

# When Rain Falls, Insurance Companies Should Listen: Determining “Weather” an Insurance Policy’s Inclusion of Property *in the Open* Refers to Property Simply Left Outside or Property Exposed to the Elements

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“[T]he insurance industry is one of the most important industries in this country and, indeed, the world.”<sup>2</sup>

## I. INTRODUCTION

Imagine the following hypothetical situation. Gaston Pierre (Pierre) was the owner of Timely Timber Tree Farm (Timely Timber), a timber farm situated on a 300-acre plot of land in Moline, Illinois. Timely Timber, which specialized in the harvesting of pine, fir, and spruce, was an extremely profitable business. In fact, Timely Timber provided timber to over sixty businesses across the Midwest.

To protect his timber product, Pierre stored it at two locations on the Moline farm. First, some of the timber was stored in Timely Timber’s on-site warehouse. This warehouse always contained 40,000 timber logs. Second, Pierre stored the remaining timber directly next to the on-site storage warehouse. There were 500 logs stored in this manner.

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2. Robert H. Jerry, *A Brief History of Insurance*, in 1 NEW APPLEMAN ON INSURANCE § 1.02 (Jeffrey E. Thomas & Francis J. Mootz III eds., 2010).

On June 3, 2012, Pierre learned a big storm was coming through Moline. In preparation for the storm, Pierre had a manager lock and secure Timely Timber's on-site warehouse. In addition, several of Timely Timber's employees secured the 500 logs located next to it. Specifically, those 500 logs were separated into groups of twenty-five. After the logs were separated, the employees wrapped each group in high grade polyethylene timber wrap. Next, the logs were placed in a cardboard container and covered with two vinyl tarps. The vinyl tarps were secured to the ground with several cement bricks.

The storm came through Moline the following day. The storm, which brought a massive amount of wind and rain, blew the vinyl tarps, cardboard containers, and polyethylene wrap off all of the logs stored next to the warehouse. Consequently, these logs were soaked with water and soon rotted.

After discovering the rotted logs, Pierre filed a claim with his insurance company, Moline Tree Insurance (Moline Tree). Moline Tree rejected Pierre's claim because an exclusionary provision of Pierre's policy allowed Moline Tree to deny coverage for "any loss or damage caused by rain to business property *in the open*."<sup>3</sup> Due to the coverage denial, Pierre lost over \$50,000 in profits.

Unfortunately, this hypothetical situation is familiar to many business owners. In fact, insurance companies routinely deny coverage for property damaged while it was stored *in the open*. This Article will address and answer this issue by determining whether the phrase *in the open* refers to either property simply left outside or property left unprotected from the elements.

Part II discusses four prior cases that have addressed this issue. Each case's discussion will be formatted in the following manner. First, the underlying facts of the case will be discussed. Second, the procedural history will be provided. Third, the court's decision will be analyzed. Last, the significance of the case will be explained.

Part II will also be separated into two subparts. The first subpart will discuss cases that have interpreted *in the open* to exclude coverage. In other words, in these cases, the insurance companies used the policies' *in the open* provisions to deny coverage.<sup>4</sup> The second subpart will discuss the only case that has analyzed *in the open* to include coverage. In this single case,

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3. Unless otherwise noted, any emphasis of *in the open* or *open* was added by the Author.

4. See *Twenhafel v. State Auto Prop. & Cas. Ins. Co.*, 581 F.3d 625 (7th Cir. 2009); *Victory Peach Grp., Inc. v. Greater N.Y. Mut. Ins. Co.*, 707 A.2d 1383 (N.J. Super. Ct. App. Div. 1998); *N. Tex. Constr. Co. v. U.S. Fire Ins. Co.*, 485 S.W.2d 389 (Tex. App. 1972).

the insurance company actually provided coverage for property damaged while *in the open*.<sup>5</sup>

Part III analyzes this issue. Specifically, Part III will explain why courts should interpret *in the open* as meaning being simply left outside irrespective of whether the property is protected or unprotected from the elements. In this section, several different definitions for the term *open* will also be analyzed.

Part IV offers insurance companies advice on how not to avoid liability for denying coverage for property destroyed while *in the open*. Lastly, Part V summarizes the main arguments and implications of this Article.

## II. STATE AND FEDERAL CASES INTERPRETING *IN THE OPEN*

### A. INTERPRETING *IN THE OPEN* TO EXCLUDE INSURANCE COVERAGE

#### 1. North Texas Construction Company v. United States Fire Insurance Company (1972)

##### *i. The Underlying Facts*

In April 1969, North Texas Construction Company (North Texas) received some galvanized metal sheets, which were going to be placed on the roof, sides, and doors of a hangar it was constructing.<sup>6</sup> When North Texas received the metal sheets, they were “wrapped in polyethylene then banded with band metal in a wood frame and then wrapped again in a cardboard container, which [was] also paraffined, and then probably also banded and put on skids again with cover sheets to protect it.”<sup>7</sup> After receiving the sheets, North Texas placed them on “some boards that were placed on the ground *in the open*.”<sup>8</sup>

On Friday, May 7, 1969, North Texas employees inventoried the metal.<sup>9</sup> In order to perform the inventory, the employees removed the galvanized metal sheets from their cardboard containers and polyethylene wrap-

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5. See QBE Specialty Ins. Co. v. FSI, Inc., No. 3:09cv435, 2011 U.S. Dist. LEXIS 47042 (W.D.N.C. May 2, 2011).

6. See *N. Tex. Constr. Co.*, 485 S.W.2d at 390. The galvanized metal sheets were also composed of 26-gauge steel and covered with zinc galvanizing. *Id.* The purpose of the zinc galvanize was to protect the metal from rain, sleet, snow, and other forms of precipitation. *Id.*

7. *Id.*

8. *Id.* (emphasis added).

9. See *N. Tex. Constr. Co.*, 485 S.W.2d at 390.

ping.<sup>10</sup> After the inventory was completed, the employees rewrapped the metal sheets in the polyethylene and weighed them down on the boards.<sup>11</sup>

Later that Friday night, a rainstorm came through the hangar's worksite and blew the covering off of the galvanized metal.<sup>12</sup> Consequently, the metal sheets became wet.<sup>13</sup>

North Texas did not discover the wet metal sheets until the following Monday.<sup>14</sup> After discovering the wet sheets, a North Texas employee dried them.<sup>15</sup> Soon after, North Texas began installing the sheets on the hangar.<sup>16</sup> However, once North Texas began the installation, the metal sheets started to discolor and rust.<sup>17</sup>

North Texas filed a claim with its insurance company, United States Fire Insurance Company (United States Fire), seeking compensation for the damaged metal. United States Fire denied the claim because it believed the metal was damaged while *in the open*. In denying the claim, United States Fire referenced an exclusionary provision of North Texas's policy that prohibited coverage for "loss or damage to property *in the open* caused by rain; [sic] or 'by deterioration'; or 'by rust.'"<sup>18</sup>

#### ii. *The Procedural History*

After receiving the coverage denial, North Texas filed suit.<sup>19</sup> Subsequently, a hearing was held before a trial judge.<sup>20</sup> The judge ruled in United States Fire's favor and found that North Texas's loss was within the insurance policy's exclusionary provision.<sup>21</sup> Specifically, the trial court noted the galvanized metal's damage "was caused (1) 'by rain on March 7, 1969,

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10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.*

14. *See N. Tex. Constr. Co.*, 485 S.W.2d at 390. North Texas employees could not immediately inspect the metal sheets because of mud. *Id.*

15. *See id.*

16. *See id.*

17. *See id.* One of North Texas's employees stated the discoloration was caused by a combination of white rust and red rust. This employee testified that the white rust occurred "when water [seeped] between [the] stacked sheets of galvanized steel and no oxygen [was] present." *N. Tex. Constr. Co.*, 485 S.W.2d at 390. This same employee noted that the white rust ate through the metal sheets' galvanizing. Once the white rust destroyed the galvanizing, "the red rust deteriorate[d] the steel underneath it." *Id.* at 391.

18. *N. Tex. Constr. Co.*, 485 S.W.2d at 390 (emphasis added).

19. *See id.*

20. *See id.*

21. *See N. Tex. Constr. Co.*, 485 S.W.2d at 390.

while the sheet metal was in the open'; and (2) 'by deterioration'; and (3) 'by rust.'" North Texas appealed the judge's decision.<sup>22</sup>

*iii. Court of Civil Appeals of Texas, Tenth District, Waco*

The Texas Court of Civil Appeals affirmed the trial court's ruling.<sup>23</sup> In addition, its analysis consisted of only two sentences: "We hold that the evidence is legally sufficient to support the findings in question. Any one of the findings supports the judgment."<sup>24</sup>

*iv. Significance of North Texas Construction Company v. United States Fire Insurance Company*

Even though the Texas Court of Civil Appeals ruled in United States Fire's favor, its opinion neither defined nor analyzed *in the open*. Instead, the court solely found the galvanized metal was not subject to coverage because it was *in the open*. From reading the underlying facts of the case, courts could discern when property should be considered *in the open*. For instance, the *North Texas* court found property would be considered *in the open* if: (1) it was stored outside a building; (2) it was covered in protective wrapping while stored outside a building; or (3) it was covered in protective wrapping then placed in a container, which was stored outside a building.<sup>25</sup>

2. Victory Peach Group, Incorporated v. Greater New York Mutual Insurance Company (1998)

*i. The Underlying Facts*

Victory Peach Group, Incorporated (Victory Peach) owned a motor inn located in Springfield, New Jersey.<sup>26</sup> In 1991, a principal of Victory Peach discovered leaks inside this motor inn.<sup>27</sup> In addition to finding the leaks, the principal also "observed 'seams [in the roof] that were open from the wind and . . . from months of weather.'"<sup>28</sup> Consequently, on November 10, 1991, the principal began to repair the leaks and seams in the roof.<sup>29</sup>

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22. *See id.*

23. *See id.*

24. *Id.* at 391.

25. *See N. Tex. Constr. Co.*, 485 S.W.2d at 390.

26. *See Victory Peach Grp., Inc. v. Greater N.Y. Mut. Ins. Co.*, 707 A.2d 1383, 1383 (N.J. Super. Ct. App. Div. 1998).

27. *See id.* at 1383-84.

28. *Id.* at 1384 (alteration in original).

29. *See id.*

In order to repair the roof, the principal cut sections out of it to make several troughs.<sup>30</sup> The troughs, which were used to divert and drain water off the roof, caused several of the roof's seams to become exposed.<sup>31</sup>

The principal was not able to complete the repairs on November 10.<sup>32</sup> Accordingly, he had to find a way to protect the exposed seams. Thus, "three large, heavy, vinyl tarpaulins were placed over the troughs and nailed down to the roof using roofing nails and flat shingles."<sup>33</sup>

Later that night, a rainstorm blew through Springfield. The storm's winds "ripped off the tarpaulins and securing shingles," thus allowing water to leak into the motor inn and causing damage to its "interior and its contents."<sup>34</sup>

After discovering the damaged interior and contents, Victory Peach filed a claim with its insurance company, Greater New York Mutual Insurance Company (Greater New York).<sup>35</sup> Greater New York denied Victory Peach's claim because it believed the damaged interior and contents were *in the open*. Specifically, Greater New York denied the claim because, under Victory Peach's policy, Greater New York did not provide coverage for "loss or damage caused by or resulting from 'rain, snow, ice or sleet to personal property *in the open*.'"<sup>36</sup>

#### ii. *The Procedural History*

After Greater New York denied coverage, Victory Peach filed suit in the Superior Court of New Jersey.<sup>37</sup> The court addressed the coverage and damage issues on separate dates.<sup>38</sup> First, in May 1995, a judgment of liability was entered against Greater New York.<sup>39</sup> Second, in September 1996, a jury assessed Victory Peach's damages at \$100,000.<sup>40</sup> Subsequently, "[f]inal judgment was entered in favor of Victory Peach for that amount plus \$26,215.07 prejudgment interest."<sup>41</sup> Greater New York appealed the judgment of liability.<sup>42</sup>

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30. *See id.*

31. *See Victory Peach Grp., Inc.*, 707 A.2d at 1383.

32. *See id.*

33. *Id.* at 1384.

34. *Id.*

35. *See id.* at 1383.

36. *Victory Peach Grp., Inc.*, 707 A.2d at 1385 (emphasis added).

37. *See id.* at 1383.

38. *See id.*

39. *See id.*

40. *See id.*

41. *See Victory Peach Grp., Inc.*, 707 A.2d at 1383.

42. *See id.* Victory Peach also appealed the trial court's ruling because it believed the trial court should not have vacated the default judgment, which entered against Greater

iii. *The Superior Court of New Jersey, Appellate Division*

The Superior Court of New Jersey affirmed the judgment against Greater New York.<sup>43</sup> Its analysis, which consisted of a single paragraph, began by discussing a reasonable insured person's interpretation of *in the open*.<sup>44</sup> The court noted that a reasonable insured person would interpret *in the open* as meaning "being left exposed to the elements."<sup>45</sup> After identifying the reasonable insured person's definition for *in the open*, the Superior Court then analyzed the dictionary definition of *open*.<sup>46</sup> It recognized that *Random House Webster's College Dictionary* defined *open* as "the open air or the outdoors."<sup>47</sup>

After defining both *in the open* and *open*, the court applied those definitions to the facts of Victory Peach's case.<sup>48</sup> It held that because "the damaged property was located in the interior of the building, it was not left 'in the open.'"<sup>49</sup> However, the court did note that the motor inn's interior and contents would not have been covered by the insurance policy if they were damaged because the roof contained "a gaping hole which exposed the interior of the building openly to the elements."<sup>50</sup>

iv. *Significance of Victory Peach Group, Incorporated v. Greater New York Mutual Insurance Company*

The *Victory Peach* decision is significant for four main reasons. First, unlike the *North Texas* decision, which took a factual analysis of the phrase *in the open*, the *Victory Peach* decision provided more legal analysis. Albeit two sentences, the court's analysis noted that Victory Peach's property was not *in the open* because it was not "left exposed to the elements."<sup>51</sup> Second, the *Victory Peach* court was the first court to analyze *in the open* by using a reasonable person or reasonable insured's interpretation of it.<sup>52</sup>

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New York on September 16, 1996. *Id.* If the court had not vacated the default judgment, Victory Peach would have received a judgment of \$205,847.60 plus \$53,545.74 added pre-judgment interest. Because the judgment was vacated, Victory Peach only received a total judgment of \$126,215.07. *Id.*

43. *See id.* at 1387.

44. *See id.* at 1385-86.

45. *Victory Peach Grp., Inc.*, 707 A.2d. at 1386.

46. *See id.*

47. *Id.* (quoting THE RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 947 (1991)).

48. *See id.*

49. *Id.*

50. *Victory Peach Grp., Inc.*, 707 A.2d at 1386.

51. *Id.*

52. *See id.* at 1385-86.

Third, the *Victory Peach* decision, like *North Texas*, identifies what should be considered *in the open*. For instance, according to *Victory Peach*, property is *in the open* if: (1) it was left exposed to the elements; (2) it was exposed to the open air; (3) it was exposed to the outdoors; or (4) it was not located inside a building.<sup>53</sup>

Fourth, the *Victory Peach* decision showed the primary reason courts have incorrectly interpreted *in the open*. For example, in *Victory Peach*, the court analyzed the phrase *in the open* as being synonymous with the term *open*. More specifically, when defining *in the open*, the Superior Court of New Jersey used definitions for two separate forms of speech. First, the court defined the phrase *in the open*, which is the noun form of speech. Second, the court defined the term *open*, which is the adjective form of speech.<sup>54</sup>

3. Roger Twenhafel d/b/a Consolidated Services v. State Auto Property and Casualty Insurance Company (2009)

*i. The Underlying Facts*

Roger Twenhafel (Twenhafel) owned Consolidated Services, a wood cabinet manufacturing company located in Murphysboro, Illinois.<sup>55</sup> His inventory, which primarily consisted of wood, was stored outside “under an industrial covering or tarp. The tarp was secured with six-by-six oak beams and large concrete blocks, which weighed about ninety pounds each, that were placed on top of the tarp.”<sup>56</sup> On September 22, 2006, a storm came through Murphysboro and blew the tarp, blocks, and beams off Twenhafel’s wood.<sup>57</sup> Consequently, the wood was damaged.<sup>58</sup>

After discovering the damaged wood, Twenhafel filed a claim with his insurance company, State Auto Property and Casualty Insurance Company (State Auto).<sup>59</sup> State Auto denied Twenhafel’s claim.<sup>60</sup> In denying the claim, State Auto referenced an exclusionary provision in Twenhafel’s policy that stated coverage would not be provided for “loss or damage caused

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53. *See id.* at 1386.

54. This issue is more thoroughly discussed and analyzed in Part III of this Article. Moreover, the different definitions for the adjective and noun form of *open* are listed in Appendix I and Appendix II.

55. *See Twenhafel v. State Auto Prop. & Cas. Ins. Co.*, 581 F.3d 625, 627 (7th Cir. 2009).

56. *Id.*

57. *See id.*

58. *See id.*

59. *See id.*

60. *See Twenhafel*, 581 F.3d at 627.

by or resulting from . . . [r]ain, snow, ice or sleet to personal property *in the open*.”<sup>61</sup>

*ii. The Procedural History*

After State Auto denied Twenhafel’s claim, he filed suit in the Circuit Court of Jackson County, Illinois.<sup>62</sup> State Auto had the case moved to federal court.<sup>63</sup> Once the case was in federal court, State Auto filed a motion for summary judgment on the issue of liability.<sup>64</sup> It argued Twenhafel’s wood inventory was not covered by the policy because rain damaged the wood while the wood was *in the open*.<sup>65</sup>

Twenhafel filed a motion for summary judgment on the issue of liability and damages.<sup>66</sup> In his motion, “Twenhafel asserted that the wood inventory was not ‘in the open’ because it was covered by an industrial tarp; therefore, he was entitled to coverage under the policy.”<sup>67</sup>

The district court agreed with Twenhafel and held the phrase *in the open* meant being “exposed to the elements with no protection at all.”<sup>68</sup> Thus, it ruled that since Twenhafel’s wood was covered by an industrial tarp, it was not *in the open*.<sup>69</sup> State Auto appealed.<sup>70</sup>

*iii. The Seventh Circuit Court of Appeals*

The Seventh Circuit Court of Appeals affirmed the district court’s decision.<sup>71</sup> It began its analysis by recognizing the court’s purpose in interpreting the insurance policy was to “give effect to the intentions of the parties as expressed by the language of the policy.”<sup>72</sup> In this case, the court noted that both Twenhafel and State Auto intended for any property loss to be covered by the policy, unless the loss was excluded under the policy’s

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61. *Id.* (emphasis added).

62. *See id.*

63. *See id.*

64. *See id.*

65. *See Twenhafel*, 581 F.3d at 627.

66. *See id.*

67. *Id.*

68. *Id.* at 628.

69. *See id.* The district court allowed Twenhafel’s motion for summary judgment and awarded him \$81,678 plus prejudgment interest, post-judgment interest, and court costs. *Id.*

70. *See Twenhafel*, 581 F.3d at 628.

71. *See id.* at 630.

72. *Id.* at 629 (quoting *BASF AG v. Great Am. Assurance Co.*, 522 F.3d 813, 819 (7th Cir. 2008) (quoting *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 860 N.E.2d 307, 314 (2006))).

exclusionary provision.<sup>73</sup> Under Twenhafel's policy's exclusionary provision, coverage was specifically prohibited for any property damaged while *in the open*.<sup>74</sup>

As the court noted, Twenhafel's insurance policy did not define the phrase *in the open*.<sup>75</sup> Thus, the court was left with the task of defining it. The court of appeals, like the district court, chose to apply the ordinary meaning of the phrase.<sup>76</sup> Hence, it defined *open* as "being left exposed to the elements or, in other words, being unprotected from the elements."<sup>77</sup> After identifying the meaning of *open*, the court then applied this definition to the facts of Twenhafel's case. It ruled that Twenhafel's wood inventory was not *in the open* "because it was securely covered by a tarp and not left exposed to the elements."<sup>78</sup>

The Seventh Circuit Court of Appeals also used its decision as an opportunity to address two of State Auto's main arguments.<sup>79</sup> First, State Auto argued that the court of appeals should not define *in the open* using its common meaning.<sup>80</sup> The court disagreed because it believed the phrase *in the open* was unambiguous.<sup>81</sup> Since the phrase was unambiguous, the court held it had no choice but to apply the common meaning.<sup>82</sup> In addition, the court of appeals also noted that if State Auto wanted the court to define *in the open* using a specific definition, State Auto should have defined *in the open* in the insurance policy itself.<sup>83</sup> Thus, as the court recognized, "State Auto, as the drafter of the policy, was in the best position to define what was meant by 'in the open' if it meant something other than the common or ordinary meaning."<sup>84</sup> Because State Auto chose not to define the phrase, it placed the court in the position of performing this task for it.

Second, State Auto argued the court should not analyze *in the open* as meaning "exposed to the elements" because this definition would not consider the "adequacy of the protection."<sup>85</sup> For instance, State Auto believed that, under this definition, wood covered in newspaper would not be considered *in the open*.<sup>86</sup> The court of appeals disagreed.<sup>87</sup> It stated, "a reason-

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73. See *id.*

74. See *id.*

75. See *Twenhafel*, 581 F.3d at 629.

76. See *id.*

77. *Id.*

78. *Id.* at 630.

79. See *id.* at 629-30.

80. See *Twenhafel*, 581 F.3d at 630.

81. See *id.* at 630.

82. See *id.*

83. See *id.*

84. *Id.*

85. *Twenhafel*, 581 F.3d at 630.

86. See *id.*

able person would not think that newspapers would protect property from exposure to the elements.”<sup>88</sup>

*iv. Significance of Roger Twenhafel d/b/a Consolidated Services v. State Auto Property and Casualty Insurance Company*

The *Twenhafel* case essentially held that *in the open* means being outside while exposed to the elements. Interestingly, the *Twenhafel* court was the only court that provided a solution to this interpretation problem. More specifically, the *Twenhafel* court informed insurance companies they could avoid this problem by defining *in the open* in the insurance policy itself.<sup>89</sup>

B. INTERPRETING *IN THE OPEN* TO INCLUDE INSURANCE COVERAGE

I. QBE Specialty Insurance Company v. FSI, Incorporated (2011)

*i. The Underlying Facts*

FSI is a North Carolina company that “provides intermodal storage for loaded and empty intermodal shipping containers.”<sup>90</sup> In July 2009, someone broke into one of FSI’s shipping containers.<sup>91</sup> As a result of the break in, 1,920 computer monitors were stolen.<sup>92</sup> After discovering the theft, FSI filed a claim with its insurance carrier, QBE Specialty Insurance Company (QBE).<sup>93</sup>

QBE denied FSI’s claim.<sup>94</sup> In denying the claim, QBE referenced a provision of FSI’s insurance policy that stated QBE would provide coverage for the “[p]ersonal property of others *in the open*.”<sup>95</sup> QBE believed that since the monitors were inside shipping containers, they were not *in the open* and, thus, not covered by the policy.<sup>96</sup>

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87. *See id.*

88. *Id.*

89. *See id.*

90. *See* QBE Specialty Ins. Co. v. FSI, Inc., 2011 U.S. Dist. LEXIS 47042, at \*1-2 (W.D.N.C. May 2, 2001).

91. *See id.* at \*3.

92. *See id.*

93. *See id.*

94. *See id.* at \*1.

95. *QBE Specialty Ins. Co.*, 2011 U.S. Dist. LEXIS 47042, at \*4 (emphasis added).

96. *See id.* at \*5.

ii. *The Procedural History*

QBE filed a motion for summary judgment and a motion for judgment on the pleadings because it believed the commercial property coverage provision of FSI's insurance policy did not require it to cover the stolen monitors.<sup>97</sup> FSI disagreed and filed a counterclaim seeking coverage.<sup>98</sup>

iii. *The District Court for the Western District of North Carolina*

The district court began its analysis by noting that *in the open* was not defined in FSI's insurance policy.<sup>99</sup> Since *in the open* was not defined in the policy, the court used the phrase's ordinary meaning, which it obtained from *Merriam-Webster's Online Dictionary* (Merriam-Webster).<sup>100</sup> It found that Merriam-Webster defined *open* as "'having no enclosing or confining barrier: accessible on all or nearly all sides' and also as 'completely free from concealment: exposed to general view or knowledge.'"<sup>101</sup>

The district court noted that neither of these definitions supported FSI's belief that its items were *in the open*.<sup>102</sup> It held that "the stolen cargo was locked inside a large intermodal shipping container, which was locked, sealed, and weather-tight."<sup>103</sup> Additionally, the court believed the monitors were in an enclosed barrier and inaccessible because they were located in a locked container.<sup>104</sup> Moreover, since the monitors were in a sealed container, the court did not believe they were "'exposed to general view or knowledge.'"<sup>105</sup>

iv. *Significance of QBE Specialty Insurance Company v. FSI, Incorporated*

The *QBE* analysis of *in the open* parallels the Seventh Circuit Court of Appeals's analysis of the phrase. For instance, like *Twenhafel*, the court used a dictionary definition of the term *open* and applied that definition to the facts of the underlying case. Like the *Victory Peach* decision, the *QBE* court also incorrectly interpreted *in the open* by analyzing the phrase as

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97. *See id.* at \*1.

98. *See id.*

99. *See id.* at \*7.

100. *QBE Specialty Ins. Co.*, 2011 U.S. Dist. LEXIS 47042, at \*7.

101. *Id.* (citing *Open—Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/open> (last visited Mar. 4, 2012)). In addition, the *QBE* court noted this definition had been used by several different courts.

102. *See id.* at \*8.

103. *Id.*

104. *See id.*

105. *QBE Specialty Ins. Co.*, 2011 U.S. Dist. LEXIS 47042, at \*8.

being synonymous with the term *open*. For instance, the court used a definition for the adjective form of *open* to analyze an insurance policy that used the noun form of speech (i.e., *in the open*).

### III. ANALYSIS

#### A. INSURANCE POLICY INTERPRETATION

Generally, insurance policies are interpreted using the ordinary rules of contractual interpretation.<sup>106</sup> Under these rules, courts perform specific steps to determine the meaning of an insurance policy's word or phrase. First, the court determines if the insurance policy's word or phrase is either ambiguous or unambiguous.<sup>107</sup> A phrase or word is deemed ambiguous if it is subject to "support[ing] two meanings, one favorable to the insurer, and

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106. See *Yalter v. Endocare, Inc.*, 412 Fed. App'x 24, 25 (9th Cir. 2011) (citing *Bank of the West v. Superior Court*, 833 P.2d 545 (Cal. 1992)) ("Under California law, insurance policies are interpreted using the ordinary rules of contract construction."); *Leprino Foods Co. v. Factory Mut. Ins. Co.*, 653 F.3d 1121, 1127 (10th Cir. 2011) (quoting *Allstate Ins. Co. v. Huizar*, 52 P.3d 816, 819 (Colo. 2002)) ("Under Colorado law, insurance policies are interpreted 'consistently with the well-established principles of contractual interpretation.'"); *Douglas S. v. Altius Health Plans, Inc.*, 409 Fed. App'x 219, 223 (10th Cir. 2010) (citing *Quaid v. U.S. Healthcare, Inc.*, 158 P.3d 525, 527 (Utah 2007)) ("Utah law has made clear that insurance policies are read as contracts."); *Rainbow USA, Inc. v. Nutmeg Ins. Co.*, 612 F. Supp. 2d 716, 725 (E.D. La. 2009) ("[B]oth New York and Louisiana law require that insurance policies be interpreted in accordance with the rules for interpreting contracts in general."); *Sims v. Mulhearn Funeral Home, Inc.*, 956 So.2d 583, 594 (La. 2007) (citing *LeBlanc v. Aysenne*, 921 So.2d 85, 89 (La. 2006)) ("The rules of contractual interpretation do not permit courts to interpret an insurance policy in an unreasonable manner to enlarge its provisions beyond what is reasonably contemplated by its terms or to achieve an absurd conclusion."). The author recognizes that insurance policy interpretation is a matter of state law. In addition, the author also recognizes that not all courts follow the specific steps identified in this portion of the Article.

107. See *Sheridan v. Nationwide Ret. Solutions, Inc.*, 313 Fed. App'x 615, 619 (4th Cir. 2009) ("[T]he first step . . . is to determine whether, as a matter of law, the contract is ambiguous or unambiguous on its face."); *Walsh v. Nelson*, 622 N.W.2d 499, 503 (Iowa 2001) ("[T]he court determines whether a disputed term is ambiguous."); *Schroeder v. Bd. of Supervisors of La. State Univ.*, 591 So.2d 342, 345 (La. 1991) (quoting *Savoie v. Fireman's Funds Ins. Co.*, 347 So.2d 188, 191 (La. 1977) ("[W]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made."); *Yogman v. Parrott*, 937 P.2d 1019, 1021 (Or. 1997) ("If the provision is clear, the analysis ends.").

the other favorable to the insured.”<sup>108</sup> In contrast, a term or phrase is unambiguous if it has a clear, identifiable interpretation.<sup>109</sup>

If the court finds the policy’s word or phrase is ambiguous, it must proceed to the subsequent step of defining the word or phrase. When defining the word or phrase, the court must interpret the provision “‘as understood by an ordinary person, not by one engaged in the insurance business.’”<sup>110</sup> In other words, under this step, the court interprets the provision as a reasonable insured person would interpret it.<sup>111</sup>

If the court finds the policy’s language is unambiguous, it will not have to perform the subsequent step of defining the language. Instead, the court will enforce the insurance policy as written and adopted by both the insurer and insured.<sup>112</sup> In other words, unambiguous terms are given their “plain and ordinary meaning.”<sup>113</sup> Courts typically reference the dictionary to determine a word’s or phrase’s plain and ordinary meaning.<sup>114</sup>

108. *Foodtown, Inc. v. Nat’l Union Fire Ins. Co.*, 412 Fed. App’x 502, 504 (3d Cir. 2011) (quoting *Mazzilli v. Accident & Cas. Ins. Co. of Winterthur, Switz.*, 170 A.2d 800, 803 (N.J. 2011)); *Royal Ins. Co. of Am. v. KSI Trading Corp.*, 563 F.3d 68, 74 (3d Cir. 2009); *Terra Nova Ins. Co. v. Fray-Witzer*, 869 N.E.2d 565, 573 (Mass. 2007).

109. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”); *Anderson v. Hess Corp.*, 649 F.3d 891, 897 (8th Cir. 2011) (“[T]he language of a contract governs its interpretation if the language is clear and unambiguous.”).

110. *Dish Network Corp. v. Arch Specialty Ins. Co.*, 659 F.3d 1010, 1016 (10th Cir. 2011) (quoting *Allstate Ins. Co. v. Juniel*, 931 P.2d 511, 516 (Colo. App. 1996)). *See also Charter Oil Co. v. Am. Emp’rs’ Ins. Co.*, 69 F.3d 1160, 1165 (D.C. Cir. 1995) (quoting *Robin v. Blue Cross Hosp. Serv., Inc.*, 637 S.W.2d 695, 698 (Mo. 1982)) (“[T]he language of an insurance policy is to be given ‘the meaning that would ordinarily be understood by the layman who bought and paid for the policy.’”); *Nat’l Union Fire Ins. Co. v. Maune*, 277 S.W.3d 754, 757 (Mo. Ct. App. 2009) (citing *Bowan ex rel. Bowan v. Gen. Sec. Indemn. Co. of Ariz.*, 174 S.W.3d 1, 8 (Mo. Ct. App. 2005)) (“In determining whether the language used in the policy is ambiguous, we consider the language in light of the meaning that would normally be understood by the layperson who bought and paid for the policy.”).

111. *See Charter Oil Co.*, 69 F.3d at 1165.

112. *See Chevron*, 467 U.S. at 842-43; *Anderson*, 649 F.3d at 897.

113. *St. Paul Fire & Marine Ins. Co. v. Lewis*, 935 F.2d 1428, 1431 (3d Cir. 1991) (“[I]f the phrase is not ambiguous, it must be given its plain meaning.”); *Jefferson Block 24 Oil & Gas, L.L.C. v. Aspen Ins. UK Ltd.*, 652 F.3d 584, 590 (5th Cir. 2011) (quoting *Show Car Speed Shop, Inc. v. U.S. Fid. & Guar. Co.*, 596 N.Y.S. 2d 608, 609 (N.Y. App. Div. 1993)) (“[C]lear and unambiguous terms of an insurance policy must be given their plain and ordinary meaning.”); *Levy v. Minn. Life Ins. Co.*, 517 F.3d 519, 523 (7th Cir. 2008) (citing *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1212 (Ill. 1992)) (“We construe the policy as a whole, giving unambiguous words their plain, ordinary, and popular meaning.”).

114. *See Twenhafel v. State Auto Prop. & Cas. Ins. Co.*, 581 F.3d 625 (7th Cir. 2009); *QBE Specialty Ins. Co. v. FSI, Inc.*, No. 3:09cv435, 2011 U.S. Dist. LEXIS 47042, \*1-2 (W.D.N.C. May 2, 2011); *Victory Peach Grp., Inc. v. Greater N.Y. Mut. Ins. Co.*, 707 A.2d 1383 (N.J. Super. Ct. App. Div. 1998).

In the context of interpreting *in the open*, courts have consistently ruled the phrase is unambiguous.<sup>115</sup> Hence, when interpreting the phrase, the courts have relied on its plain and ordinary meaning.<sup>116</sup>

1. *Using the Correct Form of Speech: In the Open Is Synonymous with Being Outdoors*

The primary reason courts have misinterpreted *in the open* is because they have interpreted the phrase using the wrong part of speech. More specifically, some of the courts that have analyzed the phrase incorrectly interpreted *open*'s adjective part of speech instead of the noun part of speech.<sup>117</sup> In fact, in these cases, the plain language of the policies either included or excluded coverage for items left *in the open*, not *open* property. Hence, in these insurance policies, *in the open* was used to identify a location and not provide a description of the property.

Under the noun form of *open*, it is identified as being synonymous with outdoors.<sup>118</sup> Indeed, not only does Merriam-Webster recognize the noun form of *open* as being synonymous with outdoors, but also nature, open air, and wilderness.<sup>119</sup> In addition to being synonymous with outdoors, Merriam-Webster also provides a list of words related to the noun form of *open*.<sup>120</sup> For example, *open* is related to terms such as outside, backwoods, and frontier.<sup>121</sup>

Merriam-Webster does not identify a definition for the noun form of *open*. However, there is a definition for one of its synonyms, outdoors. Specifically, Merriam-Webster defines outdoors as “a place or location away from the confines of a building.”<sup>122</sup> Thus, because outdoors is defined as being located away from a building and because the noun form of *open* is synonymous with outdoors, *in the open* should also be interpreted as meaning being located outside a building. This should be the definition for *in the*

115. *Victory Peach Grp., Inc.*, 707 A.2d at 1386; *Twenhafel*, 581 F.3d at 630. The author also agrees that the term *in the open* is unambiguous.

116. *Victory Peach Grp., Inc.*, 707 A.2d at 1386; *Twenhafel*, 581 F.3d at 630.

117. See *Twenhafel*, 581 F.3d at 625; *QBE Specialty Ins. Co.*, 2011 U.S. Dist. LEXIS 47042, at \*1; *Victory Peach Grp., Inc.*, 707 A.2d at 1383.

118. See *Open—Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/open> (last visited Mar. 4, 2012) [hereinafter *Open—Definition*, MERRIAM-WEBSTER.COM]. The complete definition for *open*'s noun part of speech (in the *open*) can be found in Appendix I.

119. See *id.*

120. See *id.*

121. See *id.*

122. *Outdoors—Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/outdoors> (last visited Mar. 4, 2012) (defining outdoors as “a place or location away from the confines of a building”).

*open*, irrespective of whether the property is protected or unprotected from the elements.

## 2. *Open as an Adjective*

Instead of interpreting the noun form of *open*, courts have chosen to interpret the adjective part of speech.<sup>123</sup> According to Merriam-Webster, there are over twenty different definitions for *open*'s adjective part of speech.<sup>124</sup> However, only four of those definitions are relevant to this issue. Under those four definitions, *open* is defined as: (1) "having no enclosing or confining barrier: accessible on all or nearly all sides"; (2) "completely free from concealment: exposed to general view or knowledge"; (3) "not covered with a top, roof, or lid"; and 4) "having no protective covering."<sup>125</sup> The following subsections will analyze these definitions and identify the reasons they support the argument that *open* property refers to property left outside irrespective of whether the property is exposed to the elements.

### *i. "Having No Enclosing or Confining Barrier: Accessible on All or Nearly All Sides"*

Under Merriam-Webster's first definition, *open* is defined as "having no enclosing or confining barrier: accessible on all or nearly all sides."<sup>126</sup> This definition supports the notion that property wrapped in protective covering, but stored outside a building, is not *open* property. First, items stored outside a building are neither located within a confined barrier nor inaccessible. For instance, according to Merriam-Webster, an item is confined if it is enclosed by *borders* or *walls*.<sup>127</sup> Hence, under this definition, confined means being located behind a physical structure that makes the property inaccessible. Items stored outside a building are neither enclosed behind a physical barrier nor inaccessible.

One could argue that, under this definition, property is *open* if it is stored behind an insured's wall, but outside a building. However, this interpretation ignores the formatting of this definition. For example, Merriam-Webster's use of the colon essentially equates "having no enclosing or con-

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123. Several of these courts have consistently used the adjective form of speech found in Merriam-Webster.

124. See *Open—Definition*, MERRIAM-WEBSTER.COM, *supra* note 118. The complete definition for *open*'s adjective part of speech can be found in Appendix II.

125. *Id.*

126. *Id.*

127. See *Confine—Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/confine> (last visited Mar. 4, 2012) (defining *confine* as "something [as borders or walls] that encloses").

fining barrier” with being “accessible on all or nearly all sides.”<sup>128</sup> Thus, to be considered *open*, property must have no confining barrier or accessibility. Property stored outside a building, regardless of whether it is located behind a wall, would be *open* because it is accessible to the public.

The court in *QBE* recognized the parallel between being accessible and having an enclosing barrier. In that case, the court refused to find that items stored in locked, sealed, and weather-tight intermodal containers were *in the open* because “the goods were contained in an ‘enclosing or confining barrier’ and inaccessible ‘on all sides.’”<sup>129</sup>

ii. “Exposed or Vulnerable to Attack or Question”

Under Merriam-Webster’s third definition, *open* is defined as being “exposed or vulnerable to attack or question.”<sup>130</sup> Property left outside, even if wrapped within a protective covering, is either exposed or vulnerable to attack. Indeed, in a number of cases that have addressed this issue, the property left outside was attacked by the elements. For example, in *North Texas*, the galvanized metal sheets, which were wrapped in polyethylene and stored outside, were attacked by a storm.<sup>131</sup>

Similarly, in *Twenhafel*, the wood inventory, which was wrapped in industrial tarp then secured with oak beams, concrete blocks, and stored outside, was also attacked by a storm.<sup>132</sup> In both cases, the items were vulnerable to attack because the storms damaged them. In contrast, in *QBE*, the stolen computer monitors were neither exposed nor vulnerable to attack since they were located in a large locked and sealed shipping container.<sup>133</sup>

iii. “Not Covered with a Top, Roof, or Lid”

Merriam-Webster’s fourth definition is separated into two subparts. The first subpart defines *open* as “not covered with a top, roof, or lid.”<sup>134</sup> Under this definition, property simply left outside would be considered *open* property. In fact, the first subpart makes being covered with a “top,

128. *Open—Definition*, MERRIAM-WEBSTER.COM, *supra* note 118.

129. *QBE Specialty Ins. Co. v. FSI, Inc.*, No. 3:09cv435, 2011 U.S. Dist. LEXIS 47042, at \*8, \*13 (W.D.N.C. May 2, 2001).

130. *Open—Definition*, MERRIAM-WEBSTER.COM, *supra* note 118.

131. *N. Tex. Constr. Co. v. U.S. Fire Ins. Co.*, 485 S.W.2d 389, 390 (Tex. App. 1972).

132. *See Twenhafel v. State Auto Prop. & Cas. Ins. Co.*, 581 F.3d 625, 627 (7th Cir. 2009).

133. *See QBE Specialty Ins. Co.*, 2011 U.S. Dist. LEXIS 47042, at \*1-2.

134. *Open—Definition*, MERRIAM-WEBSTER.COM, *supra* note 118.

roof, or lid” a prerequisite to not being *open*.<sup>135</sup> Thus, if property is not covered or protected by a “top, roof, or lid,” it is *open*.<sup>136</sup>

Interestingly, even though this definition appears to directly address this issue, the courts have routinely failed to analyze it in any of their decisions. Instead, the courts have chosen to solely analyze the definition found in the second subpart.

*iv. “Having no Protective Covering”*

Under the fourth definition’s second subpart, *open* is defined as “having no protective covering.”<sup>137</sup> At initial glance, this definition would seem to indicate that property with some type of protective covering, such as polyethylene wrapping, should not be considered *open* property. However, the second subpart is not a definition by itself. Instead, it is grouped with the first subpart, which defines *open* as “not covered with a top, roof, or lid.”<sup>138</sup> If the second subpart directly follows a definition that includes words synonymous with enclosure, it would only be logical to interpret the terms “protective covering” as also being synonymous with enclosure. Thus, “protective covering” should be interpreted as being synonymous with not having a “top, roof, or lid.”<sup>139</sup> While inconsistent with prior court interpretations of it, this definition would be consistent in finding *open* refers to property left outside and not within some type of enclosed structural building.

IV. A SIMPLE SOLUTION TO A SIMPLE PROBLEM

As author of the insurance policy, an insurance company has to ensure that any ambiguous terms or phrases are defined in the insurance policy itself. Failure to do so can lead to disastrous results. In fact, by defining the ambiguous terms or phrases in the policy, the insurance company avoids having the courts do so. This simple step could save the insurance company thousands or even millions of dollars.

V. CONCLUSION

Overall, for over forty years, courts have consistently misinterpreted *in the open*. This misinterpretation can easily be remedied by either the insurance companies or the courts. For instance, insurance companies could de-

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135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Open—Definition*, MERRIAM-WEBSTER.COM, *supra* note 118.

fine *in the open* within their insurance policies. This would avoid having the court perform this task. In addition, courts could help resolve this issue by interpreting *open*'s correct part of speech. In other words, courts must begin interpreting *open*'s noun part of speech instead of the adjective part of speech. If either the courts or insurance companies do not change their approach to this issue, *in the open* will continue to be misinterpreted for another forty years.

## APPENDICES

### APPENDIX I: Definition of Open's Noun Part of Speech<sup>140</sup>

#### Definition of OPEN

- 1 : opening
- 2 : open and unobstructed space: as
  - a : open air
  - b : open water
- 3 : an open contest, competition, or tournament
- 4 : a public or unconcealed state or position

#### Examples of OPEN

- <a daguerreotype of a cowboy whose face is roughened from a hard life in the open>

#### First Known Use of OPEN: 13th century

#### Related to OPEN

Synonyms: nature, open air, outdoors, out-of-doors, wild, wilderness

Related Words: backwoods, bush, country, frontier, hinterland, sticks, up-country, outside, without, badland, barren, desert, waste, wasteland

### APPENDIX II: Definition of Open's Adjective Part of Speech<sup>141</sup>

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140. *Id.*

141. *Id.*

Definition of *OPEN*

**1** : having no enclosing or confining barrier: accessible on all or nearly all sides <cattle grazing on an *open* range>

**2 a (1)** : being in a position or adjustment to permit passage: not shut or locked <an *open* door> **(2)** : having a barrier (as a door) so adjusted as to allow passage <the house was *open*>

**b** : having the lips parted <stood there with his mouth wide *open*>

**c** : not buttoned or zipped <an *open* shirt>

**3 a** : completely free from concealment: exposed to general view or knowledge <their hostilities eventually erupted with *open* war>

**b** : exposed or vulnerable to attack or question: **Subject** <*open* to doubt>

**c** : being an operation or surgical procedure in which an incision is made such that the tissues are fully exposed

**4 a** : not covered with a top, roof, or lid <an *open* car> <her eyes were *open*>

**b** : having no protective covering <*open* wiring> <an *open* wound>

**5** : not restricted to a particular group or category of participants <*open* to the public> <*open* housing>: as

**a** : enterable by both amateur and professional contestants <an *open* tournament>

**b** : enterable by a registered voter regardless of political affiliation <an *open* primary>

**6** : fit to be traveled over: presenting no obstacle to passage or view <the *open* road> <*open* country>

**7** : having the parts or surfaces laid out in an expanded position: spread out: Unfolded <an *open* book>

**8 a (1)** : Low **13 (2)** : formed with the tongue in a lower position <Italian has an *open* and a close *e*>

**b (1)** : having clarity and resonance unimpaired by undue tension or constriction of the throat <an *open* vocal tone> **(2) of a tone**: produced by an open string or on a wind instrument by the lip without the use of slides, valves, or keys

**9 a** : available to follow or make use of <the only course *open* to us>

**b** : not taken up with duties or engagements <keep an hour *open* on Friday>

**c** : not finally decided : subject to further consideration <the salary is *open*> <an *open* question>

**d** : available for a qualified applicant: Vacant <the job is still *open*>

**e** : remaining available for use or filling until canceled <an *open* order for more items>

**f** : available for future purchase <these items are in *open* stock>

**g** : available for breeding : not now pregnant <an *open* heifer>

**h** : not proprietary: available to third party developers <*open* source code>

**10 a** : characterized by ready accessibility and usually generous attitude: as **(1)** : generous in giving **(2)** : willing to hear and consider or to accept and deal with: Responsive **(3)** : free from reserve or pretense: Frank

**b** : accessible to the influx of new factors (as foreign goods)  
<an *open* market>

**11 a** : having openings, interruptions, or spaces <*open* mesh>: as  
**(1)** : being porous and friable <*open* soil> **(2)** : sparsely distributed:  
Scattered <*open* population> **(3) of a compound**: having components  
separated by a space in writing or printing (as *opaque projector*)

**b** : not made up of a continuous closed circuit of channels  
<the insect circulatory system is *open*>

**12 a** : *of an organ pipe*: not stopped at the top *b of a string on a  
musical instrument* : not stopped by the finger

**13** : being in operation <an *open* microphone>; *especially*: ready  
for business, patronage, or use <the store is *open* from 9 to 5> <the  
new highway will be *open* next week>

**14 a (1)** : characterized by lack of effective regulation of various  
commercial enterprises <an *open* town> **(2)** : not repressed by legal  
controls <*open* gambling> **b** : free from checking or hampering re-  
straints <an *open* economy> **c** : relatively unguarded by opponents  
<passed to an *open* teammate>

**15** : having been opened by a first ante, bet, or bid <the bidding is  
*open*>

**16** : *of punctuation*: characterized by sparing use especially of the  
comma

**17 a** : containing none of its endpoints <an *open* interval> *b*: be-  
ing a set or composed of sets each point of which has a neighborhood  
all of whose points are contained in the set <the interior of a sphere is  
an *open* set>

**18 a** : being an incomplete electrical circuit

**b** : not allowing the flow of electricity <an *open* switch>

**19** : *of a universe*: having insufficient mass to halt expansion  
gravitationally

### Examples of OPEN

- The door suddenly swung *open*.
- You left the blinds **wide open**.
- The meat was roasted over an *open* fire.
- I was so tired that I couldn't keep my eyes *open*.
- Don't chew with your mouth *open*.
- staring with her eyes **wide open**
- There's already an *open* jar of pickles in the refrigerator.
- They kept the road *open* throughout the winter.

### Origin of *OPEN*

Middle English, from Old English; akin to Old High German *offan* open, Old English *ūp* up

**First Known Use:** before 12th century

Related to OPEN

**Synonyms:** Clear, cleared, free, unclogged, unclosed, unobstructed, unstopped