Case No. 09-60661

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WMS INDUSTRIES, INC.,
Plaintiff - Appellant,

v.

FEDERAL INSURANCE CO.,
Defendant - Appellee.

On Appeal from the United States District Court
for the Southern District of Mississippi

REPLY BRIEF OF PLAINTIFF-APPELLANT WMS INDUSTRIES, INC.

Craig C. Martin*
Barry Levenstam
Matt D. Basil
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
Phone: (312) 222-9350
Fax: (312) 527-0484

Lindsay C. Harrison
JENNER & BLOCK LLP
1099 New York Avenue NW
Suite 900
Washington, DC 20001
Phone: (202) 639-6000
Fax: (202) 639-6066

Raymond L. Brown
BROWN BUCHANAN, P.A.
3112 Canty Street
Post Office Box 2220
Pascagoula, MS 39569-2220
Phone: (228) 762-0035
Fax: (228) 762-0299

* *Counsel of Record*

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

As WMS's Opening Brief demonstrated, WMS purchased an insurance policy to cover its business income losses in the event of a natural disaster like Hurricane Katrina. That Policy provides that once such a disaster damages one of WMS's covered premises and thereby impairs WMS's operations there, WMS becomes entitled to compensation throughout the period of restoration for its business income losses that result from damage "to property" — a defined term that is *not* limited to property at covered premises. Federal drafted the Policy. Although Federal now suggests that it would not have issued such broad coverage, this is precisely the scope of coverage its Policy provided. Moreover, it is the scope of coverage WMS purchased to protect its business income, a scope of coverage that was necessary given the nature of its business.

Even more important than what the parties now say in litigation, however, is the plain text of the Policy. If this Court focuses only on the Policy's text, as the law requires, WMS must prevail. Federal agreed to restore WMS's business income to the level WMS would have achieved if there had been no loss or damage "to property," and the property of the casinos with which WMS did business fits squarely within the term "property" as the Policy defined it: "**Property** means: **building**; **personal property**; **personal property of employees**; **electronic data**

processing property; **valuable papers**; **fine arts**; or **research and development property**." RE-85; Tr. Ex. P-72.[1] The district court erroneously imposed an unwritten limitation on the type of property concerned, holding that Federal's Policy covered only those losses caused by damage to the property physically located at Premises 24. In so holding, the district court rewrote the Policy, adding words that are not there and combining separate sections of the Policy in a manner that renders key Policy language superfluous. By so doing, the district court rendered a $100 million insurance policy essentially worthless. Consequently, this Court should vacate the judgment of the district court and remand for a recalculation of damages.

ARGUMENT

I. The Interpretation Adopted By The District Court And Defended By Federal Contravenes The Plain Language Of The Policy.

Federal concedes that this Court must focus first and foremost on the Policy's plain text. *See* Fed. Br. 19. Federal also concedes that a court may not rewrite an insurance policy nor add words that are not already there in interpreting what coverage it provides. *See id*. 19-20. Yet Federal's brief distracts from the only thing that matters — the Policy's plain language. Without rewriting the Policy

[1] Citations to the Record Excerpts are abbreviated "RE-__," providing the page number of the Record Excerpts. Citations to the Record on Appeal are abbreviated "R-__," with parallel citations to both the Record on Appeal and Record Excerpts provided where applicable. Trial exhibits in the Record on Appeal did not receive page numbers when the district court assembled the record; accordingly, trial exhibits that do not appear in the Record Excerpts are abbreviated "Tr. Ex __."

or adding words that are not there, the Policy indisputably provided WMS with Business Income and Extra Expenses (BI/EE) coverage for all of its business income losses incurred due to impaired business operations at Premises 24 as a result of Hurricane Katrina, and the district court erred in holding to the contrary.

A. Federal's Interpretation Erroneously Rewrites The Policy By Merging The Trigger And Scope Of Coverage Provisions To Impose A Non-Existent Limitation On The Term "Property."

Federal attempts subtly to alter the Policy's text by merging two separate Policy provisions into one. The Policy sets forth in separate sections (1) the requirements to trigger coverage, which are the same for all of the Policy's Premises Coverages, and (2) the scope of each of those Premises Coverages, including BI/EE coverage, which scope differs depending on which form of Premises Coverage is at issue. RE-64. Both the district court and Federal agree that WMS met the requirements of the trigger clause: the Policy's Premises Coverages were indisputably triggered by the extensive damage to Premises 24 caused by Hurricane Katrina. Fed. Br. 4, 12. This appeal therefore turns on the interpretation of the latter provision, and specifically on whether the phrase "to property" in the Policy's BI/EE coverage grant should be interpreted as written or instead should be rewritten by inserting a non-existent limitation on the term "property."

As WMS explained in its Opening Brief, once coverage is triggered, the Policy's provision governing the scope of BI/EE coverage states what Federal must pay. WMS Br. 28. Indeed, the provision begins with those very words:

> *We will pay for* the actual:
>
> - **business income** loss you incur due to the actual impairment of your **operations**; and
> - **extra expense** you incur due to the actual or potential impairment of your **operations**,
>
> during the **period of restoration**, not to exceed the applicable Limit of Insurance for Business Income with Extra Expense shown in the Declarations.
>
> This actual or potential impairment of **operations** must be caused by or result from direct physical loss or damage by a **covered peril** *to* ***property***, unless otherwise stated.
>
> This Premises coverage applies only at those premises:
>
> - where you incur a **business income** loss or **extra expense**, and
> - for which a Limit of Insurance for Business Income With Extra Expense is shown in the Declarations.

RE-64 (italicized emphasis added).[2]

A plain reading of the Policy therefore should have afforded WMS with BI/EE coverage for its actual business income loss throughout the period of restoration, so long as the loss was incurred due to the impairment of its operations

[2] Terms in boldface above are bolded in the Policy and are specifically defined therein. See RE-64.

at Premises 24 and so long as the impairment of its operations was caused by damage "to property."

Federal's brief obfuscates the word "property" as used in the BI/EE coverage grant. Federal repeatedly uses the phrase "property *at Premises 24*" in describing the Policy's BI/EE coverage, even though that phrase appears nowhere in the coverage grant itself. *Compare, e.g.*, Fed. Br. 11, 12, 35 (characterizing the scope of coverage as damage to "property *at Premises 24*") (emphasis added) *with* RE-64 (covering "damage *to property*") (emphasis added); *see also* Fed. Br. 11 (characterizing the BI/EE Policy as covering "lost income caused by damage to property *at a WMS premises scheduled in the Declarations*") (emphasis added).

Under Federal's interpretation, one must stop reading the coverage grant at the phrase "damage to property" and then look elsewhere, *i.e.* back up to the Policy's trigger provision, to find a limitation on which property is covered. This interpretive reference back is unnecessary in any of the Policy's other Premises Coverages, which specify in the scope of coverage provision exactly what property is covered. *See* WMS Br. 37-40. Like the district court, *see id*. 32-33, Federal must therefore rewrite the Policy to achieve its desired interpretation, in clear contravention of Mississippi law. *See Merchants Co. v. Hartford Accident & Indemnity Co.*, 188 So. 571, 572 (Miss. 1939).

Unlike the reading Federal urges on the Court, the trigger and scope provisions of the Policy are separate and distinct. First, the trigger provision sets forth the conditions that must exist to trigger *each* of the Policy's Premises Coverages, not just its BI/EE coverage. The trigger provision expressly states that it applies to the multiple "Premises Coverage*s*" appearing in that section of the Policy, including Contractual Penalties, Fungus Clean-up Or Removal, Ingress And Egress, and New Product Delay. *See* RE-64-66 (emphasis added). It is not part of the "Policy's *entire* BI/EE coverage grant," Fed. Br. 21; rather, it is the trigger for *each* of the Policy's various Premises Coverages.

Second, it strains credulity to call the language of the trigger provision part of a coverage grant because the language limits rather than conveys coverage. Each of the Policy's coverage grants begins with the phrase "We will pay for" and then goes on to describe the scope of coverage. The trigger provision describes solely when "the Premises Coverages apply." *See* RE-64.

Third, while in this Court Federal feigns ignorance about the Policy's trigger clause because it is not labeled "trigger clause," *see* Fed. Br. 25, in the district court Federal very well understood the separate functions of the Policy's trigger and scope clauses. In responding to WMS's motion for partial summary judgment, Federal conceded that BI/EE coverage been triggered: "[l]ike the Building And Personal Property coverage of the Policy, the BI/EE coverage was *triggered* by

'direct physical loss or damage' to property at Premises #24 that was 'caused by or result[ed] from a covered peril.'" R-2797 (emphasis added). Federal continued: "If that occurred—and it did during Hurricane Katrina—Federal agreed to 'pay for' business income loss and/or extra expense . . . ." *Id.* Thus, in the district court, regardless whether the words "trigger" and "scope" appeared in the Policy, Federal recognized and indeed conceded the separate purposes of the Policy's trigger and scope clauses; while the parties disputed the scope of BI/EE coverage — *i.e.*, what Federal agreed to "pay for" — they agreed that BI/EE coverage was triggered. *See* R-5928 (granting WMS's motion for partial summary judgment as to the triggering of BI/EE coverage). That Federal has shifted its stance before this Court betrays the weakness of its position.

Federal attempts to defend its interpretation by arguing that it is "absurd" to provide coverage to WMS for damage to the property of casinos because BI/EE coverage is a "Premises Coverage." Fed. Br. 25. But BI/EE coverage is a "Premises Coverage" because it is *triggered* by damage to the premises. The fact that BI/EE coverage is a "Premises Coverage" does not also mean that only damage to property at the premises is compensable under the Policy. Imposing such a limitation would render Premises Coverages such as Ingress and Egress and New Product Delay equally "absurd." The Policy's Ingress and Egress coverage protects against damage to property "at a location contiguous to" a covered

premises. *See* RE-65. The Policy's New Product Delay coverage protects against damage to any property that "result[s] in a delay in the introduction of any new product" irrespective of where that property is damaged. *Id*. Both are nonetheless Premises Coverages.

Federal concedes that this Court must read the Policy as a whole, construing one provision in the light of the others. Fed. Br. 20-21. Further, Federal does not dispute that all Policy language must be given meaning, with none rendered superfluous. *Id.* 21. Yet Federal's brief extracts only the general BI/EE coverage grant from the Premises Coverages section of the Policy, *id.* 21-22, and completely fails to consider how its interpretation would render critical Policy language in other Premises Coverages superfluous. *See id.* 26.

Federal drafted the Policy. Federal cannot dispute that it deliberately used limiting language in defining the scope of "property" covered in other Premises Coverages, such as Fungus Clean-Up or Removal and Ingress and Egress. Federal cannot dispute that it explicitly limited the scope of those coverages to property *at the covered premises*, but provided no similar limitation in BI/EE coverage. *Compare* RE-64 (Fungus Clean-Up coverage extends to the impairment of operations caused by "the presence of fungus *at your premises shown in the Declarations*), *and* RE-65 (Ingress And Egress coverage extends to impairment of operations caused by prevention of ingress to or egress from "*a premises shown in*

the Declarations" resulting from "direct physical loss or damage by a covered peril *to property at a location contiguous to such premises*"), with RE-64 (BI/EE coverage extends to impairment of operations caused by "direct physical loss or damage by a covered peril *to property*") (emphasis added).

Because these facts are indisputable, Federal can muster only the admission that it "may have used slightly different language" in those provisions than in the BI/EE provision — with no explanation of why. Fed. Br. 26. But the language of the other Premises Coverages is far more than "slightly different." *See* WMS Br. 37-40.

This Court has repeatedly rejected insurers' arguments that policy language that does not facially limit coverage is nevertheless intended to do so "where, as here, the insurer demonstrated elsewhere that it knew how to exclude the disputed damages if it so desired." *Whiddon v. Federated Mut. Ins. Co.*, 138 F. App'x 663, 668 n.7 (5th Cir. 2005). Not only do the other Premises Coverages demonstrate that Federal could have but did not limit BI/EE coverage to property "at the covered premises," but, under Federal's interpretation, the language in the other Premises Coverages limiting the type of property covered serves no purpose at all and is completely unnecessary. If Federal's interpretation were correct, the Policy could have used only the word "property" in each of the Premises Coverage to define the scope of coverage, with the reader looking up to the trigger provision to

define what type of property is covered, and then back down to complete the scope of coverage.

Only Federal's interpretation renders Policy language superfluous. WMS's interpretation does not. Although Federal's brief quotes the district court's statement that WMS's interpretation would render the Policy's Dependent Business Premises coverage superfluous, Federal never addresses any of WMS's arguments to the contrary. *Compare* Fed. Br. 39 n.34 *with* WMS Br. 47-48. Because Federal's interpretation is the only one that renders parts of the Policy superfluous, the Court may reject it on that basis alone. *See Am. Guarantee & Liab. Ins. Co. v. 1906 Co.*, 129 F.3d 802, 806 (5th Cir. 1997); *Transco Exploration Co. v. Pacific Employers Ins. Co.*, 869 F.2d 862, 864 n.3 (5th Cir. 1989).

B. The Term "Property" Unambiguously Includes The Property of Casinos.

Federal questions whether the buildings of WMS's casino customers are "property." *See* Fed. Br. 30-31. Initially, this argument is irrelevant because WMS's operations were impaired by damage not only to buildings but also to the casinos' personal property and electronic data processing property. *See* WMS Br. 20. While Federal contends that the personal property of casinos could have been quickly replaced, Fed Br. 30, that did not happen, *see* WMS Br. 20, nor did Federal attempt to prove otherwise at trial, as evidenced by Federal's failure to cite any record evidence to support this argument in its brief. *See* Fed. Br. 30.

Even if the only relevant damaged "property" were casino buildings, the Policy's definition of "property" plainly includes *all* buildings: "**Property** means: **building**; **personal property**; **personal property of employees**; **electronic data processing property**; **valuable papers**; **fine arts**; or **research and development property**." RE-85. Moreover, the Policy's definition of "building" includes *all* structures, including those of the casinos: "**Building** means: a structure; building components; completed additions; additions to the structure under construction; and alteration and repairs to the structure." RE-75.

While the Policy states that "**[b]uilding** does not mean . . . any structure you do not own, occupy and are not legally or contractually required to insure," *id.*, this does not exclude the buildings of casinos from coverage. This same definition of "building" applies to the Policy's Dependent Business Premises coverage and to its BI/EE coverage. If the Policy categorically excluded buildings of casinos from the definition of "building," then in the Dependent Business Premises coverage, the term "building" would be excluded from "property," and the Policy phrase "property of a dependent business premises" would be meaningless. *See* RE-67. Federal *voluntarily* paid the full policy limits for WMS's Dependent Business Premises coverage, however, effectively admitting that the casino buildings are "property" under the Policy.

Furthermore, the Policy's "Any Other Location" coverage demonstrates that Federal knew how to exclude damage to property at dependent business premises from coverage where appropriate. That coverage grant *expressly* provides: "This Additional Coverage does not apply to business income loss or extra expense you incur caused by or resulting from loss or damage to property at . . . a dependent business premises." RE-66. Federal could have but did not include such language in the BI/EE coverage grant. RE-64. The property of casinos is therefore "property" under the Policy. Precisely because Federal could have but did not use such an exclusion here, should the Court conclude that the definition of "building" creates any ambiguity, that ambiguity must be resolved for WMS and against Federal. *See* Section IV *infra*.

C. Federal's References To Parol Evidence Cannot Transform The Meaning Of The Policy's Plain Text.

Federal next asks the Court to focus on parol evidence, Fed. Br. 5, even though Federal concedes that doing so is impermissible where the Policy is clear. See *id*. 19 ("'[L]egal purpose or intent should first be sought in an objective reading of the words employed in the contract to the exclusion of parol or extrinsic evidence.'" (citation omitted)). The parol evidence Federal urges on the Court is its testimony that WMS could have purchased additional Dependent Business Premises coverage but elected not to do so. Even if this were a permissible consideration (and it is not), it is a red herring. WMS did not purchase additional

Dependent Business Premises coverage because additional coverage was unnecessary. Given that the casinos serviced by WMS at Premises 24 were dispersed throughout the region, it was unlikely that a hurricane or other covered peril would strike multiple casinos but leave Premises 24 unscathed. Under the terms of the Policy, if Premises 24 was damaged, then the Policy's BI/EE coverage would be triggered for any business losses incurred as a result of damage "to property," including those losses related to the impaired operation of WMS's Wide Area Progressive ("WAP") network resulting from damage to casinos. WMS thus had no need to purchase additional coverage for its Dependent Business Premises. That is precisely why WMS purchased only $1 million in Dependent Business Premises coverage but $100 million in blanket BI/EE coverage. *See also* WMS Br. 48.

D. The Cases Cited by Federal Actually Support WMS's Interpretation.

Federal's brief attempts to distract from the Policy's text by speaking in general terms about the "obvious purpose" of business income insurance and citing cases interpreting such policies in other jurisdictions. But the "purpose" cited by Federal is obvious only to Federal, as Federal's interpretation renders the $100 million coverage that WMS purchased virtually worthless. The obvious purpose of the $100 million of business income coverage to WMS was to cover the business income lost in the aftermath of a major disaster like Hurricane Katrina. In any

event, debates about which purpose is "obvious" are irrelevant, as the purpose of the Policy is reflected in its plain text. As the Mississippi Supreme Court has stated, "A court must effect a determination of the meaning of the language used, not the ascertainment of some possible but unexpressed intent of the parties." *See Cherry v. Anthony, Gibbs, Sage*, 501 So. 2d 416, 419 (Miss. 1987) (internal quotation marks omitted).

Moreover, the cases cited by Federal actually support WMS's interpretation of the Policy. Federal omits any discussion of what the policies in those cases actually say and does not explain how their terms compare to the Policy here. In fact, the policies in the cases Federal asserts "merit special attention," Fed. Br. 27, are materially distinguishable: unlike the BI/EE coverage here, the insurers in those cases explicitly agreed to cover only damage to property at the covered premises; none cover damage "to property" generally. These policies therefore contrast starkly with the Policy drafted by Federal and demonstrate how Federal *could* have but did not write its Policy so as to restrict coverage to losses from damage at covered premises. Because no such restriction is contained in the Policy Federal sold to WMS, the cases cited by Federal actually support WMS's interpretation of the Policy at issue in *this* case.

In *Gregory v. Continental Insurance Co.*, the policy language at issue made clear that the business interruption provision applied only to losses that resulted from damage at the insured's premises. That policy insured:

> against loss resulting directly from necessary interruption of business caused by the perils insured against damaging or destroying, during the policy period, *real or personal property* (except finished stock) *at the premises described in this endorsement*, subject to the limit of liability specified above for the premises at which the damage or destruction occurs.

575 So. 2d 534, 535 (Miss. 1990) (quoting policy language) (emphasis added). This language contrasts starkly with the language in Federal's Policy, which covers lost business income due to "direct physical loss or damage by a covered peril *to property*." RE-64 (emphasis added).

Federal also cites *United Air Lines, Inc. v. Insurance Co. of Pennsylvania*, 439 F.3d 128 (2d Cir. 2006). *See* Fed. Br. 29. The policy in that case provided insurance "'against loss resulting directly from the necessary interruption of business caused by *damage to or destruction of the Insured Locations* resulting from Terrorism, Sabotage, Mutiny, Insurrection, Rebellion, or Coup d'Etat.'" 493 F.3d at 131 (quoting policy language) (emphasis added). The policy stated that "this section is specifically extended to cover a situation when access to the Insured Locations is prohibited by order of civil authority as a direct result of *damage to adjacent premises*." *Id*. at 129 (quoting policy language) (emphasis added). As in *Gregory*, this express limitation on coverage to only those losses

incurred as a result of damage at a specified location differentiates the policy from the Policy at issue here.

Federal also relies on *Ramada Inn Ramogreen, Inc. v. Travelers Indemnity Co. of America*, 835 F.2d 812 (11th Cir. 1988), and *Royal Indemnity Insurance Co. v. Mikob Properties, Inc.*, 940 F. Supp. 155 (S.D. Tex. 1996). *See* Fed. Br. 26, 28. In *Ramada*, the policy insured specifically "'against loss of earnings resulting directly from the necessary interruption of the insured's business caused by loss or damage by a peril insured against *to a building or personal property on the premises designated in the declarations*.'" 835 F.2d at 813 (emphasis added). In *Royal Indemnity*, the policy provided that the insurer would pay for loss of business income from a suspension of operations "caused by direct physical loss of or damage *to property at or within 500 feet of insured premises*." 940 F. Supp. at 156 (emphasis added). Like the policies in the other cases Federal cites — and unlike the Policy drafted by Federal — these policies expressly restrict the scope of coverage to losses resulting from damages to or at specified premises listed in the policies' declarations.[3]

[3] Federal relies to a lesser extent on *St. Joseph Light & Power Co. v. Zurich Insurance Co.*, 698 F.2d 1351 (8th Cir. 1983), for the proposition that to recover a business income loss under a business interruption policy, there "must be evidence that [the] interruption [was] 'caused by' the covered peril." Fed. Br. 26. That case is irrelevant, however, because Federal does not dispute that Hurricane Katrina caused the damage giving rise to WMS's business interruption claim and that Hurricane Katrina is a covered peril; there is no allegation that some "other peril[]" caused the damage. R-7774 (RE-48).

Had Federal written the Policy in the same manner as the insurers in the cases on which it relies, perhaps then it could attempt to deny WMS coverage for any losses that did not result from damages to WMS's property. But it did not write — and WMS did not purchase — a BI/EE policy that limited coverage to losses stemming from damages to property at the covered premises.

Courtenay, Hunter & Fontana, LLP v. Massachusetts Bay Insurance Company, No. Civ. A. 07-976 (E.D. La. July 7, 2008), cited in WMS's opening brief, demonstrates this point. It differs from Federal's cases precisely *because* it involved policy language that is equivalent, in relevant part, to Federal's Policy. Both policies provided coverage for losses resulting from damage to "property" that was described in terms different from those used to describe *covered* property. Hence, the principle articulated in *Courtenay* applies equally here: where an insurance policy defines the scope of coverage by a reference to "[t]he term 'property' [which] is used generically," while the term for covered property "is not used at all," *Courtenay* Order, at 6, a court should not limit the scope of the coverage in a way that the policy itself does not.[4]

[4] Federal also wrongly suggests that a subsequent order in *Courtenay* undermines the argument WMS raises with respect to the difference between its Policy's trigger and scope provisions. *See* Fed. Br. 29 n.19. In *Courtenay*, the policyholder argued that it was entitled to be compensated for any business losses it sustained during the applicable coverage period *even once its operations were no longer suspended*. *Courtenay, Hunter & Fontana, LLP v. Massachusetts Bay Ins. Co*., No. Civ. A. 07-976, 2008 WL 3876421, at *2 (E.D. La. Aug. 19, 2008). WMS does not contend that, once triggered, the coverage for business income loss continues whether or not

Similarly, in *Zurich American Insurance Co. v. ABM Industries, Inc*., the insurer argued for limiting business income coverage to losses that resulted from damage to property owned or leased by the insured despite the fact the terms of the policy contained no such limitation. The court rejected that argument because "[t]he terms of the insurance policy . . . do not limit coverage to property owned or leased by the insured." 397 F.3d 158, 167 (2d Cir. 2005). *ABM Industries* thus highlights that business income insurance is not, as Federal suggests, inherently limited to losses that result from damage to property owned by the insured. *See* Fed. Br. 28 n.17. Rather, any limitations are determined on a case-by-case basis using the terms of individual policies.

E. The Consequences Of WMS's Interpretation Are Reasonable.

Federal urges this Court to reject a plain text reading because of what it deems to be the unreasonable consequences of such a reading. *See* Fed. Br. 25 n.15. This argument appears only in one of Federal's 38 footnotes and is therefore deemed waived under this Court's precedent. *See Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 356 n.7 (5th Cir. Tex. 2003) (arguments raised only in footnotes are waived); *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993). Yet even taking Federal's "consequences" argument as made, it is merely another attempt to avoid the Policy's text.

WMS's operations remain impaired; rather, WMS contends it is entitled to compensation for its business losses as long as WMS's operations remain impaired due to damage to "property."

Federal suggests that, under WMS's understanding of the Policy, had Premises 24 lost only roof shingles during Hurricane Katrina and quickly replaced them thereafter, WMS could nonetheless have recovered all of its lost business income if its operations continued to be impaired by the hurricane's enduring damage to its casino customers' property. While Federal deems this consequence illogical, Federal could easily have drafted its Policy to avoid this result. Federal cannot escape its obligations by virtue of drafter's remorse.

Moreover, Federal's suggestion that the Policy language as drafted has no reasonable limitations on coverage is simply wrong. Coverage is triggered only if WMS incurs direct physical loss or damage to property at its covered premises. The damage to property must be caused by a covered peril and not just any "storm." The impaired operations must result from damage to property, and not merely "unfavorable economic conditions" attributable to the covered peril. R-7769 (RE-43).[5] Federal is thus incorrect when it suggests WMS is arguing that Federal must pay for any loss of business income "regardless of the cause of the shortfall." Fed. Br. 24.

[5] For instance, WMS could not seek business interruption coverage if customers were deterred from visiting undamaged casinos as a result of Hurricane Katrina.

F. Federal's Arguments About the "Period of Restoration" Are Irrelevant.

Federal makes many arguments in its brief about the Policy's "period of restoration," but they carry no weight for two reasons. First, Federal attempts to defeat an argument that WMS does not make. Federal claims that WMS argued that the Policy's "period of restoration" somehow expands the scope of the Policy's BI/EE coverage. Fed. Br. 31-37. WMS makes no such claim. Rather, WMS has argued that it was entitled to compensation during the period of restoration *only* for losses it sustained as a result of the impairment of its operations at Premises 24 due to damage *to property*. In other words, WMS has claimed simply that the period of restoration defines the time period during which the coverage grant applies and not the scope of the grant itself. Accordingly, the several cases Federal cites as holding that an insured is entitled to coverage for business losses during a period of restoration only as long as its operations are impaired or suspended (depending on the language of the relevant policy), *see id*., are inapposite here.

Second, Federal's brief seems to argue something different from what the district court ruled with respect to the period of restoration. Federal appears to be arguing that Federal's duty to cover did not end when the period of restoration ended; rather, the duty to cover ended when WMS was able to begin administering and monitoring its slot machine network again, albeit at a remote site in Nevada.

See Fed. Br. 33-34. Federal's argument fails as soon as one reads the definition of the term "period of restoration," which states clearly that the coverage period ends when WMS's "operations are restored, with reasonable speed, to the level which would generate the business income amount that would have existed if no direct physical loss or damage occurred, including the time required to . . . repair or replace the property." The district court thus correctly found this period ended on December 2, 2005, and that WMS was entitled to coverage for 365 days thereafter. *See* R-7774 (RE-48). Although Federal seems to disagree, it has not squarely challenged or cross-appealed the district court's finding that the period of restoration ended 365 days after WMS was able to operate once again without impairment at Premises 24. *Id.* Federal's "period of restoration" arguments are therefore irrelevant.

II. The District Court Misinterpreted The Policy Term "Operations," In Contravention Of The Policy Language And Other Parts Of Its Decision.

The district court erred by excluding WMS's WAP operations from the scope of the BI/EE coverage on the basis that those operations do not occur at Premises 24. Federal seems to agree that the district court erred on this point; indeed, Federal concedes that WMS's "business activities occurred *only* at Premises #24." Fed. Br. 38 (distinguishing *Iteld, Bernstein & Associates, LLC v. Hanover Ins. Group*, No. Civ. A. 08-3418, 2009 WL 2496552 (E.D. La. Aug. 12,

2009), on this basis) (emphasis added). Given that (1) WMS's WAP operations were the central component of WMS's business activities at Premises 24 (indeed, the critical revenue generator), WMS Br. 44, (2) Federal has conceded that *all* of WMS's business activities occurred at Premises 24, Fed. Br. 38, and (3) the Policy defines "operations" to mean WMS's "business activities occurring at your premises," RE-79, Federal does not seem to refute that the district court misinterpreted the Policy term "operations."

Moreover, Federal concedes that there is only one definition of the term "operations" under the Policy and that it applies to both BI/EE and Dependent Business Premises coverage. Fed. Br. 37 n.33. The Policy provides that "[o]perations means your business activities occurring at your premises." RE-79. To be compensated under both the Policy's BI/EE coverage and Dependent Business Premises coverage, WMS must incur losses due to an "impairment of operations" caused by damage to property — the BI/EE coverage requiring damage "to property," and the Dependent Business Premises coverage requiring damage to "property . . . at a dependent business premises." RE-64, 67. Both coverages therefore require WMS to demonstrate it incurred losses due to the impairment of its business activities occurring at *WMS's* covered premises; the only difference is whether that impairment must be caused by damage to "property" or to "property . . . at a dependent business premises."

Federal's only response to this fact is to assert that because the term "operations" is used in both the BI/EE coverage and the Dependent Business Premises coverage, the definition of "operations" "must be read in the context of the coverage grant at issue." Fed. Br. 37, n.33. But the definition of "operations" should not be read differently from section to section to suit Federal. In drafting the Policy, Federal provided only a single definition of "operations" in the Policy's definitions section: "your business activities occurring at your premises." In contrast, when Federal meant for other terms to be differently defined in the context of different coverages, the Policy provides separate definitions (for example, "period of restoration," *see* RE-80-81).[6]

Federal and the district court agree that the Policy's Dependent Business Premises coverage applied here. *See* WMS Br. 44-45. WMS could not have received that coverage unless its "operations," *i.e.*, conducting and monitoring the WAP network "at [WMS's] premises," were impaired by damage to dependent business premises. Accordingly, the district court's holding that WMS's WAP "operations" occur at the casinos rather than at Premises 24 is erroneous. As this argument provided the basis for the district court's ruling limiting WMS's damages, this Court must vacate and remand.

[6] This is not, contrary to Federal's assertion, Fed. Br. 37, an argument that the term "operations" is somehow a coverage grant providing coverage that does not otherwise exist under the Policy's BI/EE component. Rather, it is nothing more than a straightforward, and what should be non-controversial, statement that the term "operations" is used in the undisputed coverage grant as it is defined.

III. The District Court Clearly And Erroneously Held That BI/EE Coverage Terminated When WMS Was Able To Mitigate A Portion Of Its Losses.

Federal does not dispute that it is error to terminate a policyholder's coverage when it mitigates a portion of its losses. Instead, Federal asserts that the district court did not do so. Fed. Br. 39-40. But the district court's judgment makes clear what it did. By improperly confusing mitigation of losses with restoration of operations, the district court denied WMS compensation to which it was clearly entitled under the Policy solely because, as the Policy required, WMS mitigated its losses. There is simply no disputing that the district court held that WMS's BI/EE coverage terminated when WMS began to mitigate some, but not all, of its losses.

In its factual findings, the district court correctly determined that Hurricane Katrina — an "undisputed . . . covered peril" — caused "an impairment of operations at Premises 24, resulting in lost business income." R-7774 (RE-48). The district court further found that "the property and operations at Premises 24" were not "'restored,' within the meaning of the contract" until "December 2, 2005." *Id*. As the terms of the Policy make clear, property is not restored until "operations" are at "the level which would generate the business income amount that would have existed if no direct physical loss or damage occurred." RE 80-81. Under the logic of the district court's own findings, before December 2, 2005, operations at Premises 24 were *not* "at the level which would generate the business

income amount that would have existed if no direct physical loss or damage occurred." *Id*.

The Policy provides that WMS is entitled to recover its lost business income through the period of restoration, which it defines as 365 days after WMS's property and operations at Premises 24 were restored (*i.e.*, December 2, 2006). RE-80-81. Yet the district court held that the Policy only covered losses until September 11, 2005, the date on which WMS relocated its Mississippi WAP operations to another of its locations in Nevada to, in the words of the district court, "mitigate its WAP losses" stemming from the damages at Premises 24. R-7779 (RE-53). September 11, 2005 was not the date when Premises 24 was operating at "the level which would generate the business income amount that would have existed if no direct physical loss or damage occurred" — that is, the date that, under the terms of the Policy, determined the coverage period. That date, as the district court itself found, was December 2, 2005. R-7774 (RE-48). Accordingly, only one reading of the district court's opinion is possible — the date that determined the end of coverage was the date on which mitigation started, and not, as the Policy required, the date when operations were restored.

This ruling not only contravenes the Policy's express terms; it rendered the $100 million of coverage WMS bought almost entirely worthless. The Policy covered each of WMS's 27 premises across the country. In light of the nature of

WMS's business, under the district court's reading of the Policy, unless some covered peril destroyed all 27 of WMS's premises, thereby making mitigation impossible, WMS would receive compensation for only the brief periods before it could begin to relocate some portion of its monitoring operations from a damaged premises to an undamaged premises.

The district court's miniscule damages award in this very case proves its error: the court found WMS entitled only to the business income losses it suffered during the 13 days from when coverage started after Hurricane Katrina until WMS could restart some operations in Nevada, an amount that barely exceeded $100,000, less than .1 percent of its coverage limit. In fact, WMS lost business income totaling many millions of dollars. *See* WMS Br. 19. It defies reason and common sense that WMS would purchase a multimillion dollar policy to cover no more than thousands of dollars of business income loss. Yet Federal's brief does not dispute WMS's point that this is the necessary consequence of the district court's decision. *See* WMS Br. 52-54.

IV. WMS Did Not Waive The *Contra Proferentum* Canon And Other Principles Of Interpretation Erring In Favor Of Coverage.

Conceding that insurance policies are interpreted in favor of coverage and against the drafter, Federal argues only that WMS has waived the point. Fed. Br. 40-41. Federal is mistaken. True, WMS has always argued that the Policy unambiguously provides for coverage of WMS's business income losses that

resulted from damage to the casinos in the WAP network. But WMS also has always argued alternatively that if the Policy were ambiguous, then the canon of *contra proferentum* should apply. Federal's selective quotations from WMS's pleadings are belied by the entirety of the district court record.

Indeed, when Federal moved to strike WMS's expert witness who was to testify about the meaning of the Policy, WMS argued that this evidence was necessary in case the court found the Policy to be ambiguous. *See* R-1577-1578. Indeed, the very pleading Federal quotes to support its waiver argument argues that an insurance "'policy is construed most strongly against the insurer as the drafter of the policy.'" *See* R-1578 (quoting *Progressive Gulf Ins. Co. v. We Care Day Care Ctr., Inc.*, 953 So. 2d 250, 253-54 (Miss. Ct. App. 2006)). WMS continued to make similar arguments throughout the district court proceedings, repeatedly opposing Federal's motions to exclude WMS's testimony about the meaning of the Policy. *See, e.g.*, R-5060-5067; R-4276-4277.

The issue of ambiguity did not arise at trial because the district court ruled before trial that the Policy was unambiguous: "Because the policy is clear and unambiguous, coverage opinion testimony will not be admitted." *See* 3/5/09 Order. The district court reiterated this ruling repeatedly during the trial. *See* R-6702 (Tr. 332:16-24); *see also* R-6899 (Tr. 529:6-9). Federal's counsel expressly

acknowledged this at the trial, stating, "[t]he Court has ruled that it is not ambiguous, and there will be no other proof beyond that." R-6441 (Tr. 71:12-14).

Accordingly, WMS did not waive the canon of *contra proferentum*, and should the Court conclude the Policy is ambiguous, the Court must interpret it in the light most favorable to WMS.

CONCLUSION

The Court should vacate the judgment of the district court below and remand for a recalculation of the damages WMS is owed.

Respectfully submitted,

/s/Craig C. Martin
Craig C. Martin*
Barry Levenstam
Matt D. Basil
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
Phone: (312) 222-9350
Fax: (312) 527-0484

Lindsay C. Harrison
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
Phone: (202) 639-6000
Fax: (202) 661-4956

Raymond L. Brown
BROWN BUCHANAN, P.A.
3112 Canty Street
Post Office Box 2220

Pascagoula, MS 39569-2220
Phone: (228) 762-0035
Fax: (228) 762-0299

Attorneys for WMS Industries, Inc.

*Counsel of Record

Date: February 4, 2010

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that she served a true and accurate copy of the foregoing Brief of Plaintiff-Appellant WMS Industries, Inc. to the below listed counsel by having one digital PDF version of the Brief on a 3.5 inch diskette and two paper copies of the Brief and one copy of the Record Excerpts delivered by overnight delivery, on February 4, 2010.

William N. Reed
Jason Richard Bush
Bradley S. Clanton
Walker W. Jones, III
Charles W. Pickering, Sr.
Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.
4268 I 55 N.
Meadowbrook Office Park
Jackson, MS 39211-0000

John W. Joyce
Steven W. Usdin
Barrasso Usdin Kupperman Freeman & Sarver, L.L.C.
Suite 2400
909 Poydras Street
New Orleans, LA 70112-0000

/s/Lindsay C. Harrison
Lindsay C. Harrison
Attorney for Plaintiff-Appellant WMS Industries, Inc.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)(7)

The undersigned, counsel for Plaintiff-Appellant WMS Industries, Inc. certifies that this Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) and Fifth Circuit Rule 32.3 because, according to the word processor used to prepare this brief, Microsoft Word, this brief contains 6,627 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/Lindsay C. Harrison
Lindsay C. Harrison
Attorney for Plaintiff-Appellant WMS Industries, Inc.