement) and the BI Endorsement (the Commercial Inland Marine Coverage Part, the Rolling Stock Form (as modified by the Track Form), and the BI Endorsement are collectively referred to herein as the “**Business Interruption Coverage**”). In general terms, the provisions of the Policy comprising the Business Interruption Coverage establish the contractual right to payment that ultimately gave rise to the Settlement Payment—once the claim was made and processed. These provisions of the Policy provide that Travelers will pay the business interruption loss, as defined and delineated therein, if certain casualty events occur, including damage to track or roadbed following a derailment, and if the insured complies with the claim process delineated in the Policy.

40. More specifically, a “Covered Cause of Loss” or damage to “Covered Property,” as these terms are defined under the Rolling Stock Form, was a condition precedent to the Debtor’s right to payment under the Business Interruption Coverage. Thus, Under the BI Endorsement, which comprises a portion of the Business Interruption Coverage, Travelers agreed as follows:

**We will pay:**

- (a) The amount by which your “Business Income” is actually reduced during the “period of restoration” due to loss or damage to Covered Property from a Covered Cause of Loss; and
- (b) Your necessary “Extra Expense” to continue normal operations following loss of or damage to Covered Property from a Covered Cause of Loss.

**The most we will pay** in total for “Business Income” and “Extra Expense” under this Additional Coverage is:

\$750,000	per day
But we will not pay more than	
\$7,500,000	in any one occurrence.

See **Exhibit E** (emphasis added). This excerpt from the BI Endorsement describes the contractual terms of the right to payment that gave rise to the Settlement Payment in which Wheeling claims a valid and enforceable first priority security interest.

41. What this means is that as of April 19, 2013, the date of issuance of the Policy, Travelers was contractually obligated to pay the Debtor and its Affiliates up to \$7.5 million, upon the occurrence of a covered loss during the policy period, and upon the terms of sections (a) and (b) in the above excerpt from the BI Endorsement. The Debtor’s subsequent Derailment gave rise to a covered loss and thereby satisfied one of the conditions precedent to the Debtor’s contractual right to payment up to the amount set forth in the BI Endorsement—\$7.5 million. But the Derailment did not **create** the right to payment. The right to payment was created when

the Policy was issued; the Derailment was simply an event that satisfied a condition precedent to payment. See e.g. *Uptegrove v. Metro. Life Ins. Co. of New York*, 145 Neb. 51, 55, 15 N.W.2d 220, 223 (1944) (“The promise of defendant to pay disability benefits was made to the employee. He is the person thus insured under the contract and his substantive rights to payment of all the installments became fixed when he suffered the permanent, total disability during the life of the certificate and survived the 30 months’ period of their duration.”). The Derailment satisfied one condition precedent to payment and also gave rise to the need to submit a “claim” in order to satisfy the remaining conditions to payment under the Policy. The right to payment, however, existed long before the Debtor had any basis upon which to make a “claim.”

2. **Submitting A “Claim” For Business Interruption Losses And Obtaining Payment Thereof.**

42. As noted above, the occurrence of a casualty event giving rise to loss as defined in the Policy did not automatically lead to a payment under the Policy. More was required. In order to get payment, the insured, the Debtor, was required to follow the contractually prescribed procedures to make a claim.

43. Thus, under the Business Interruption Coverage in the Policy, and specifically, under the Loss Conditions in the Commercial Inland Marine Conditions, the Debtor assumed, in relevant part, the following Duties In The Event Of Loss (the “Claim Duties”). The performance of these Claim Duties constituted conditions precedent to receiving payment under the BI Endorsement.<sup>7</sup> They included:

2. Give us [Travelers] prompt notice of the loss or damage.
3. As soon as possible, give us a description of how, when and where the loss or damage occurred.

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<sup>7</sup> Wheeling notes that there are other rights to payment under the Policy, both under the Deluxe Property Coverage Part as well as under the Commercial Inland Marine Coverage Part.

4. Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim. [. . .]
6. As often as may be reasonably required, permit us to inspect the property proving the loss or damage and examine your books and records. [. . .]
7. We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. [. . .]
8. Send us a signed, sworn proof of loss containing the information we request to settle the claim. You must do this within 60 days after our request. We will supply you with the necessary forms. [. . .]
10. Cooperate with us in the investigation or settlement of the claim.

See **Exhibit B**, p. 1, ¶ C.

44. While the Policy does not define the term “claim,” the foregoing Claim Duties lay out the process the Debtor was required to follow in order to make a “claim” for coverage under the Policy after a covered loss occurred. The Claim Duties come within the definition of the term “claim” by authorities such as Thomsett:

**claim** a demand, request or notice submitted to an insurance company by an insured person or company. The claim asks for benefits under the terms of a policy when a loss has been suffered. The insurance contract specifies that covered losses are either paid or reimbursed by the company.

MICHAEL C. THOMSETT, *INSURANCE DICTIONARY* 27 (1989). In fact, the Claim Duties are what is commonly known in the area of insurance as a “Claim Provision”—the “clause in an insurance policy that describes the administration and submission of claims procedure.” HARVEY W. RUBIN, *DICTIONARY OF INSURANCE TERMS* 82 (5<sup>th</sup> ed. 2008) (1987). It is only upon satisfaction of all contractual conditions in the Policy that the payment right is finally fixed and no longer conditional. At this point, Travelers must make payment pursuant to the express payment

provisions in the Commercial Inland Marine Coverage Part of the Policy with respect to Business Interruption Coverage.

45. The performance of the Claim Duties did not however, **create** the right to payment. That right was created when the Policy was executed. At that time, the right to payment was contingent and conditional. When the Derailment occurred, the Debtor had further conditions to satisfy before the conditional payment right became unconditional. It was required to notify Travelers and perform the other acts described in the Claim Duties—essentially it was required to make a claim under the Policy in the manner prescribed. By compliance with the Claim Duties following the Derailment, the right to payment under the BI Endorsement went from conditional to fixed and absolute, even if then unliquidated.

46. This claims process is not a theoretical construct. It is exactly what happened in this case. Documents produced during discovery reveal that within hours of the Derailment, the Debtor contacted Travelers in accordance with the Claim Duties. Travelers subsequently assigned a claim number of EMN6755 (actually, at one point, there were two claim numbers related to losses for business interruption), and then Travelers proceeded to investigate and adjust the claim. For example, attached hereto as **Exhibit G** is a New Claim Referral dated July 8, 2013, related to the Derailment. This exhibit established a “claim.” It contained no commitment to any payment; in fact, payment was disputed as set forth in another letter from Travelers dated August 9, 2013, and attached hereto as **Exhibit H**. These exhibits illustrate the central point of this Memorandum: the “claim” is part of a process by which an insured, such as the Debtor, notifies the insurer of a loss and seeks coverage. The “claim” is assigned a number, but this number is not a dollar amount, nor is it a payment commitment; it is an administrative identifier—it identifies a case or a file. In short, the “claim,” in insurance parlance, is not a

dollar amount, nor any agreement to pay a dollar amount; rather, it is an administrative process prescribed by the applicable provisions of the Policy.

Eventually, the Debtor and Travelers concluded the claims process and agreed upon the amount of the payment. Neither the Derailment, nor compliance with the Claim Duties created the right to payment; instead, it commenced and encompassed the process by which that right to payment, arising when the Policy was executed, went from being a conditional and contingent right to a fixed right.

### **3. Summary.**

47. When Travelers issued the Policy to the Debtor, the Debtor held a conditional, contractual right to payment for business interruption losses. Under the terms of the Policy, the conditional right to payment became a fixed and absolute right to payment only when a covered loss occurred, the Debtor complied with its Claim Duties, and by doing so made a “claim.” Under the terms of the Policy and Maine law, the right to payment under the Policy is distinct from the claim. The right to payment arose before the claim was or could have been made. The claim was a procedure that the insured, the Debtor, was required to follow in order to turn a conditional right to payment into a fixed right of payment, but clearly the right to payment is not the same thing as the claim. The former is a contractual right; the latter is a process that must be undertaken—a duty that must be performed—in order to obtain performance of the contractual right to payment.

### **CONCLUSION**

48. The Debtor held a conditional right to payment from Travelers that accrued no later than the date the Policy was issued (April 19, 2013). Upon the occurrence of the Derailment, one condition to the right to payment became satisfied, but additional conditions to



payment remained unfulfilled. Specifically, the Debtor was required to submit its claim in the manner prescribed by the Policy and in compliance with the Claim Duties. Once this occurred, the right to payment became fixed.

49. Clearly, as defined and contemplated in the Policy, the right to payment and the claim are two distinct matters. The former is a contractual right of the Debtor—conditional at first, but later becoming fixed and liquidated. The latter describes a process with which the Debtor was required to comply before payment could be made. These conclusions are required by the terms of the Policy and applicable state law. As such, they are determinative in this Court’s assessment of the validity, enforceability and perfection of Wheeling’s interests in the Settlement Payment. The Settlement Payment represents a post-petition payment of a pre-petition account or payment intangible in which Wheeling indisputably holds a valid and enforceable first priority security interest. Under the terms of the Policy and under Maine law, the Settlement Payment was the payment of an account or a payment intangible; it was not the “claim” as that term is used in the Policy. Wheeling’s security interest in the right to payment, that is, the Settlement Payment, is not excluded from the scope of Article 9.

For these and for all of the foregoing reasons, Wheeling respectfully requests that this Court enter its order requiring the Debtor to turn over to Wheeling all of the Settlement Payment received to which the Debtor is entitled under the Policy.

Dated: March 27, 2014

/s/ George J. Marcus

George J. Marcus

Daniel L. Rosenthal

David C. Johnson

Andrew C. Helman

Counsel for Wheeling & Lake Erie Railway  
Company

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### CERTIFICATE OF SERVICE

I, Karen A. Stone, hereby certify that I am over eighteen years old and that I caused a true and correct copy of the above document to be served upon the parties electronically at the addresses set forth on the Service List set forth below on 27<sup>th</sup> day of March, 2014.

/s/ Karen A. Stone

Karen A. Stone

Paralegal

## Mailing Information for Case 13-10670

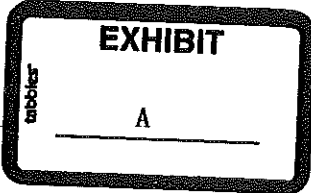
### Electronic Mail Notice List

The following is the list of **parties** who are currently on the list to receive email notice/service for this case.

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## COMMON POLICY CONDITIONS – DELUXE

All Coverage Parts included in this policy are subject to the following conditions.

### A. CANCELLATION

1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
2. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:
  - a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
  - b. 60 days before the effective date of cancellation if we cancel for any other reason.
3. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.
4. Notice of cancellation will state the effective date of cancellation. If the policy is cancelled, that date will become the end of the policy period. If a Coverage Part is cancelled, that date will become the end of the policy period as respects that Coverage Part only.  
Cancellation will not affect coverage on any shipment in transit on the date of the cancellation. Coverage will continue in full force until such property is delivered and accepted.
5. If this policy or any Coverage Part is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.
6. If notice is mailed, proof of mailing will be sufficient proof of notice.

### B. CHANGES

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

### C. EXAMINATION OF YOUR BOOKS AND RECORDS

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.

### D. INSPECTIONS AND SURVEYS

1. We have the right but not obligated to:
  - a. Make inspections and surveys at any time;
  - b. Give you reports on the conditions we find; and
  - c. Recommend changes.
2. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake related only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:
  - a. Are safe or healthful; or
  - b. Comply with laws, regulations, codes or standards.
3. Paragraphs 1. and 2. of this condition apply not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.
4. Paragraph 2. of this condition does not apply to any inspections, surveys, reports or recommendations we may make relative to certification, under state or municipal statutes, ordinances or regulations, of boilers, pressure vessels or elevators.

### E. PREMIUMS

1. The first Named Insured shown in the Declarations:
  - a. Is responsible for the payment of all premiums; and
  - b. Will be the payee for any return premiums we pay.
2. We compute all premiums for this policy in accordance with our rules, rates, rating plans,



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premiums and minimum premiums. The premium shown in the Declarations was computed based on rates and rules in effect at the time the policy was issued. On each renewal continuation or anniversary of the effective date of this policy, we will compute the premium in accordance with our rates and rules then in effect.

**F. TRANSFER OF YOUR RIGHTS AND DUTIES UNDER THIS POLICY**

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

**G. WHEN WE DO NOT RENEW**

If we decide not to renew this policy we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 60 days before the expiration date.

**H. DELUXE PROPERTY COVERAGE PART- REFERENCE TO FORMS AND ENDORSEMENTS**

In some instances, the Deluxe Property Declarations may list endorsements included in the Deluxe Property Coverage Part that reference:

1. The Commercial Property Coverage Part;
2. The Commercial Inland Marine Coverage Part;
3. Commercial Property forms including, but not limited to, the following:
  - a. Building and Personal Property Coverage Form;
  - b. Business Income Coverage Form;
  - c. Commercial Property Conditions;
  - d. Causes of Loss – Special Form;
  - e. Causes of Loss – Earthquake Form.
4. Commercial Inland Marine Forms including but not limited to the Transportation Coverage – Special Form

Endorsements referencing the Commercial Property Coverage Part, Commercial Inland Marine Coverage Part, Commercial Property Forms, or Commercial Inland Marine Forms apply to the Deluxe Property Coverage Forms in the same manner as they apply to the Forms they reference.

**I. INSURANCE UNDER TWO OR MORE COVERAGE PARTS**

If two or more of this policy's Coverage Parts apply to the same loss or damage, we will not pay more than the actual amount of the loss or damage.

This policy consists of the Common Policy Declarations and the Coverage Parts and endorsements listed in that declarations form.

In return for payment of the premium, we agree with the Named Insured to provide the insurance afforded by a Coverage Part forming part of this policy. That insurance will be provided by the company indicated as insuring company in the Common Policy Declarations by the abbreviation of its name opposite that Coverage Part.

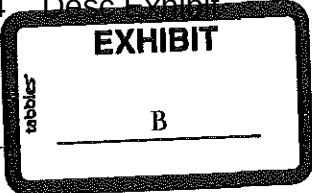
One of the companies listed below (each a stock company) has executed this policy, and this policy is countersigned by the officers listed below:

- The Travelers Indemnity Company (IND)
- The Phoenix Insurance Company (PHX)
- The Charter Oak Fire Insurance Company (COF)
- Travelers Property Casualty Company of America (TIL)
- The Travelers Indemnity Company of Connecticut (TCT)
- The Travelers Indemnity Company of America (TIA)
- Travelers Casualty Insurance Company of America (ACJ)

*Wendy C. Ship*  
Secretary

*Brian MacLean*  
President

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COMMERCIAL INLAND MARINE

## COMMERCIAL INLAND MARINE CONDITIONS

The following conditions apply in addition to the Common Policy Conditions and applicable Additional Conditions in Commercial Inland Marine Coverage Forms:

### LOSS CONDITIONS

#### A. Abandonment

There can be no abandonment of any property to us.

#### B. Appraisal

If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

1. Pay its chosen appraiser; and
2. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we will still retain our right to deny the claim.

#### C. Duties In The Event Of Loss

You must see that the following are done in the event of loss or damage to Covered Property:

1. Notify the police if a law may have been broken.
2. Give us prompt notice of the loss or damage. Include a description of the property involved.
3. As soon as possible, give us a description of how, when and where the loss or damage occurred.
4. Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim. This will not increase the Limit of Insurance. However, we will not pay for any subsequent loss or damage resulting from a cause of loss that is not a Covered Cause of Loss. Also, if feasible,

set the damaged property aside and in the best possible order for examination.

5. You will not, except at your own cost, voluntarily make a payment, assume any obligation, or incur any expense without our consent.
6. As often as may be reasonably required, permit us to inspect the property proving the loss or damage and examine your books and records.

Also permit us to take samples of damaged and undamaged property for inspection, testing and analysis, and permit us to make copies from your books and records.

7. We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed.
8. Send us a signed, sworn proof of loss containing the information we request to settle the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.
9. Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or suit.
10. Cooperate with us in the investigation or settlement of the claim.

#### D. Insurance Under Two Or More Coverages

If two or more of this policy's coverages apply to the same loss or damage, we will not pay more than the actual amount of the loss or damage.

#### E. Loss Payment

1. We will give notice of our intentions within 30 days after we receive the sworn proof of loss.
2. We will not pay you more than your financial interest in the Covered Property.
3. We may adjust losses with the owners of lost or damaged property if other than you. If we pay the owners, such payments will satisfy your claim against us for the owners' property. We will not pay the owners more than



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their financial interest in the Covered Property.

- 4. We may elect to defend you against suits arising from claims of owners of property. We will do this at our expense.
- 5. We will pay for covered loss or damage within 30 days after we receive the sworn proof of loss if you have complied with all the terms of this Coverage Part and:
  - a. We have reached agreement with you on the amount of the loss; or
  - b. An appraisal award has been made.
- 6. We will not be liable for any part of a loss that has been paid or made good by others.

**F. Other Insurance**

- 1. You may have other insurance subject to the same plan, terms, conditions and provisions as the insurance under this Coverage Part. If you do, we will pay our share of the covered loss or damage. Our share is the proportion that the applicable Limit of Insurance under this Coverage Part bears to the Limits of Insurance of all insurance covering on the same basis.
- 2. If there is other insurance covering the same loss or damage, other than that described in 1. above, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. But we will not pay more than the applicable Limit of Insurance.

**G. Pair, Sets Or Parts**

**1. Pair Or Set**

In case of loss or damage to any part of a pair or set we may:

- a. Repair or replace any part to restore the pair or set to its value before the loss or damage; or
- b. Pay the difference between the value of the pair or set before and after the loss or damage.

**2. Parts**

In case of loss or damage to any part of Covered Property consisting of several parts when complete, we will only pay for the value of the lost or damaged part.

**H. Recovered Property**

If either you or we recover any property after loss settlement, that party must give the other prompt notice. At your option, the property will be returned to you. You must then return to us the amount we paid to you for the property. We will pay recovery expenses and the expenses to repair the recovered property, subject to the Limit of Insurance.

**I. Reinstatement Of Limit After Loss**

The Limit of Insurance will not be reduced by the payment of any claim, except for total loss or damage of a scheduled item, in which event we will refund the unearned premium on that item.

**J. Transfer Of Rights Of Recovery Against Others To Us**

If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing:

- 1. Prior to a loss to your Covered Property.
- 2. After a loss to your Covered Property only if, at time of loss, that party is one of the following:
  - a. Someone insured by this insurance; or
  - b. A business firm:
    - (1) Owned or controlled by you; or
    - (2) That owns or controls you.

This will not restrict your insurance.

**GENERAL CONDITIONS**

**A. Concealment, Misrepresentation Or Fraud**

This Coverage Part is void in any case of fraud, intentional concealment or misrepresentation of a material fact, by you or any other insured, at any time, concerning:

- 1. This Coverage Part;
- 2. The Covered Property;
- 3. Your interest in the Covered Property; or
- 4. A claim under this Coverage Part.

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**B. Control Of Property**

Any act or neglect of any person other than you beyond your direction or control will not affect this insurance.

The breach of any condition of this Coverage Part at any one or more locations will not affect coverage at any location where, at the time of loss or damage, the breach of condition does not exist.

**C. Legal Action Against Us**

No one may bring a legal action against us under this Coverage Part unless:

1. There has been full compliance with all the terms of this Coverage Part; and
2. The action is brought within 2 years after you first have knowledge of the direct loss or damage.

**D. No Benefit To Bailee**

No person or organization, other than you, having custody of Covered Property will benefit from this insurance.

**E. Policy Period, Coverage Territory**

We cover loss or damage commencing:

1. During the policy period shown in the Declarations; and
2. Within the coverage territory.

**F. Valuation**

The value of property will be the least of the following amounts:

1. The actual cash value of that property;
2. The cost of reasonably restoring that property to its condition immediately before loss or damage; or
3. The cost of replacing that property with substantially identical property.

In the event of loss or damage, the value of property will be determined as of the time of loss or damage.

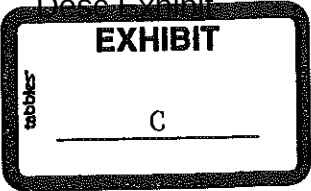


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# RAILROAD ROLLING STOCK COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy, the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section F. Definitions.

### A. Coverage

We will pay for direct physical loss of or damage to Covered Property from any of the Covered Causes of Loss.

#### 1. Covered Property

Covered Property, as used in this Coverage Form, means the following property described in the Declarations:

- a. Your railroad rolling stock including locomotives, railcars, and other equipment operated on railroad tracks;
- b. Your mobile equipment not licensed for highway use, which you use in the course of your railroad operations; and
- c. Similar property of others in your care, custody or control.

#### 2. Property Not Covered

Covered Property does not include:

- a. Property that you loan, lease or rent to others;
- b. Property for sale or in the course of manufacture;
- c. Property while waterborne;
- d. Property contained on or in railroad rolling stock or mobile equipment;
- e. Railroad tracks, beds, switches, signals, trestles, bridges, tunnels or ties; or
- f. Contraband or property in the course of illegal transportation or trade.

#### 3. Covered Causes Of Loss

Covered Causes of Loss means Risks Of Direct Physical Loss Or Damage except those causes of loss listed in the Exclusions.

#### 4. Additional Coverages

##### a. Additionally Acquired Property

If during the policy period you acquire additional property of a type already cov-

ered by this coverage form, we will cover such property for up to 90 days, but not beyond the end of the policy period.

The most we will pay for loss or damage is the lesser of:

- (1) 25% of the total Limit of Insurance shown in the Declarations for that type of property; or
- (2) \$250,000.

You will report values of such property to us within 90 days from the date you take possession and will pay any additional premium due. If you do not report such property, coverage will cease automatically 90 days after the date the property is acquired or at the end of the policy period, whichever occurs first.

The Coinsurance Additional Condition does not apply to this coverage.

This Additional Coverage does not increase the applicable Limit of Insurance shown in the Declarations.

##### b. Debris Removal

(1) We will pay your expenses to remove debris of Covered Property caused by or resulting from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date of direct physical loss or damage.

(2) The most we will pay under this Additional Coverage is 25% of:

- (a) The amount we pay for the direct physical loss or damage to Covered Property; plus
- (b) The deductible in this policy applicable to that loss or damage.



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(3) Payment under this Additional Coverage will not increase the applicable Limit of Insurance, but if:

(a) The sum of direct physical loss or damage and debris removal expense exceeds the Limit of Insurance; or

(b) The debris removal expense exceeds the amount payable under the 25% limitation;

we will pay up to an additional \$75,000 in any one occurrence under this Additional Coverage.

(4) This Additional Coverage does not apply to costs to:

(a) Extract "pollutants" from land or water; or

(b) Remove, restore or replace polluted land or water.

c. Preservation Of Property

If it is necessary to move Covered Property to preserve it from loss or damage by a Covered Cause of Loss, we will pay for any direct physical loss or damage to that property:

(1) While it is being moved or while temporarily stored at another location; and

(2) Only if the loss or damage occurs within 90 days after the property is first moved.

This Additional Coverage does not increase the applicable Limit of Insurance.

d. Fire Department Service Charge

When the fire department is called to save or protect Covered Property from a Covered Cause of Loss, we will pay up to \$25,000 for your liability for fire department service charges:

(1) Assumed by contract or agreement prior to loss; or

(2) Required by local ordinance.

No Deductible applies to this Additional Coverage.

e. Pollutant Clean Up And Removal

We will pay your expense to extract "pollutants" from land or water if the dis-

charge, dispersal, seepage, migration, release or escape of the "pollutants" is caused by or results from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date on which the Covered Cause of Loss occurs.

This Additional Coverage does not apply to costs to test for, monitor or assess the existence, concentration or effects of "pollutants". But we will pay for testing which is performed in the course of extracting the "pollutants" from the land or water.

The most we will pay under this Additional Coverage is \$25,000 for the sum of all covered expenses arising out of Covered Causes of Loss occurring during each separate 12 month period of this policy.

The limit for this Additional Coverage is in addition to the Limit of Insurance.

f. Fire Protective Systems

If your fire protective equipment discharges accidentally or to control a Covered Cause loss, we will pay for your expense to:

(1) Recharge or refill your fire protective systems; and

(2) Replace or repair faulty valves or controls which caused the discharge.

The most we will pay under this Additional Coverage is \$75,000.

g. Valuable Papers and Records

We will pay your costs to research, replace, or restore lost or damaged valuable papers and records, including those which are on computer software, for which there are no duplicates. The most we will pay under this Additional Coverage is \$50,000. But we will not pay for loss or damage to accounts, bills, deeds, evidences of debt, currency, money, notes or securities.

h. Rerailment Expense

We will pay your reasonable and necessary expense to upright and re-rail Covered Property due to a Covered Cause of

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Loss. The most we will pay under this Additional Coverage is \$25,000 for the sum of all covered expenses arising during each separate 12 month period of this policy.

The limit for this Additional Coverage is in addition to the Limit of Insurance.

i. "Fungus", Wet Rot Or Dry Rot

We will pay for loss or damage by "fungus", or wet or dry rot that is the result of one or more of the Covered Causes of Loss, except fire or lightning, that occurs during the policy period and only if all reasonable means were used to save and preserve the property from further damage at the time of and after the occurrence of any such cause of loss. As used in this Additional Coverage, the term loss or damage means:

- (1) Direct physical loss or damage to Covered Property caused by "fungus", or wet or dry rot, including the cost of removal of the "fungus", or wet or dry rot;
- (2) The cost to tear out and replace any part of the Covered Property as needed to gain access to the "fungus", or wet or dry rot; and
- (3) The cost of testing performed after removal, repair, replacement or restoration of the damaged property is completed, provided there is a reason to believe that "fungus", or wet or dry rot is present.

The most we will pay under this Additional Coverage in each separate 12 month period of this policy is \$25,000 for the sum of all loss or damage described in (1), (2) and (3) above. With respect to a particular occurrence which results in "fungus", or wet or dry rot, we will not pay more than a total of \$25,000 even if the "fungus", or wet or dry rot continues to be present or active, or recurs, in a later policy period. This Additional Coverage does not increase the applicable Limit of Insurance.

B. Exclusions

- 1. We will not pay for loss or damage caused directly or indirectly by any of the following.

Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss or damage.

a. Governmental Action

Seizure or destruction of property by order of governmental authority.

But we will pay for loss or damage caused by or resulting from acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread if the fire would be covered under this Coverage Form.

b. Nuclear Hazard

- (1) Any weapon employing atomic fission or fusion; or
- (2) Nuclear reaction or radiation, or radioactive contamination from any other cause. But if nuclear reaction or radiation, or radioactive contamination results in fire, we will pay for the direct loss or damage caused by that fire if the fire would be covered under this Coverage Form.

c. War And Military Action

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power or action taken by governmental authority in hindering or defending against any of these.

d. "Fungus", Wet Rot And Dry Rot

Presence, growth, proliferation, spread or any activity of "fungus", or wet or dry rot.

But if "fungus", or wet or dry rot results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

This exclusion does not apply:

- (1) When "fungus", or wet or dry rot results from fire or lightning; or



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(2) To the extent that coverage is provided in the "Fungus", Wet Rot And Dry Rot Additional Coverage.

Exclusions B.1.a. through B.1.d. apply whether or not the loss event results in widespread damage or affects a substantial area.

2. We will not pay for loss or damage caused by or resulting from any of the following:

- a. Delay, loss of use, loss of market or any other consequential loss.
- b. Dishonest or criminal act committed by:
  - (1) You, any of your partners, employees, directors, trustees, or authorized representatives;
  - (2) A manager or a member if you are a limited liability company;
  - (3) Anyone else with an interest in the property, or their employees or authorized representatives; or
  - (4) Anyone else to whom the property is entrusted for any purpose.

This exclusion applies whether or not such persons are acting alone or in collusion with other persons or such acts occur during the hours of employment.

This exclusion does not apply to Covered Property that is entrusted to others who are carriers for hire or to acts of destruction by your employees. But theft by employees is not covered.

- c. Work upon the property.
 

But if work upon the property results in fire or explosion, we will pay for direct loss or damage caused by that fire or explosion if the fire or explosion would be covered under this Coverage Form.
- d. Artificially generated current creating a short circuit or other electric disturbance within an article covered under this Coverage Form.
 

But if artificially generated current, as described above, results in fire or explosion, we will pay for direct loss or damage caused by that fire or explosion if the fire or explosion would be covered under this Coverage Form.

This exclusion only applies to loss or damage to that article in which the disturbance occurs.

- e. Unexplained disappearance.
  - f. Shortage found upon taking inventory.
  - g. Contamination of any kind.
  - h. Voluntary parting with any property by you or anyone entrusted with the property if induced to do so by any fraudulent scheme, trick, device or false pretense.
  - i. Unauthorized instructions to transfer property to any person or to any place.
  - j. Neglect of an insured to use all reasonable means to save and preserve property from further damage at and after the time of loss.
3. We will not pay for loss or damage caused by or resulting from any of the following. But if loss or damage by a Covered Cause of Loss results, we will pay for the loss or damage caused by that Covered Cause of Loss.
- a. Wear and tear, depreciation.
  - b. Any quality in the property that causes it to damage or destroy itself, hidden or latent defect, gradual deterioration.
  - c. Insects, vermin, rodents, birds or other animals.
  - d. Corrosion, rust, dryness or dampness of atmosphere, extremes or changes of temperature, whether natural or man-made, including freezing or melting.
  - e. Mechanical breakdown, derangement of mechanical parts, equipment breakdown, malfunction or failure of the Covered Property.
  - f. Any condition or event, including explosion, within a hot water boiler, steam boiler, steam pipe, steam turbine or steam engine.
  - g. Programming errors.
  - h. Omission in, or faulty, inadequate or defective design, specifications, workmanship, repair, construction, renovation, remodeling or maintenance of the Covered Property.
  - i. "Flat wheel".

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C. Limits Of Insurance

The most we will pay for loss or damage in any one occurrence is the applicable Limit of Insurance shown in the Declarations.

D. Deductible

We will not pay for loss or damage in any one occurrence until the amount of the adjusted loss or damage before applying the applicable Limits of Insurance exceeds the Deductible shown in the Declarations.

We will then pay the amount of the adjusted loss or damage in excess of the Deductible, up to the applicable Limit of Insurance.

E. Additional Coverage Conditions

The following conditions apply in addition to the Commercial Inland Marine Conditions and the Common Policy Conditions.

1. Valuation

As shown on the Coverage Form Declarations, the value of the property will be as follows unless otherwise endorsed on the policy:

a. AAR Valuation

If Association of American Railroads (AAR) Valuation is shown as the applicable valuation, the value of the property will be determined according to the Interchange Rules of the American Association of Railroads.

We will not pay more for loss or damage than the least of:

- (1) The value of the property as determined by AAR; or
(2) The applicable Limit of Insurance.

b. Actual Cash Value

If Actual Cash Value is shown as the applicable valuation, we will not pay more for loss or damage than the least of:

- (1) The actual cash value of that property;
(2) The cost of reasonably restoring that property to its condition immediately before the loss or damage;
(3) The cost of replacing that property with substantially identical property; or
(4) Your legal liability for property of others.

c. Stated Amount

If Stated Amount Valuation is shown as the applicable valuation, we will not pay more for loss or damage than the least of;

- (1) The Limit of Insurance shown in the schedule for that property;
(2) The cost of reasonably restoring that property to its condition immediately before loss or damage;
(3) The cost of replacing that property with substantially identical property; or
(4) Your legal liability for property of others.

2. Coverage Territory

We cover property wherever located within:

- a. The United States of America (including its territories and possessions);
b. Puerto Rico; and
c. Canada.

3. Coinsurance

If a Coinsurance percentage is shown in the Declarations, the following condition applies:

We will not pay the full amount of any loss if the value of Covered Property at the time of loss times the Coinsurance percentage shown for it in the Declarations is greater than the Limit of Insurance for the property.

Instead, we will determine the most we will pay using the following steps:

- a. Multiply the value of Covered Property at the time of loss by the Coinsurance percentage;
b. Divide the Limit of Insurance of the property by the figure determined in Step a.;
c. Multiply the total amount of loss, before the application of any deductible, by the figure determined in Step b.; and
d. Subtract the deductible from the figure determined in Step c.

We will pay the amount determined in Step (d) or the Limit of Insurance, whichever is less. For the remainder, you will either have to rely on other insurance or absorb the loss yourself.



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4. Numbering or Names

You may change only your internal numbering or names of Covered Property, without material change to the actual Covered Property, provided you maintain a permanent record of the changes and provide them to us in the event of loss.

F. Definitions

1. "Flat wheel" means the wearing of a wheel's surface as a result of a braking action, failure of a braking mechanism to release after a

raking action, or other failure of a wheel to turn.

2. "Fungus" means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or by-products produced or released by fungi.

3. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

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POLICY NUMBER: QT-630-6357L188-TIL-13

COMMERCIAL INLAND MARINE  
GENERAL PURPOSE ENDORSEMENT

RAILROAD TRACK & ROAD BED DEDUCTIBLE

This endorsement modifies insurance provided under the COMMERCIAL INLAND MARINE COVERAGE PART DECLARATIONS.

The following specific deductible is added under RAILROAD ROLLING STOCK COVERAGE in Section II - DEDUCTIBLE in COMMERCIAL INLAND MARINE COVERAGE PART DECLARATIONS:

"Railroad Track and Roadbed Deductible": \$250,000.

"Claims involving insured damage in excess of \$350,000": \$100,000



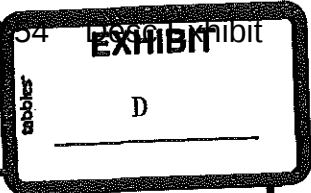
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**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **RAILROAD ROLLING STOCK DAMAGE TO TRACK AND ROADBED COVERAGE**

This endorsement modifies insurance provided under the RAILROAD ROLLING STOCK COVERAGE FORM.

A. The following Additional Coverage is added to Section - A Coverage:

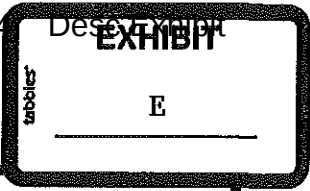
1. **Damage to Track and Roadbed**

We will pay your reasonable and necessary expense to repair or replace damaged track and roadbed located on your premises or for which you are legally liable if the damage is

caused by derailment or collision. The most we will pay under this Additional Coverage is \$25,000 for the sum of all covered expenses arising during each separate 12 month period of this policy.

The limit for this Additional Coverage is in addition to the Limit of Insurance.

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POLICY NUMBER: QT-630-6357L1 88-TIL-13

COMMERCIAL INLAND MARINE  
ISSUE DATE: 04-19-13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## RAILROAD ROLLING STOCK "BUSINESS INCOME" AND "EXTRA EXPENSE" COVERAGE

This endorsement modifies insurance provided under the RAILROAD ROLLING STOCK COVERAGE FORM.

A. The following Additional Coverage is added to Section - A Coverage:

1. "Business Income" and "Extra Expense"

We will pay:

(a) The amount by which your "Business Income" is actually reduced during the "period of restoration" due to loss of or damage to Covered Property from a Covered Cause of Loss; and

(b) Your necessary "Extra Expense" to continue normal operations following loss of or damage to Covered Property from a Covered Cause of Loss.

The most we will pay in total for "Business Income" and "Extra Expense" under this Additional Coverage is:

\$ 750,000 per day  
but we will not pay more than  
\$ 7,500,000 in any one occurrence.

A 24 hour waiting period deductible applies to this Additional Coverage.

B. The following Definitions are added to Section - F Definitions:

1. "Business Income" means your net income that would have been earned had no loss or damage occurred, plus normal payroll and expenses which are reasonable and neces-

sary for you to operate your business after loss or damage.

2. "Extra Expense" means reasonable and necessary expense you incur in order to continue your business operations after loss or damage that you would not have incurred had there been no loss or damage.

3. "Period of Restoration" means the period of time that:

(a) Begins with the date of loss of or damage to Covered Property caused by or resulting from any Covered Cause of Loss; and

(b) Ends on the date when the property should be repaired, rebuilt or replaced with reasonable speed and similar quality.

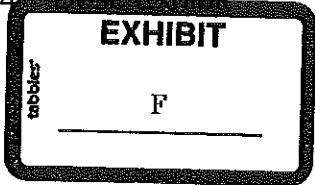
"Period of Restoration" does not include any increased period required due to the enforcement of any ordinance or law that:

(a) Regulates the construction, use or repair, or requires the tearing down of any property; or

(b) Requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify, or neutralize, or in any way respond to, or assess the effects of "pollutants".

The expiration date of this policy will not cut short the "period of restoration".

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One Tower Square, Hartford, Connecticut 06183

TRAVELERS CORP. TEL: 1-800-328-2189  
COMMERCIAL INLAND MARINE  
COMMON POLICY DECLARATIONS  
ISSUE DATE: 04/19/13  
POLICY NUMBER: QT-630-6357L188-TIL-13

INSURING COMPANY:  
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA

1. NAMED INSURED AND MAILING ADDRESS:  
MONTREAL MAINE AND ATLANTIC  
CORPORATION (AS PER IL T8 00)  
15 IRON ROAD  
BANGOR, ME 04401

2. POLICY PERIOD: From 04/01/13 to 04/01/14 12:01 A.M. Standard Time at  
your mailing address.

3. LOCATIONS  
Premises Bldg.  
Loc. No. No. Occupancy Address  
  
SEE IL TO 03

4. COVERAGE PARTS FORMING PART OF THIS POLICY AND INSURING COMPANIES:  
DELUXE PROPERTY COVERAGE PART DECLARATIONS DX TO 00 11 12 TIL  
COMMERCIAL INLAND MARINE COV PART DECLARATIONS CM TO 01 07 86 TIL

5. NUMBERS OF FORMS AND ENDORSEMENTS  
FORMING A PART OF THIS POLICY: SEE IL T8 01 10 93

6. SUPPLEMENTAL POLICIES: Each of the following is a separate policy  
containing its complete provisions:  
Policy Policy No. Insuring Company

7. PREMIUM SUMMARY:  
Provisional Premium \$ 75,053  
Due at Inception \$ 18,992  
Due at Each \$ SEE IL TO 30

NAME AND ADDRESS OF AGENT OR BROKER:  
THE PLEXUS GROUPE LLC (YK931)  
21805 FIELD PKWY STE 300  
DEER PARK, IL 60010

COUNTERSIGNED BY:  
\_\_\_\_\_  
Authorized Representative

DATE: \_\_\_\_\_

IL TO 02 11 89(REV. 09-07) PAGE 1 OF 1  
OFFICE: CHICAGO IL



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POLICY NUMBER: QT-630-6357L188-TIL-13  
EFFECTIVE DATE: 04-01-13  
ISSUE DATE: 04-19-13

LISTING OF FORMS, ENDORSEMENTS AND SCHEDULE NUMBERS

THIS LISTING SHOWS THE NUMBER OF FORMS, SCHEDULES AND ENDORSEMENTS BY LINE OF BUSINESS.

IL TO 02 11 89 COMMON POLICY DECLARATIONS  
IL T8 01 10 93 FORMS, ENDORSEMENTS AND SCHEDULE NUMBERS  
IL T3 18 05 11 COMMON POLICY CONDITIONS-DELUXE  
IL TO 30 12 90 NON-STANDARD PAYMENT SCHEDULE  
IL TO 03 04 96 LOCATION SCHEDULE  
IL T8 00 GENERAL PURPOSE ENDORSEMENT

DELUXE PROPERTY

DX TO 00 11 12 DELUXE PROP COV PART DECLARATIONS  
DX 00 03 07 94 DELUXE PROP COV PART SCHED-SPECIF LIMITS  
DX 00 04 11 12 TABLE OF CONTENTS - DELUXE PROP COV PART  
DX T1 00 11 12 DELUXE PROPERTY COVERAGE FORM  
DX T1 01 11 12 DELUXE BI (AND EE) COVERAGE FORM  
DX T3 01 11 12 CAUSES OF LOSS-EARTHQUAKE  
DX T3 02 11 12 CAUSES OF LOSS - BROAD FORM FLOOD  
DX T3 17 03 98 FUNCTIONAL BUILDING VALUATION  
DX T4 02 01 08 TERRORISM RISK INS ACT 2002 DISCLOSURE  
DX 00 07 10 94 MAINE - STANDARD FIRE POLICY PROVISIONS  
DX 01 67 11 12 MAINE CHANGES  
DX 01 82 11 12 VERMONT CHANGES  
IL F0 86 06 09 MAINE CHANGES-POST-JUDGMENT INTEREST  
DX T3 98 04 02 ELECTRONIC VANDALISM LIMITATION ENDT

INLAND MARINE

CM A0 28 08 96 IMPAK COVERAGE PART DECLARATIONS  
CM T0 62 10 08 WAREHOUSE OPERATOR'S COV FORM DEC  
CM T0 77 02 08 RAILROAD ROLLING STOCK COV FORM DEC  
CM T3 71 08 96 IM PAK COVERAGE SUMMARY  
CM T0 11 08 05 TABLE OF CONTENTS  
CM 00 01 09 04 COMMERCIAL INLAND MARINE CONDITIONS  
CM T1 43 08 96 IMPAK COVERAGE FORM  
CM T1 86 10 08 WAREHOUSE OPERATOR'S COV FORM  
CM T1 92 02 08 RAILROAD ROLLING STOCK COVERAGE FORM  
CM T8 00 GENERAL PURPOSE ENDORSEMENT  
CM T3 98 01 08 TERRORISM RISK INS ACT 2002 DISCLOSURE  
CM T5 27 02 08 RR ROLL STOCK "BUS. INC" & "EXT EXP" COV  
CM T5 29 02 08 RR ROLL STOCK EART MOVT LMT OF INS/DED  
CM T5 32 02 08 RR ROLL STOCK "FLOOD" LIMIT OF INS & DED  
CM T5 37 02 08 RR ROLLING STOCK DMG TRACK & ROADBED COV  
CM T5 38 02 08 RAILROAD ROLLING STOCK VARIED VALUATION  
CM T5 60 01 10 BLANKET LOSS PAYEES  
CM T5 61 01 10 BLANKET NAMED INSURED



IL T8 01 10 93

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POLICY NUMBER: QT-630-6357L188-TIL-13

EFFECTIVE DATE: 04-01-13

ISSUE DATE: 04-19-13

INTERLINE ENDORSEMENTS

IL T3 82 08 06	EXCL OF LOSS DUE TO VIRUS OR BACTERIA
IL T3 79 01 08	CAPS ON LOSSES FROM CERT ACTS OF TERROR
IL F0 06 09 07	ME CHANGES-CONCEALMENT, MISREP OR FRAUD
IL F0 66 09 07	VERMONT CHANGES STATUTORY LIABILITY
IL T3 55 08 98	EXCL OF CERTAIN COMPUTER REL LOSSES
IL T9 31 02 11	ME CHANGES-CANCELLATION AND NONRENEWAL
IL T9 32 09 07	VT CHANGES CONCEAL MISREPRESENT OR FRAUD
IL T9 89 10 94	VERMONT CHANGES
IL T9 93 10 94	INS INSPECTION SERVICES EXEMPT FROM LIAB

POLICYHOLDER NOTICES

PN T9 14 11 12	NICC - DELUXE PROP CVG FORM
PN T9 15 11 12	NICC - DELUXE BI/EE FORMS

IL T8 01 10 93

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One Tower Square, Hartford, Connecticut 06183

COMMERCIAL INLAND MARINE  
COVERAGE PART DECLARATIONS

POLICY NO.: QT-630-6357L188-TIL-13  
ISSUE DATE: 04-19-13

INSURING COMPANY:  
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA

DECLARATIONS PERIOD: From 04-01-13 to 04-01-14 12:01 A.M. Standard Time at your mailing address shown in the Common Policy Declarations.

The Commercial Inland Marine Coverage Part consists of these Declarations, the Commercial Inland Marine Conditions Form and the Coverage Forms shown below.

I. COVERED PROPERTY AND LIMITS OF INSURANCE

RAILROAD ROLLING STOCK COVERAGE FORM

A. Schedule of Covered Property	Limit of Insurance
1. RAILROAD ROLLING STOCK SCHEDULE DATED 03/29/2011	\$ 5,000,000
2.	\$
3.	\$
4.	\$
5.	\$
6.	\$
7.	\$
8.	\$
9.	\$
10.	\$

B. All Covered Property In Any One Occurrence: \$ 7,500,000

II. Deductible: \$ 50,000

III. Valuation:

- Association of American Railroads (AAR)
- Actual Cash Value
- Stated Amount

IV. Coinsurance: %

CM T0 77 02 08

PRODUCER: THE PLEXUS GROUPE LLC

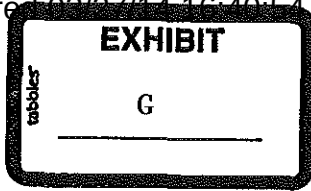
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OFFICE: CHICAGO IL

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Janice McKay  
716-855-5664



P.O. BOX 242  
Buffalo, NY 14240

JAMCKAY@TRAVELERS.COM  
FAX 1-877-749-0037

NEW CLAIM REFERRAL

DATE: 7/8/13

To: claimspro / Claude St-Amour Fax #:

OUR INSURED: Montreal Maine & Atlantic

OUR CLAIM #: BVU3816 DATE OF LOSS: , 7/6/13

CLAIMANTS: Montreal Maine & Atlantic

OTHER INFORMATION: Train derailment Lac Megantic QC. This is first party property claim. We need full investigation.

Type of Loss:

Auto  General Liability BI  PD  Commercial Property

We are referring the attached loss to your office for:

Full investigation  
 Task assignment / specify details -

Please include the following in your investigation:

- Contact Insured within 24 hours
- Contact claimant(s) attorney within 24 hours
- Contact all other parties within 48 hours
- Complete "contact sheet"
- Obtain medical authorization(s)
- Obtain wage authorization (s)
- Obtain statements from: Insured  Claimant(s)  Witness
- Inspect damaged property – are you able to determine what caused break to fail.
- Submit Index form to IBC
- Request Police/fire/other relevant reports
- Obtain photos of damaged train. \_\_\_\_\_
- Complete Bodily Injury Worksheet
- Obtain non-waiver agreement
- Other - write estimate to repair or advise on total loss value.

Special Instructions:

Within 24 hours of assignment please provide me with the name of handling adjuster .

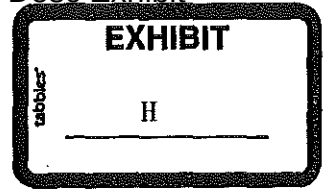
Note: No authority is granted to settle or deny this claim at this time.

Please submit your 1<sup>st</sup> report within 30 days from the date of the assignment.

Thank you for your attention to this matter.







# TRAVELERS

**John Callahan**

*Executive General Adjuster  
Travelers Insurance  
Property Major Case Unit, Rochester, NY*

(585) 723-8589  
(877) 265-1148 (fax)

One Tower Square  
Hartford, CT 06183

August 9, 2013

**VIA CERTIFIED MAIL**

Montreal, Maine and Atlantic Corp. and all other Insureds  
15 Iron Head  
Bangor, ME 04401  
Attn: Edward Burkhardt

Insured:	Montreal, Maine and Atlantic Corp. et al.
Claim Number:	EMN6755
Policy Number	630-6357L188
Date of Loss:	July 6, 2013

Dear:

Travelers Property Casualty Company of America ("Travelers") hereby acknowledges receipt of the above-referenced claim which was received on July 6, 2013 and relates to a derailment that occurred in Lac-Megantic, Quebec. The following represents our current understanding of the status of this claim:

**I. CLAIM FOR PROPERTY DAMAGE**

Travelers issued policy number 630-6357L188 for the term of April 1, 2013 to April 1, 2014 to you which provides, in relevant part, as follows:

**RAILROAD ROLLING STOCK COVERAGE FORM  
CM T1 92 02 08**

**A. Coverage**

We will pay for direct physical loss of or damage to Covered Property from any of the Covered Causes of Loss.

**1. Covered Property**

Covered Property, as used in this Coverage Form, means the following property described in the Declarations:

Page 2

- a. Your railroad rolling stock including lo-comotives, railcars, and other equipment operated on railroad tracks;
- b. Your mobile equipment not licensed for highway use, which you use in the course of your railroad operations; and
- c. Similar property of others in your care, custody or control.

The Declarations of this part of the policy describe the following property only:

**I. COVERED PROPERTY AND LIMITS OF  
INSURANCE RAILROAD ROLLING STOCK  
COVERAGE FORM  
CM T0 77 02 08**

A. Schedule of Covered Property

**1. RAILROAD ROLLING STOCK  
SCHEDULE DATED  
03/29/2011**

The policy also provides specifically as follows:

2. Property Not Covered

Covered Property does not include:

- a. Property that you loan, lease or rent to others;
- b. Property for sale or in the course of manufacture;
- c. Property while waterborne;
- d. Property contained on or in railroad rolling stock or mobile equipment;
- e. Railroad tracks, beds, switches, signals, trestles, bridges, tunnels or ties; or
- f. Contraband or property in the course of illegal transportation or trade.

Based on the above quoted policy provisions, only that property listed on the schedule submitted to Travelers (which was updated on March 7, 2013) is covered under the

Page 3

Railroad Rolling Stock coverage form of the policy<sup>1</sup>. As of the current time, it is our understanding that the only items of Covered Property that were at the scene of the July 6, 2013 loss incident were 4 locomotives and 1 caboose, although it is also our understanding that there may have been one track owned by you and located on a sidetrack that was damaged by the fire and/or explosion that ensued. We are continuing to investigate whether any of these items were damaged and, if so, the extent of any damage sustained. It does not, however, appear that any of the railcars attached to these locomotives and this caboose were Covered Property.

## II. EXPENSE TO REPAIR TRACKS AND ROADBEDS

Endorsement CM T5 37 02 08 to the Railroad Rolling Stock Coverage Form of the Policy provides the following Additional Coverage for expenses incurred to repair or replace damaged Tracks and/or Roadbeds:

A. The following Additional Coverage is added to Section – A Coverage:

### 1. Damage to Track and Roadbed

We will pay your reasonable and necessary expense to repair or replace damaged track and roadbed located on your premises or for which you are legally liable if the damage is caused by derailment or collision. The most we will pay under this Additional Coverage is \$25,000 for the sum of all covered expenses arising during each separate 12 month period of this policy.

The limit for this Additional Coverage is in addition to the Limit of Insurance.

It appears that the \$25,000 limit for this Additional Coverage was intended to be \$250,000, not \$25,000, and Endorsement CM T8 00 makes it clear that this coverage is subject to a deductible of \$250,000. Subject to the \$250,000 deductible, therefore, Travelers is prepared to make payment in an amount not to exceed \$250,000 for expenses you incur to repair or replace damaged track and/or roadbed on your premises or for which you are legally liable when and if you provide us with evidence that these expenses have been incurred.

## III. BUSINESS INCOME AND EXTRA EXPENSE

Form CM T5 27 02 08 of the policy provides as follows:

A. The following Additional Coverage is added to Section – A Coverage:

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<sup>1</sup> Endorsement form CM T5 38 02 08 does amend the Declarations to add "Similar property of others not under lease to you while at the Hermon, Derby, or Millinocket shops for repair/refurbishing/slow speed testing" as Covered Property, but that property is not in issue in this claim.

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1. "Business Income" and "Extra Expense"

We will pay:

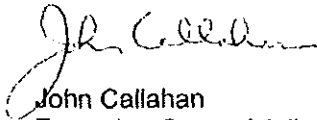
- (a) The amount by which your "Business Income" is actually reduced during the "period of restoration" due to loss of or damage to Covered Property from a Covered Cause of Loss; and
- (b) Your necessary "Extra Expense" to continue normal operations following loss of or damage to Covered Property from a Covered Cause of Loss.

As noted above, it appears that the locomotives and caboose that were a part of the train that was involved in the July 6, 2013 loss incident are the only items of Covered Property that were at the scene of the accident. It also appears that the intent of the parties was that the policy was to provide extra expense coverage only. Nevertheless, under full reservation of its rights, Travelers is continuing to investigate whether any of these items of property sustained physical loss or damage and, if any physical loss or damage to these items was sustained, whether you sustained any loss of Business Income or incurred any Extra Expenses as a result of any such loss or damage. However, even if all of the terms of Form CM T5 27 02 08 were applicable, any loss of income sustained or extra expenses incurred as a result of damage to the tracks, the roadbeds, the railcars, or any other property damaged by the July 6, 2013 incident is not covered under the policy.

As noted above, Travelers is continuing to investigate the question of whether any scheduled items of property sustained physical loss or damage and, if so, whether you sustained any loss of Business Income or incurred any Extra Expenses as a result of any such damage. As also noted above, subject to the \$250,000 deductible and the \$250,000 limit of coverage (in excess of the deductible), we are prepared to respond if and when you provide us with documentation that you have incurred expenses for the repair or replacement of damaged track or roadbed. Travelers, however, continues to reserve all of its rights under the insurance policy and applicable law, and neither this letter nor any other statements or actions of Travelers or its representatives should be construed to be a waiver of any of these rights.

If there are any questions, please do not hesitate in contacting the undersigned.

Sincerely,



John Callahan  
Executive General Adjuster  
Business Insurance Major Case Unit  
Travelers Property Casualty Company of America

CC: The Plexus Groupe LLC