**STATE OF MICHIGAN**
**IN THE COURT OF APPEALS**

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| GAVRILIDES MANAGEMENT COMPANY LLC, GAVRILIDES PROPERTY MANAGEMENT LLC, and GAVRILIDES MANAGEMENT WILLIAMSTON LLC, | CASE NO. 354418 |
| Plaintiffs-Appellants, | |
| v. | Lower Court Case No. 20-258-CB-C30 |
| MICHIGAN INSURANCE COMPANY, | HON. JOYCE DRAGANCHUK |
| Defendant-Appellee. | |

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**UNITED POLICYHOLDERS' MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS**

Pursuant to Mich. Ct. R. 7.212(H), *Amicus Curiae* United Policyholders ("UP") respectfully moves the Court to grant it leave to file the *amicus curiae* brief in support of Plaintiffs-Appellants, attached hereto as **Exhibit 1**.[1] In support of this motion, UP states:

[1] Pursuant to Mich. Ct. R. 7.212(H)(3), the undersigned certifies to this Court that no portion of the proposed *amicus curiae* brief has been prepared by counsel for any party herein and that no party herein has contributed financially to its preparation.

## MOVANT'S INTEREST

1. UP is a non-profit 501(c)(3) organization founded in 1991 whose mission is to serve as a trustworthy and useful information resource and as an effective voice for a broad range of insurance policyholders in Michigan and throughout the United States. Because UP routinely assists and informs individual and commercial policyholders with regard to every type of insurance product and the overall insurance claim process, it has a special interest in the orderly development of Michigan's insurance law.

2. UP assists and informs disaster victims and individual and commercial policyholders with regard to every type of insurance product. Grants, donations and volunteers support UP's work. UP does not accept funding from insurance companies.

3. UP's work is divided into three program areas: (1) Roadmap to Recovery™ (helping individuals and businesses understand their rights and options during the insurance claim and loss recovery process); (2) Roadmap to Preparedness (promoting financial and insurance literacy and disaster preparedness); and (3) Advocacy and Action (advancing pro-consumer laws and public policy). UP hosts a library of tips, sample forms and articles on commercial and personal lines insurance products, coverage and the claims process at www.uphelp.org.

4. State insurance regulators, academics and journalists throughout the U.S. routinely seek UP's input on insurance and legal matters. Since 2009, UP's Executive Director Amy Bach has served as an official consumer representative to the National Association of Insurance Commissioners. UP routinely works with insurance regulators, including the Michigan Department of Insurance and Financial Services and Director Anita J. Fox, on matters that impact policyholders.

5. UP seeks to assist courts as *amicus curiae* in trial court and appellate proceedings throughout the United States, including the Michigan Supreme Court, particularly in cases involving insurance principles that are likely to impact large segments of the public. UP has appeared as *amicus curiae* in the Michigan Supreme Court in *Cello-Foil Products, Inc. v. Michigan Mutual Liability Co.*, No. 104107 (1997), and in a number of cases before the United States Court of Appeals for the Sixth Circuit involving issues of Michigan insurance law, the latest being *Estate of Rochow v. Life Insurance Co. of North America*, No. 12-2074 (2014). A complete listing of all cases in which UP has appeared as *amicus curiae* can be found in our online *Amicus* Project library at www.uphelp.org.

**REASONS FOR GRANTING UP LEAVE TO FILE *AMICUS CURIAE* BRIEF**

6. UP has a special interest in the informed resolution and orderly development of Michigan's insurance law, particularly where, as here, insurance coverage claims related to SARS-CoV-2 and COVID-19 (the disease caused by infection of SARS-CoV-2) have flooded the courts and threaten to adversely impact the rights of policyholders in Michigan (and nationwide) if not thoroughly and sufficiently considered. UP believes the attached *amicus curiae* brief will significantly assist this Court by highlighting two historical points that may arise in the course of this Court's deliberations.

7. First, UP tracks how insurance industry commentators, *before* the wave of lawsuits filed by policyholders for loss from SARS-CoV-2 and associated orders of Civil Authority, misrepresented the state of the law. Contrary to their assertions, the strong majority of courts in March 2020 had found that events which rendered property unfit for its intended use caused "loss" and "damage" to that property. Second, UP analyzes the primary authority relied upon by courts which have concluded that policyholders have not sufficiently pleaded "physical

loss of" their property as a result of orders of Civil Authority issued as a result of SARS-CoV-2 and COVID-19. UP shows that such authority makes an inaccurate conclusion based upon a very skewed and partial survey of existing case law.

8. In addition to the foregoing, UP has a keen interest in preserving the integrity of the process by which insurance companies obtain regulatory approval for the standard insurance policy forms they sell, because policyholders, nationwide, rely upon regulators to protect their interests by making informed decisions on what language the regulators will permit insurance companies to use in their forms and how much they can charge for those forms. Regulators are the only party with any opportunity to negotiate the content of standard forms and the rates which insurance companies can charge for those forms; policyholders are offered the approved forms on a take-it-or-leave-it basis. UP seeks to preserve the integrity of the regulatory and insurance-buying processes by ensuring this Court has full information about the regulatory process, both in general and with specific reference to the standard-form Virus or Bacteria Exclusion.

9. UP believes the attached *amicus curiae* brief will significantly assist this Court by providing it with the full factual history and context of the drafting and regulatory approval of the Virus or Bacteria Exclusion. Resolution of the issues raised in this Appeal will affect not only the parties, but Michigan policyholders generally, and, indeed, all policyholders nationally whose policies contain this standard-form exclusion. As this Court is no doubt aware, insurance companies nationwide are arguing that they have no obligation to pay any claims for loss and damage arising from COVID-19 because all potential coverage is barred by the same Virus or Bacteria Exclusion at issue in the Appeal. It is thus critical that, in ruling on the Appeal, this Court has the full factual record before it.

10. Pursuant to Mich. Ct. R. 7.212(H), UP respectfully requests the Court grant it leave to file an *amicus curiae* brief narrowly focused on the aforementioned issues.

**CONCLUSION**

UP and the nationwide policyholders whose interests it represents have a vital interest in this proceeding due to the importance of the issues discussed above. Because of its unique perspective on insurance issues, UP's proposed *amicus curiae* brief will assist the Court in weighing considerations that are relevant to the disposition of this Appeal.

WHEREFORE, UP respectfully moves this Court to grant it leave to file the proposed *amicus curiae* brief in support of Plaintiffs-Appellants, attached hereto as **Exhibit 1**.

Dated: February 16, 2021

Respectfully submitted,

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# EXHIBIT 1

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# BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFFS-APPELLANTS

Dated: February 16, 2021

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## STATEMENT OF INTEREST OF AMICUS CURIAE

United Policyholders ("UP") is a non-profit 501(c)(3) organization founded in 1991 whose mission is to serve as a trustworthy and useful information resource and as an effective voice for a broad range of insurance policyholders in Michigan and throughout the United States. Because UP routinely assists and informs individual and commercial policyholders with regard to every type of insurance product and the overall insurance claim process, it has a special interest in the orderly development of Michigan's insurance law.

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involving insurance principles that are likely to impact large segments of the public. UP has appeared as *amicus curiae* in the Michigan Supreme Court in *Cello-Foil Products, Inc. v. Michigan Mutual Liability Co.*, No. 104107 (1997), and in a number of cases before the United States Court of Appeals for the Sixth Circuit involving issues of Michigan insurance law, the latest being *Estate of Rochow v. Life Insurance Co. of North America*, No. 12-2074 (2014). A complete listing of all cases in which UP has appeared as *amicus curiae* can be found in our online *Amicus* Project library at www.uphelp.org.

## INTRODUCTION

UP files this brief to give this Court further context in relation to four issues relevant to the arguments raised by Michigan Insurance Company ("MIC") in the Defendants-Appellees' Brief on Appeal ("MIC's Brief").

As an initial matter, UP discusses how this case – heard on a non-existent record on an extremely rushed timeline – is not the proper vehicle for ruling on insurance coverage issues affecting many thousands of Michigan policyholders.

The next two issues relate to the case law concluding that events similar to the impact of SARS-CoV-2 virions (an infective virus outside of a host cell) or closures by Civil Authorities as a result of damage by those virions cause "physical loss of or damage to property" or "physical loss" to property, upon which UP highlights two historical points that may arise in the course of this Court's deliberations. First, UP tracks how insurance industry commentators, *before* the wave of lawsuits filed by policyholders for loss from SARS-CoV-2 and associated orders of Civil Authority, misrepresented the state of the law. Contrary to their assertions, the strong majority of courts in March 2020 had found that events which rendered property unfit for its intended use caused "loss" and "damage" to that property. Second, UP analyzes the primary authority – 10A COUCH ON INSURANCE § 148:46 (2005) – relied upon by courts which have

concluded that policyholders have not sufficiently pleaded "physical loss of" their property as a result of orders of Civil Authority issued as a result of SARS-CoV-2 and COVID-19 (the disease caused by infection of SARS-CoV-2). UP shows that COUCH makes an inaccurate conclusion based upon a very skewed and partial survey of existing case law. UP submits that the insurance industry's early public propaganda, and the unsupportable conclusion of COUCH, have led to a number of poorly-reasoned decisions upon which MIC relies.

The fourth issue involves the application of a Virus or Bacteria Exclusion, which was drafted by insurance industry drafting organizations, the Insurance Service Office, Inc. ("ISO") and the American Association of Insurance Services ("AAIS"). In 2006, after the industry paid out millions of dollars for loss and damage arising from the SARS coronavirus in 2002-2003, ISO and AAIS sought and obtained regulatory approval for their member insurance companies to include this exclusion in their standard-form property insurance policies. UP addresses whether, when ISO and AAIS averred to regulators that property insurance policies had not historically been a source of cover for "disease-causing agents," this amounted to a misrepresentation that estops the industry from enforcing the Virus or Bacteria exclusion. UP shows that ISO and AAIS have admitted the obvious point that, as insurance industry drafting organizations, it is their job to monitor developments in the common law, and therefore that they clearly knew at the time of their representations to regulators that: (i) there were eighteen decisions finding that the presence and impacts of disease-causing agents amounts to physical loss of or damage to property; and (ii) there were no contrary decisions.

## I. THIS CASE IS NOT THE PROPER VEHICLE TO RULE ON AN ISSUE THAT WILL AFFECT THOUSANDS OF MICHIGAN BUSINESSES.

The issues in this case may have a significant impact on Michigan policyholders and should be decided on a full record, in which the parties have equality of arms. This case does not

present such a record and thus should be remanded to the Circuit Court for development of the full factual and legal background which will level the playing field and permit both parties to make full and fair presentations of their case. This is critical not only to the policyholder in this case but the thousands of Michigan policyholders affected by the Circuit Court's rush to judgment.

There is no evidentiary record in this case, and there has been no discovery and thus no possibility for the policyholder to investigate and present evidence of the actual intent of MIC and the insurance industry as to the meaning of "direct physical loss of or damage to property." As discussed immediately below, the law on this issue had been clear, finding that events that render property unfit for its intended use cause physical loss or damage to that property, regardless of whether the conditions cause the need for repair or replacement, and regardless of whether those events can be "cleaned up."

Part of what a policyholder purchases with an insurance policy is the right to a good faith investigation by insurance company claims adjusters who are charged with fairly considering and applying the facts to the policy language at issue. The policyholder did not get to explore in discovery whether and how MIC adjusters conducted that investigation. Further, Gavrilides did not get to explore MIC's positions as to how its policy language – which has existed virtually unchanged for the decades in which courts have found it applied to conditions like the widespread presence of SARS-CoV-2 prompting Civil Authority orders – applied here. Gavrilides did not get the chance to explore MIC's reasons for interpreting its standard-form policy language in a manner different from how it has been interpreted by courts for decades.

Further, unlike many policyholders in Michigan, Gavrilides initially stated that it did not allege the presence of SARS-CoV-2 virions on its premises. Gavrilides has since sought to

amend its complaint, based on the evolving understanding of SARS-CoV-2 and COVID-19, to allege the presence of the virus, but this amendment was not allowed by the Circuit Court. In cases where policyholders allege the presence of SARS-CoV-2 virions, courts have concluded those virions do cause "physical loss of or damage to property."[1] Further, even those courts ruling against policyholders in cases like this one have distinguished their case from those ruling for the policyholder because there was no allegation that SARS-CoV-2 virions were present.[2] UP suggests that this case, as the pleadings now stand, is not an appropriate vehicle to make a broad proclamation on the physical loss issue, because the (current) allegations of Gavrilides are not typical: SARS-CoV-2 virions are ubiquitous in many areas of the United States and most policyholders are alleging the obvious point that those virions were present on their property.

Beyond this, the policyholder in this case did not get an adequate opportunity to investigate the origins of the "Exclusion of Loss Due to Virus or Bacteria" drafted by ISO and AAIS. As this Court is no doubt aware, most insurance policies – including MIC – employ standard property insurance forms and sell them on a take-it-or-leave-it basis, without any ability of the policyholder to negotiate or explore with the insurance company at the point of sale what the policy language means. The only negotiation occurs at the time that insurance industry drafting organizations such as ISO and AAIS present their standard forms to regulators to seek their approval. At that point, ISO and AAIS makes representations to the regulators as to the coverage provided by their current standard form, the changes proposed for the new standard

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[1] See, for example, the cases cited by Gavrilides: *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, No. 20-CV-00383-SRB, 2020 WL 5637963, at *4 (W.D. Mo. Sept. 21, 2020); *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127, 2020 WL 4692385, at *4-5 (W.D. Mo. Aug. 12, 2020).

[2] See, for example, a case cited by MIC: *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-cv-22615, 2020 WL 5051581, at *7 (S.D. Fla. Aug. 26, 2020).

form, and whether those changes are a clarification of coverage – and thus should not affect premium rates – or a contraction or even an expansion of coverage – and thus should affect premium rates. Regulators have the power to reject changes or increase rates on the basis of what ISO and AAIS represent to them.

To be absolutely clear, this is the only time that there is any "negotiation" of the content of standard-form language. Policyholders like Gavrilides buy standard forms, like the "Exclusion of Loss Due to Virus or Bacteria," with its ISO 2006 copyright and form number in the footer. Accordingly, what ISO, on behalf of MIC, represented to regulators to ensure regulatory approval is the equivalent of a representation by MIC directly to Gavrilides. And here, MIC misrepresented the effect of the "Exclusion of Loss Due to Virus or Bacteria," and as with any misrepresentation in the negotiation of any contract, there must be consequences: MIC must be estopped from relying on the exclusion. Gavrilides, however, in an oral argument on July 1, 2020 three months after it filed its complaint, did not have sufficient time to propound and review discovery and develop the record of the representations that bind MIC.

Additionally, although the insurance industry attempts to present a narrative that there is a solitary and ubiquitous "virus exclusion" used in all property damage/business interruption insurance policies, in fact not all policies contain the ISO exclusion discussed above. Although many policies contain the ISO "virus exclusion," many policies have different versions of a "virus exclusion" (or no "virus exclusion" at all). For this additional reason, this Court should not reach broad and overarching conclusions or generalized decisions concerning the application of "virus exclusions" to SARS-CoV-2 and COVID-19 insurance coverage claims. The availability of coverage must be determined on a case-by-case and policy-by-policy basis, based

on the factual record developed in each case and the specific policy language at issue in each case.

This case as it presently stands is not the right vehicle to reach issues that could dramatically affect the rights of thousands of Michigan businesses. This Court should remand this case to permit what is common in the normal course of insurance coverage disputes: the full development of the factual record to level the playing field and ensure a judgment on a full record for this Court's review. To the extent the Court decides to resolve this case on its merits, its holding should be narrowly tailored to the record and pleadings in this case and the particular policy language at issue in this case.

## II. FROM THE INCEPTION OF THE COVID-19 PANDEMIC, THE INSURANCE INDUSTRY GROSSLY MISREPRESENTED THE STATE OF THE LAW ON WHAT COURTS HAVE FOUND CONSTITUTES PHYSICAL LOSS OR DAMAGE.

The authority upon which MIC relies in arguing that Gavrilides' business did not suffer physical loss of or damage to its property is made up of two types of cases. First, it consists of cases that accepted what was very much a minority position in the United States prior to March 2020. Second, it consists of cases addressing this issue in relation to orders of Civil Authority issued as a result of COVID-19 that accepted insurance industry misrepresentations of that authority, along with a treatise, COUCH, which likewise accepts the minority, pro-insurance industry position.

### A. In March 2020, the Insurance Industry Misrepresented the State of the Law as to the Meaning of "Physical Loss or Damage" and "Physical Loss of or Damage."

Early in the COVID-19 pandemic, insurance industry lawyers and advocates went on the offensive, stating in numerous newspapers, journals and columns that the presence or suspected presence of SARS-CoV-2 did not constitute "physical loss or damage" to property under

property insurance policies. Some analogized the situation to "a spilled cup of coffee waiting to be wiped up"[3] or a dirty car in need of a wash.[4] Citing the same eight cases over and over, they argued because COVID-19 can be "easily cleaned" with a "Clorox wipe" and otherwise "self destructs," there can be no loss or damage to property.[5] They further argued this is obvious, and that "[a]nyone with even a basic understanding of insurance knows that no mainstream insurance policy is ***intended*** to respond to potentially catastrophic pandemics."[6] As shown below, this position was in direct conflict with the common law.

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[3] Michelle Bernhard, *et al.*, "Coronavirus Is Not a Direct Physical Loss Triggering Event," Law360 (Apr. 6, 2020).

[4] Bill Wilson, "Commentary: Does Business Income Insurance Cover Coronavirus Shutdowns?" Insurance Journal (Mar. 24, 2020) ("If someone's vehicle is dirty, would the owner consider filing an auto insurance physical damage claim, or would he or she simply wash the vehicle?").

[5] Michelle Bernhard, *et al.*, "Coronavirus Is Not a Direct Physical Loss Triggering Event," Law360 (Apr. 6, 2020) ("[T]he truth seems to be stretched by the claims that the possible presence of an easily cleaned virus damaged the restaurant sufficiently to trigger coverage for business interruption at the plaintiffs' restaurant."); Bill Wilson, "Here We Go Again: Another Unsubstantiated and Unsupported Accusation" (Apr. 7, 2020) ("There is substantial case law holding that physical damage requires more than the mere presence of a substance, especially one that consists largely of only short-term surface contamination that effectively self-destructs, leaving zero residual property damage."); Shannon O'Malley, "Commercial Property Insurance Coverage and Coronavirus," Zelle LLP (Mar. 11, 2020) ("The fact that the virus may be cleaned without essentially altering the property is evidence that there is no initial damage."); Heidi Hudson Raschke & Amanda Proctor, " Business Interrupted: Policyholders seek to Avoid the 'Direct Physical Loss or Damage" Requirement for Business Interruption Insurance in the Wake of the COVID-19 Pandemic," Property Casualty Focus (Mar. 27, 2020) ("[T]he surfaces where the virus might be can be cleaned. Something that can be easily wiped off the surface of property is insufficient to trigger coverage under property policies."); Bill Wilson, "Commentary: Does Business Income Insurance Cover Coronavirus Shutdowns?" Insurance Journal (Mar. 24, 2020) ("Does the mere presence of a substance on the surface of property, especially that which can be removed with a Clorox wipe, constitute 'direct physical loss?'").

[6] Bill Wilson, "Here We Go Again: Another Unsubstantiated and Unsupported Accusation" (Apr. 7, 2020).

### B. The Status of the Law in March 2020: Events Rendering Property Unsafe or Unfit for Its Intended Use Caused "Loss" or "Damage."

As of March 2020, when the COVID-19 pandemic struck the United States and consequent orders of Civil Authority started to affect businesses, there had been about forty-three cases addressing the issue of whether unusual circumstances – *i.e.*, circumstances other than a fire or a tornado or a collapse – caused "physical loss or damage" or "physical loss of or damage to" property. Of those cases, the strong majority – thirty-five of those forty-three cases – found for the policyholder.

#### 1. Property Insurance Protects Against Events that Render Property Unsafe to Inhabit or Use.

As an initial matter, courts had found physical loss or damage to property which was simply too unsafe to inhabit. For instance, in *Hughes v. Potomac Insurance Co.*,[7] the court found that policyholder's home, which became perched on the edge of a cliff after a sudden landslide caused a large chunk of the ground surrounding their property to fall into a creek, depriving the home of lateral support and stability, was damaged because it became unsafe to live in and thus useless to the owners.[8]

Similarly, in *Murray v. State Farm Fire & Casualty Co.*,[9] the policyholder sought coverage for the complete loss of its home after continued occupancy in it was rendered dangerous by the presence of falling rocks under a policy providing coverage for "direct physical loss to the property." The court rejected the insurance companies' argument that, while their

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[7] 18 Cal. Rptr. 650 (Cal. App. 1962).

[8] *Id.* at 655 (emphasis added); *see also Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986) (finding policyholder could claim Business Income coverage where risk of collapse necessitated abandonment of grocery store).

[9] 509 S.E.2d 1 (W. Va. 1998).

policies were obligated to cover actual physical damage from falling rocks, they did not "cover any losses occasioned by the potential damage that could be caused by future rockfalls."[10]

In *Manpower Inc. v. Insurance Co. of the State of Pennsylvania*,[11] the policyholder owned two adjacent buildings, but occupied only one of them. The building it did not occupy partially collapsed; but this collapse did not cause any noticeable damage to the policyholder's occupied space.[12] In the coverage action, the court first rejected the insurance company's argument that "because the collapse damaged only the area of the building around the courtyard and parking structure and not [the policyholder's] leased office space, it did not cause 'direct physical loss… or damage to' [the policyholder's] 'interest' in the building."[13]

Accordingly, events, like the presence or suspected presence of SARS-CoV-2, which make it too dangerous to use property as it was designed to be used, cause physical loss or damage to that property.

**2. Property Insurance Protects Against Temporarily Unsafe Conditions Rendering Property Uninhabitable or Unusable.**

Even a temporary condition impacting a property's safety or function can cause "physical loss or damage." In *Gregory Packaging, Inc. v. Travelers Property Casualty Co.*,[14] there was a large release of ammonia at a plant at which the policyholder manufactured juice cups. The plant was evacuated and the ammonia was remediated over the course of the next week, during which time the plant was "physically unfit for normal human occupancy and continued use."[15]

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10 *Id.* at 17 (emphasis added).

11 No. 08C0085, 2009 WL 3738099 (E.D. Wis. Nov. 3, 2009).

12 *Id.* at *1.

13 *Id.* at *3.

14 No. 2:12-cv-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014).

15 *Id.* at *2-3.

The court concluded that "property can sustain physical loss or damage without experiencing structural alteration,"[16] that "the ammonia release physically transformed the air within [the plant] so that it contained an unsafe amount of ammonia," that "the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated," and therefore that the ammonia discharge caused direct physical loss or damage to the plant.[17]

In *Western Fire Insurance Co. v. First Presbyterian Church*,[18] at issue was "whether the insured suffered a 'direct physical loss'" where "the insured acting upon the orders of the Littleton Fire Department closed the church building 'because of the infiltration of gasoline in the soil under and around the building, which gasoline and vapors thereof infiltrated the foundation and halls and rooms of the church building, making the same uninhabitable and making the use of the building dangerous.'"[19] The policyholder sought coverage for the costs of remedying the infiltration, and the court rejected the insurance company's argument that the church had suffered no direct physical loss.[20]

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16 *Id.* at *5.

17 *Id.* at *6; *see also Travco Ins. Co. v. Ward*, No. 2:10cv14, 2010 WL 2222255, at *8-9 (E.D. Va. June 3, 2010) (finding that house built with Chinese drywall which emitted toxic gases, causing the policyholder to move out, had suffered direct physical loss, despite the fact that it was "physically intact, functional and ha[d] no visible damage," noting the majority of cases nationwide find that "*physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces*") (emphasis added).

18 437 P.2d 52 (Colo. 1968).

19 *Id.* at 53-54.

20 *Id.* at 55 (emphasis added); *see also Matzner v. Seaco Ins. Co.*, No. 96-0498-B, 1998 WL 566658, at *4 (Mass. Super. Aug. 12, 1998) (concluding that the phrase "direct physical loss or damage" was ambiguous and could mean either "only tangible damage to the structure of insured property" or "more than tangible damage to the structure of insured property," and that "carbon monoxide contamination constitutes 'direct physical loss of or damage to' property"); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, No. 9400837, 1996 WL 1250616, at *2 (Mass. Super. Mar. 15, 1996) (finding oil fumes present in house after discovery of oil leak constituted physical damage to the house); *Hetrick v. Valley Mut. Ins Co.*, 15 Pa. D. & C. 4th 271, 1992 WL 524309, at *3

In *Oregon Shakespeare Festival Association v. Great American Insurance Co.*,[21] the policyholder cancelled several performances at its outdoor theatre because of dangerous levels of smoke and ash caused by numerous nearby fires. The policyholder made a claim for lost Business Income which was denied on a number of grounds, but primarily because the loss was not caused by "physical loss or damage to the theatre."[22] In the coverage case, the policyholder argued that "the wildfire smoke caused injury or harm to the interior of the theatre, which includes the air within the theatre."[23] The court first rejected the insurance company's argument that "air is not 'property'": "The policy itself does not give any indication that the air within a covered building cannot suffer contamination or infiltration such that 'physical loss of or damage to property' exists."[24] Next the court rejected the insurance company's argument that "the loss or damage must be *physical*" finding it did "not give a sufficient explanation for which air is not physical": "Certainly, air is not mental or emotional, not is it theoretical."[25] Third, the court rejected the insurance company's argument that "in order to be 'physical,' the loss or damage must be *structural* to the building itself," finding the insurance company "does not provide any evidence from within the policy to show that the plain meaning of the term 'physical' includes such a limitation."[26] Fourth, the insurance company argued that the smoke from the fires did not

(Pa. Comm. Pl. May 28, 1992) (finding that there would be coverage for loss of use of a house if an outside oil spill made the house uninhabitable).

21 No. 1:15-cv-01932-CL, 2016 WL 3267247 (D. Or. June 7, 2016).

22 *Id.* at *5.

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

require any "structural" "repairs" to the theatre, and thus there was no Period of Restoration."[27] The court rejected this, finding that dissipation of the smoke took several days, and that it was not a plausible reading of the policy to add the word "structural."[28]

Simply put, the court rejected insurer arguments that natural dissipation of smoke over time disproves coverage. The same would be true for the temporary presence of ammonia, oil fumes, or carbon monoxide. In other words, insurance industry advocates seeking to minimize COVID-19 losses are wrong when they claim that "in order to constitute 'direct physical' damage, *there must be some permanency and not just a temporary impairment*."[29]

### 3. Property Insurance Protects Against Property Affected by Actual and Suspected Dangerous Conditions.

Obviously, contamination can also constitute "physical loss or damage," and given the points above concerning property deemed too dangerous to use, so can suspected contamination. In *Stack Metallurgical Services, Inc. v. Travelers Indemnity Co. of Connecticut*,[30] the policyholder was engaged in the heat treating of metal parts used as implanted medical devices. By mistake, one of its workers left a lead hammer in a heat treater, which contaminated the unit (and the products it treated) with lead; contamination which was not discovered for some time.[31] The insurance company resisted payment of Business Income overage on the ground that the treater suffered no "physical loss or damage," which the court rejected: "There is no question that the physical transformation of the furnace which rendered it useless for processing medical

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27 *Id.* at *5-6.

28 *Id.* at *6.

29 Bill Wilson, "Commentary: Does Business Income Insurance Cover Coronavirus Shutdowns?" Insurance Journal (Mar. 24, 2020).

30 No. 05-1315, 2007 WL 464715 (D. Or. Feb. 7, 2007).

31 *Id.* at *1.

devices, the use for which it was specially certified, reduced both the value of the furnace and [the policyholder's] ability to derive business income from the furnace. This reduction of value was caused by an incident that is fairly characterized as "direct physical damage."[32] Again, property which cannot be used for its intended purpose has suffered physical loss or damage.[33]

In *American Alliance Insurance Co. v. Keleket X-Ray Corp.*,[34] the policyholder manufactured instruments used in measuring radioactivity, whose operations were interrupted by an incident which caused radioactive dust and radon gas to completely infuse the factory. The radiation affected much stock, made the building unsafe to work in, and made it impossible to calibrate the instruments prior to sale because of the background radiation. The trial court first concluded that the plant had suffered property damage, and that this property damage was the cause of the policyholder's loss of Business Income, and the Court of Appeal rejected the insurance companies' challenge to this finding on appeal.[35]

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32 *Id.* at *8.

33 *See*, *e.g.*, *Cyclops Corp. v. Home Ins. Co.*, 352 F. Supp. 931, 937 (W.D. Pa. 1973) (finding policyholder entitled to coverage for loss of Business Income where vibration of motor, without apparent damage, caused it to be shut down); *Azalea, Ltd. v. American States Ins. Co.*, 656 So. 2d 600, 602 (Fla. Dist. Ct. App. 1995) (finding that where policyholder operated a mobile home park at which vandals damaged the sewage treatment plant by adding chemicals that destroyed a bacteria colony necessary for the plant to operate, this amounted to "direct damage to the structure"); *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 968 A.2d 724 (N.J. Super. App. Div. 2009) (finding, in Service Interruption case, "[w]e conclude that the undefined term 'physical damage' was ambiguous and that the trial court construed the term too narrowly, in a manner favoring the insurer and inconsistent with the reasonable expectations of the insured. In the context of this case, the electrical grid was 'physically damaged' because, due to a physical incident or series of incidents, the grid and its component generators and transmission lines were physically incapable of performing their essential function of providing electricity.").

34 248 F.2d 920 (6th Cir. 1957).

35 *Id.* at 925.

Similar holdings were reached involving properties impacted by an array of conditions such as bacteria,[36] brown recluse spiders,[37] arsenic,[38] mold,[39] lead and asbestos.[40]

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[36] *Cooper v. Travelers Indem. Co.*, No. C-01-2400, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002) (finding policyholder could make claim for Business Income and Extra Expense loss from presence of E. coli bacteria); *see also Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 827 (3d Cir. 2005) (considering an infestation of a home with E coli bacteria, the court held that "a genuine issue of fact whether the functionality of the [policyholder's] property was nearly eliminated or destroyed, or whether their property was made useless or uninhabitable," and thus reversed the lower court's ruling in favor of the insurance company).

[37] *Cook v. Allstate Ins. Co.*, No. 48D02-0611-PL-01156, slip op. at 6-8 (Ind. Super. Nov. 30, 2007) (finding that infestation of house with Brown Recluse Spiders constituted "sudden and accidental direct physical loss" to the house: "The Court also finds that the undisputed evidence demonstrates a 'sudden and accidental direct physical loss' as a matter of law…. Case law demonstrates that a physical condition that renders property unsuitable for its intended use constitutes a 'direct physical loss' even where some utility remains and, in the case of a building, structural integrity remains").

[38] *Association of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1068 (D. Hawai'i Apr. 9, 2013) (applying Hawai'i law) (finding that intrusion of arsenic into roof from leaking water caused "direct physical loss or damage" to the roof, finding that "[d]amage" meant "[l]oss or injury to a person or property," "direct loss" meant "a loss that results immediately and proximately from an event," "immediate" meaning "[h]aving a direct impact; without an intervening agency," and "[p]hysical" meaning " of or relating to natural or material things," and "[m]aterial" meaning "[o]f or relating to matter; physical," and concluding that "[b]ased on these terms, [the policyholder] must demonstrate that an event had a direct impact and proximately caused a loss related to the physical matter of the Property," and the "concrete slab, carpet, and interior objects are physical matter within the ordinary use of those words").

[39] *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *8-*9 (D. Or. June 18, 2002) (concluding that mold damage to house which caused policyholder to abandon house and personal property could constitute "distinct and demonstrable" damage, sufficient to constitute "direct" and "physical" loss, and citing *First Presbyterian Church* and *Matzner* for the proposition that inability to inhabit a building may constitute "direct, physical loss"); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. 98-434-HU, 1999 WL 619100, at *7-*8 (D. Or. Aug. 4, 1999) (finding that policyholder could bear its burden to demonstrate that clothes impregnated with mold or mildew suffered "direct physical loss or damage" if it established "at trial a class of garments which has increased microbial counts and that will, as a result, develop either an odor or mold or mildew"); *De Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 722-23 (Tex. App. Mar. 31, 2005) (finding mold damage constituted "physical loss to property," and defining "loss" to mean "the act of losing or the thing lost; it is not a word of limited, hard and fast meaning and has been synonymous with or equivalent to, 'damage'" and noting "[a] physical loss is simply one that relates to natural or material things").

### 4. Property Insurance Protects Against Conditions and Damage That Can Be Cleaned Up or Repaired.

Contrary to the chorus of insurance industry commentators, conditions which can be easily cleaned can cause physical loss or damage, just as property that can be repaired can be damaged. Indeed, the insurance company in *Brand Management, Inc. v. Maryland Casualty Co.*,[41] where a sushi manufacturer which closed for 15 days to disinfect its premises after discovery of listeria, voluntarily paid the Business Income claim during that period.

Similarly, in *Schlamm Stone & Dolan, LLP v. Seneca Insurance Co.*,[42] the policyholder alleged that dust, soot and smoke in its law firm after the attacks of September 11, 2011 affected its operations for the balance of the month of September. The court found that "the central question before the court on this portion of plaintiff's claims is whether 'property damage' as used in the Policy includes noxious particles in an insured premises," and held that such particles

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40 *Yale Univ. v. CIGNA Ins. Co.*, 224 F. Supp. 2d 402, 413 (D. Conn. 2002) (finding while the presence of asbestos and lead in buildings did not constitute "physical loss of or damage to property," contamination by such materials could, citing "the substantial body of case law" "in which a variety of contaminating conditions have been held to constitute 'physical loss or damage to property'"); *Board of Educ. v. International Ins. Co.*, 720 N.E.2d 622, 625-26 (Ill. App. 1999) (citing liability insurance coverage cases finding that incorporation of asbestos into buildings caused "property damage," defined under liability policies to be "physical injury to or destruction of tangible property," and finding that, for purposes of summary judgment, the policyholder had established that the asbestos fiber contamination constituted Property Damage); *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 825-26 (Minn. 2000) (considering asbestos contamination of carpeting and other surfaces in apartment building and holding (1) "even though 'asbestos contamination does not result in tangible injury to the physical structure of the building, a building's function may be seriously impaired or destroyed and the property rendered useless by the presence of contaminants,' thereby satisfying the definition of direct physical loss"; and (2) "[a] principal function of any living space [is] to provide a safe environment for the occupants" and "[i]f rental property is contaminated by asbestos fibers and presents a health hazard to the tenants, its function is seriously impaired").

41 No. 05-cv-02293, 2007 WL 1772063, at *2 (D. Colo. June 18, 2007).

42 No. 603009/2002, 2005 WL 600021 (N.Y. Supr. Mar. 16, 2005).

constituted property damage under the policy.[43] Next, after initially noting that the policyholder did not own the air, and thus could not suffer property damage from particles in the air, the court observed that "the distinction between particles that have settled and particles suspended in the air raises serious problems in practical application"[44] Accordingly, the court concluded that "the presence of noxious particles, both in the air and on surfaces of the plaintiff's premises, would constitute property damage under the terms of the policy."[45]

Residue from cooking methamphetamine can be cleaned but courts have found it to be physical loss or damage. In *Farmers Insurance Co. v. Trutanich*,[46] at issue was whether losses caused by odor from an illegal methamphetamine lab caused "direct physical loss" to the policyholder's property. The court first rejected the insurance company's argument that odor was not "physical," noting that "odor was 'physical,' because it damaged the house."[47] Second, citing *First Presbyterian Church*, the court rejected the insurance company's argument the cost of removing the odor was not a "direct physical loss," stating "[t]here is evidence that the house was physically damaged by the odor that persisted in it," "the odor produced by the methamphetamine lab had infiltrated the house," and "[t]he cost of removing that odor was a direct rectification of the problem."[48]

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43 *Id.* at *4.

44 *Id.* at *5.

45 *Id.*

46 858 P.2d 1332 (Ore. App. 1993).

47 *Id.* at 1335.

48 *Id.*; *see also Largent v. State Farm Fire & Cas. Co.*, 842 P.2d 445, 446 (Or. App. 1992) (noting insurance company conceded odor caused by the operation of an illegal methamphetamine lab by the policyholder's tenants was within coverage of the property policy); *Graff v. Allstate Ins. Co.*, 54 P.3d 1266, 1267 (Wash. App. 2002) (noting and affirming trial court judgment that concluded that costs to replace carpet, paint and otherwise clean up

Courts have reached similar conclusions in cases involving odors.[49]

Now, in response to COVID-19 losses, when insurance industry commentators acknowledge these cases exist, they argue they support insurers' blanket approach to coverage denials because odor is a manifestation of damage.[50] This makes no sense. First, odorless substances like carbon monoxide or SARS-CoV-2 can be more dangerous than smelly drug residue. Second, is it not insurers' main objection that substances like viruses which can be removed by cleaning do not cause physical loss or damage?

In *In re Chinese Manufactured Drywall Products Liability Litigation*,[51] at issue were various homeowners' insurance claims for damages to homes from Chinese drywall which emitted sulfur gases causing foul odors and damaging electronic elements and devices in homes. The policies at issue provided coverage for "physical loss" or "direct physical loss," with some covering "sudden" and "accidental" "direct physical loss."[52] The insurance companies argued that the policyholders were not entitled to coverage because the drywall was not rendered

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methamphetamine residue after house was used as methamphetamine lab were covered under property insurance policy).

49 *Mellin v. Northern Sec. Ins. Co.*, 115 A.3d 799, 806 (N.H. 2015) (holding that pervasive odor of cat urine was "physical loss" to condominium); *Essex Ins. Co. v. Bloomsouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (holding, in a liability insurance case, that pervasive odor from installed carpet "can constitute physical injury to property").

50 *See*, *e.g.*, Shannon O'Malley, "Commercial Property Insurance Coverage and Coronavirus," Zelle LLP (Mar. 11, 2020) ("In the methamphetamine odor damage cases, the physical damage is demonstrated by the persistent, pervasive odor."); Bill Wilson, "Commentary: Does Business Income Insurance Cover Coronavirus Shutdowns?" Insurance Journal (Mar. 24, 2020) ("[T]here is some case law that supports an interpretation of 'direct physical loss' to include 'damage' that is not structural but could make the premises unfit for occupancy or functionality. However, a notable difference between those cases and the present one is that there was actually proof of some manifestation of at least and odor.").

51 759 F. Supp. 2d 822 (E.D. La. Dec. 16, 2010).

52 *Id.* at 830.

unsatisfactory by an "external event."[53] Citing a number of cases in this section, the court found that there "exists a covered physical loss" where "potentially injurious material" is "activated, for example by releases of gases or fibers."[54] Citing *Travco Insurance Co. v. Ward*,[55] the court concluded "that the presence of Chinese-manufactured drywall in a home constitutes a physical loss":

> Here, the Chinese-manufactured drywall is not merely laying dormant in the [policyholders'] homes, but rather is releasing elemental sulfur gases throughout the homes. Furthermore, the Chinese-manufactured drywall renders the [policyholders'] homes useless and/or uninhabitable due to the damage to the electrical wiring, appliances, and devices, as well as the ever-present sulfur gases. Thus, the factual situation is more akin to the latter cases, weighing in favor of coverage.[56]

#### 5. There Were Eight Cases Ruling Against Policyholders.

Against these thirty-five cases, carriers cite the same eight cases cited in MIC's brief.[57]

## III. COUCH ON INSURANCE MISREPRESENTED THE STATE OF THE CASE LAW

A large number of the decisions finding that policyholders have not alleged "physical loss or damage" or "physical loss of or damage to property" from the presence or suspected presence of SARS-CoV-2 and/or the COVID-19 pandemic – including a number of the cases

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53 *Id.*

54 *Id.* at 831.

55 No. 2:10cv14, 2010 WL 2222255, at *8-9 (E.D. Va. June 3, 2010).

56 759 F. Supp. 2d at 831.

57 *Mama Jo's, Inc. v. Sparta Ins. Co.*, 823 Fed. Appx. 686 (11th Cir. 2020) (dust); *Universal Image Prods., Inc. v. Chubb Corp.*, 475 Fed. App'x 569 (6th Cir. 2012) (mold); *Source Food Tech., Inc. v. U.S. Fid. & Guar.*, 465 F.3d 834 (8th Cir. 2006) (mad cow disease); *Pentair, Inc. v. Am. Guar. & Liab. Ins. Co.*, 400 F.3d 613 (8th Cir. 2005) (loss of power); *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2002) (encapsulated asbestos); *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323 (S.D.N.Y. 2014) (loss of power); *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 751 N.Y.S.2d 4 (N.Y. App. Div. 2002) (blocked access); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130 (Ohio App. 2008) (mold).

relied upon by MIC – expressly rely on a section of COUCH, titled "Generally; 'Physical' loss or damage." MIC relies upon this same section,[58] which provides:

> The requirement that the loss be "physical," given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.
>
> The opposite result has been reached, allowing coverage based on physical damage despite the lack of physical alteration of the property, on the theory that the uninhabitability of the property was due to the fact that gasoline vapors from adjacent property had infiltrated and saturated the insured building, and the theory that the threatened physical damage to the insured building from a covered peril essentially triggers the insured's obligation to mitigate the impending loss by undertaking some hardship and expense to safeguard the insured premises.[59]

Specifically, eight of MIC's cases cite this section,[60] and five other of MIC's cases apply the requirement of a "distinct, demonstrable, physical alteration of the property" set forth in COUCH.[61] These cases include the three upon which MIC relies at page 21 of its brief (*Kirsch*, *Hajer*, and *Mortar & Pestle*).

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58 MIC Brief, at 20.

59 10A COUCH ON INSURANCE § 148:46 (2005).

60 *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, Nos. 20-1949, 20-1869, 2020 WL 7395153, at *5 (E.D. Pa. Dec. 17, 2020); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.* No. 1:20-CV-665-RP, 2020 WL 7351246, at *5 (W.D. Tex. Dec. 14, 2020); *Richard Kirsch, DDS v. Aspen Am. Ins. Co.*, No. 20-11930, 2020 WL 7338570, at *4 (E.D. Mich. Dec. 14, 2020); *Hajer v. Ohio Security Ins. Co.*, No. 6:20-cv-00283, 2020 WL 7211636, at *2 (E.D. Tex. Dec. 7, 2020); *Dab Dental PLLC v. Main St. Am. Prot. Ins. Co.*, No. 20-CA-5504, 2020 WL 7137138, at *5 (Fla. Cir. Ct. Hillsborough Cnty. Nov. 10, 2020); *Hillcrest Optical, Inc. v. Continental Cas. Co.*, No. 1:20-CV-275-JB-B, 2020 WL 6163142, at *7 (S.D. Ala. Oct. 21, 2020); *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615, 2020 WL 5051581, at *5 (S.D. Fla. Aug. 26, 2020); *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020).

61 *Mortar & Pestle Corp. v. Atain Spec. Ins. Co.*, No. 20-cv-03461-MMC, 2020 WL 7495180, at *3 (N.D. Cal. Dec. 21, 2020); *Uncork & Create LLC v. Cincinnati Insurance Co.,* No. 2:20-cv-00401, 2020 WL 6436948 (S.D.W. Va. Nov. 2, 2020); *Mudpie, Inc. v. Travelers Cas. Ins. Co.*, No. 20-cv-03213-JST, 2020 WL 5525171, at *3 (N.D. Cal. Sept. 14, 2020); *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.*, No. 20-CV-907-CAB-BLM, 2020 WL

This passage in COUCH, however, grossly distorts the state of the case law. It heavily weights the pro-insurance industry cases (of which there were eight in March 2020) and does not mention the vast majority of the pro-coverage cases (of which there were thirty-five in March 2020). Specifically, COUCH cites three of the former (*Port Authority*, *Universal Image Productions* and *Newman Myers*) and three of the latter (*Chinese Drywall*, and *First Presbyterian Church* and *Hampton Foods*). These cases are neither representative of the common law as it existed in 2020, nor particularly on point in relation to the effect that thousands of SARS-CoV-2 virions and consequent orders of Civil Authority have on property.

## IV. TO PRESERVE THE INTEGRITY OF THE INSURANCE REGULATORY PROCESS, MIC MUST BE ESTOPPED FROM ENFORCING THE VIRUS OR BACTERIA EXCLUSIONS.

When ISO and AAIS drafted the Virus or Bacteria Exclusion in 2006, they were well aware that, historically, standard-form property policies covered loss and damage arising from all manner of disease-causing agents. Indeed, both organizations stated flatly in their filing memoranda on the Virus or Bacteria Exclusion that part of the services they provided to their member insurance companies was monitoring court decisions on insurance coverage. From 1957 through 2005, there had been nearly twenty decisions holding that standard-form property policies covered loss or damage from the presence of disease-causing agents. These drafting organizations further knew – because it was their job to know – that insurance companies had paid out millions of dollars for loss and damage arising from the SARS coronavirus in 2002-2003; indeed, industry coronavirus payouts motivated ISO and AAIS to draft the Virus or Bacteria Exclusion.

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5500221, at *5 (S.D. Cal. Sept. 11, 2020); *10E, LLC v. Travelers Indem. Co.*, No. 2:20-cv-04418-SVW-AS, 2020 WL 5359653, at *4 (C.D. Cal. Sept. 2, 2020).

Before their member-companies could sell policies containing the exclusion they drafted, however, ISO and AAIS had to secure approval of that exclusion from state regulators. In the course of so doing, ISO and AAIS, on behalf of their members, misrepresented to regulators that the Virus or Bacteria Exclusion was a *clarification* of coverage, because, according to ISO and AAIS, existing standard property forms did not cover loss from "disease-causing agents." This was not true and ISO and AAIS knew it was not true, but they also knew a "clarification" of coverage would draw less regulatory scrutiny and would not lead regulators to reduce premium rates. This gambit worked: regulators approved the new exclusion with no reduction in rates. The standard-form exclusion has since been sold by insurance companies (including MIC) to policyholders (including Gavrilides), with the latter having no further ability to negotiate its terms.

UP submits that, under basic contract law as applied to the unique manner in which insurance policy language is negotiated – *i.e.*, by regulators and drafting organizations – MIC must be estopped from relying on the Virus or Bacteria Exclusion.

### A. The Only Negotiation of Standard-Form Policies Drafted by Insurance Industry Ratings Organizations and Sold by Their Member Insurance Companies Occurs with State Insurance Regulators.

There are good commercial reasons for insurance companies to sell, and policyholders to buy, standard-form insurance policies. On the insurance company side, standard forms allow the ratings organizations to compile loss information nationwide, and permit insurance companies to evaluate risk. On the policyholder side, meaningful comparison of insurance products would not be possible if every insurance company sold different fifty-page forms. Further, both policyholders and insurance companies are well served by court decisions establishing the parameters of the coverage provided by standard-form insurance policies.

The process by which insurance industry drafting organizations draft and seek approval to sell standard-form insurance policy language is set forth in detail in *Morton International, Inc. v. General Accident Insurance Co.*, 629 A.2d 831 (N.J. 1993). First, the insurance industry will identify a change it wishes to make to standard forms, such as an exposure it wishes to exclude.[62] The insurance industry drafting organizations will draft the change.[63] The insurance industry drafting organizations will then seek regulatory approval, typically by submitting the same change and the same explanatory memorandum to each of the state regulators and meeting with individual regulators as necessary.[64] The insurance industry drafting organizations will then negotiate with the insurance regulators with regard to the changes they seek to make and whether those changes will require adjustment of rates.[65]

For present purposes, two points are critical. First, once approval is obtained, the standard form is sold throughout the United States, with no ability of individual policyholders to negotiate changes.[66] As *Morton* explained in relation to the insurance industry's efforts, through the Insurance Rating Board ("IRB") to add a pollution exclusion to the standard-form comprehensive general liability ("CGL") policy:

> In considering the IRB's explanatory memorandum concerning the effect of the pollution-exclusion clause which the record suggests was the only explanation offered to New Jersey insurance officials-we accord special significance to the process by which that clause gained approval in New Jersey and other states. Realistically, once the clause gained regulatory approval, it was uniformly adopted as an endorsement to the standard form CGL policies that were issued to innumerable commercial enterprises and governmental agencies for more than a decade. The abundant case law called to our attention by counsel for all parties

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62 *Id.* at 849-50.

63 *Id.* at 850.

64 *Id.* at 851.

65 *Id.* at 851-52.

66 *Id.* at 851.

> may be regarded merely as an illustrative sample of the virtually universal inclusion of the standard clause, or one of its derivatives, in CGL policies issued throughout the United States. *Of course, after regulatory approval the specific provisions of the pollution-exclusion clause ordinarily were not negotiable by purchasers of CGL policies.* As some commentators observe, the typical commercial insured rarely sees the policy form until after the premium has been paid. Ballard and Manus, supra, 75 Cornell L.Rev. at 621; W. David Slawson, Mass Contracts: Lawful Fraud in California, 48 S.Cal.L.Rev. 1, 12 (1974). *Accordingly, to the extent that the pollution-exclusion clause ever was subjected to arms-length evaluation by interests adverse to the insurance industry, that evaluation occurred only when the clause was submitted to and reviewed by state regulatory authorities.*[67]

Second, because the drafting organizations seek approval for a standard-form on behalf of all of their member companies for sale throughout the United States, statements by those drafting organizations to any regulator as to the content of the standard form bind all of the member companies everywhere. This is why the *Morton* court looked to what the IRB said on behalf of its members in New Jersey, Georgia, West Virginia, Kansas, Puerto Rico, etc.[68]

### B. The Insurance Industry Including ISO and AAIS Was Well Aware from 1957 Onward that Standard-Form Property Policies Covered Loss of Damage from the Presence of Disease-Causing Agents.

From 1957 through the eve of the introduction of the Virus or Bacteria Exclusion in 2005, courts in the United States construing standard-form first-party insurance policies such as that at issue in this case had found that the presence of disease-causing agents on property caused physical loss of or damage to property:

> E coli bacteria[69]

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67 *Id.* at 852-53 (emphasis added).

68 *See id.* at 851-54.

69 *Cooper v. Travelers Indem. Co.*, No. C-01-2400, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002); *see also Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 827 (3d Cir. 2005).

Radioactive dust.[70]

Noxious air particles[71]

Lead[72]

Asbestos[73]

Mold[74]

Mildew[75]

"[H]ealth-threatening organisms"[76]

Vaporized agricultural chemicals[77]

Pesticides[78]

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70 *American Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957)/

71 *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, No. 603009/2002, 2005 WL 600021, at *3-5 (N.Y. Sup. Mar. 16, 2005).

72 *Yale Univ. v. CIGNA Ins. Co.*, 224 F. Supp. 2d 402, 413 (D. Conn. 2002).

73 *Yale Univ. v. CIGNA Ins. Co.*, 224 F. Supp. 2d 402, 413 (D. Conn. 2002); *Board of Educ. v. International Ins. Co.*, 720 N.E.2d 622, 625-26 (Ill. App. 1999); *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 825-26 (Minn. 2000).

74 *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *8-*9 (D. Or. June 18, 2002); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. 98-434-HU, 1999 WL 619100, at *7-*8 (D. Or. Aug. 4, 1999).

75 *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. 98-434-HU, 1999 WL 619100, at *7-*8 (D. Or. Aug. 4, 1999).

76 *Pillsbury Co. v. Underwriters at Lloyd's, London*, 705 F. Supp. 1396, 1401 (D. Minn. 1989) (holding, where the policyholder experienced difficulties in destroying organisms in its creamed corn, which it was unable to solve, forcing it to destroy all cans of such corn, that the underprocessing of the cream-style corn was a loss covered by the policy; i.e., that the creamed corn had suffered physical loss or damage).

77 *Henri's Food Prods. Co. v. Home Ins. Co.*, 474 F. Supp. 889, 892 (E.D. Wis. 1979) (holding, where policyholder's salad dressings were seized by the government after they were contaminated by vaporized agricultural chemicals stored in the same warehouse which had become vaporized during storage, policyholder "incurred a loss since its products were injured").

78 *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. App. 2001).

This was no secret in the insurance industry; indeed, anyone reading one of these decisions would soon learn of the rest.[79]

It certainly was no secret to ISO and AAIS. Indeed, ISO and AAIS admit – in the very documents relevant to this case – that it was part of their responsibility to their member companies to monitor the common law on standard-form property insurance policies, and that this prompted them to draft changes to the standard forms:

> In addition, pollution exclusions are at times narrowly applied by certain courts. In recent years, ISO has filed exclusions to address specific exposures relating to contaminating or harmful substances. Examples are the mold exclusion in property and liability policies and the liability exclusion addressing silica dust. Such exclusions enable elaboration of the specific exposure and thereby can reduce the likelihood of claim disputes and litigation.[80]

Further, the insurance industry and the ratings organizations were well aware that policyholders had made successful claims for loss and damage from the presence of SARS coronavirus in the early 2000s; indeed, this was the primary motivation for ISO and AAIS to draft the Virus or Bacteria Exclusion in 2006.[81] As set forth in the Washington Post, in relation to coverage for COVID-19 claims:

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[79] For instance, *Western Fire Insurance Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (gasoline vapors) was subsequently cited by a host of other similar decisions. *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *8-9 (D. Or. June 18, 2002) (mold); *Matzner v. Seaco Ins. Co.*, No. 96-0498-B, 1998 WL 566658 (Mass. Super. Aug. 12, 1998) (carbon monoxide); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Ore. App. 1993) (methamphetamine fumes); *Hetrick v. Valley Mut. Ins. Co.*, 15 Pa. D. & C.4th 271, 1992 WL 524309, at *3 (Pa. Comm. Pl. May 28, 1992) (oil).

[80] ISO Circular, New Endorsements Filed To Address Exclusion of Loss Due to Virus or Bacteria, dated July 6, 2006 (filed in relation to the proposed Endorsement CP 01 40 07 06 - Exclusion Of Loss Due To Virus Or Bacteria), at 7 of 13 (attached hereto as **Exhibit A**) ("ISO Circular").

[81] Lucca de Paoli, *et al.*, "Insurance Unlikely to Cushion Coronavirus Losses – But There Are Exceptions," Insurance Journal (March 4, 2020) (attached hereto as **Exhibit B**).

> The forced closure of businesses nationwide because of the novel coronavirus would seem to be the perfect scenario for filing a "business interruption" insurance claim.
>
> But most companies will probably find it difficult to get an insurance payout because of policy changes made after the 2002-2003 SARS outbreak, according to insurance experts and regulators.
>
> SARS, which infected 8,000 people mostly in Asia and is now seen as foreshadowing the current pandemic, led to millions of dollars in business-interruption insurance claims. Among the claims was a $16 million payout to one hotel chain, Mandarin Oriental International.[82]

Not only did the insurance industry know that standard property insurance forms historically had responded to claims from disease-causing agents, it knew that members of the insurance industry had paid claims arising from a coronavirus when the industry sought regulatory approval for changes to its standard forms in 2006.

### C. The Insurance Industry Misled Regulators About Previously Existing Coverage for Virus Contamination Claims and Falsely Termed the Virus or Bacteria Exclusion a Clarification, Rather Than a Restriction, of Coverage.

ISO and AAIS represented hundreds of members or subscribing insurance companies in drafting and seeking approval for the new Virus or Bacteria Exclusion in 2006. On July 6, 2006, ISO submitted an ISO Circular announcing "the submission of forms filings to address exclusion of loss due to disease-causing agents such as viruses and bacteria."[83] In relevant part, ISO's circular states that (1) property policies had not historically been a source of cover for loss from "disease-causing agents"; but (2) ISO wanted to prevent efforts to "expan[d]" coverage contrary to policy intent:

> Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself

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82 Todd C. Frankel, "Insurers knew the damage a viral pandemic could wreak on businesses. So they excluded coverage," Washington Post (April 2, 2020) (attached hereto as **Exhibit C**).

83 ISO Circular, at 2 of 13 (attached hereto as **Exhibit A**).

> would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case. In addition, pollution exclusions are at times narrowly applied by certain courts. In recent years, ISO has filed exclusions to address specific exposures relating to contaminating or harmful substances. Examples are the mold exclusion in property and liability policies and the liability exclusion addressing silica dust. Such exclusions enable elaboration of the specific exposure and thereby can reduce the likelihood of claim disputes and litigation.
>
> *While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.*
>
> In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.[84]

In the same time period, AAIS's Filing Memorandum sent to state regulators likewise stated that (1) property policies had not been a source of recovery for loss or damage caused by disease-causing agents; and (2) the new exclusion was intended to "clarify policy intent":

> **Virus Or Bacteria Exclusion - Filing Memorandum**
>
> AAIS has developed and is filing a mandatory endorsement for use with the Commercial Properties Program. This new mandatory Virus Or Bacteria Exclusion, CL 0700, is described below.
>
> *Property policies have not been, nor were they intended to be, a source of recovery for loss, cost, or expense caused by disease causing agents.* With the possibility of a pandemic, there is concern that claims may result in efforts to expand coverage to create recovery for loss where no coverage was originally intended. *In light of this possibility, AAIS is filing a Virus Or Bacteria Exclusion that will specifically address virus and bacteria exposures and clarify policy intent.*
>
> This endorsement *clarifies* that loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress is excluded. Avian Flu, SARS, rotavirus, listeria, legionella, or

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[84] *Id.* at 7 of 13 (emphasis added).

anthrax are examples of disease or illness causing agents addressed by this exclusion but are by no means an exhaustive list.[85]

As shown above, it simply was not true for ISO or AAIS to assert in 2006 that property insurance policies had not been sources of recovery for loss and damage from disease-causing agents like viruses or bacteria. Further, given that the insurance industry had known this since 1957,[86] and had continued to sell insurance coverage with this knowledge and without any exclusion for disease-causing agents, it was likewise untrue for ISO and AAIS to assert these standard property insurance policies were never intended to be sources of recovery for such losses. ISO and AAIS inserted an exclusion for an existing exposure without drawing critical attention from regulators – the only persons who could meaningfully negotiate standard-form policy language – while simultaneously avoiding an enforced reduction in premiums or rates.

### D. Given the Insurance Industry's Misrepresentations, the Court Should Refuse to Permit MIC To Rely upon the Virus or Bacteria Exclusion.

In *Morton International Inc. v. General Accident Insurance Co.*, 629 A.2d 831 (N.J. 1993), the court held that the standard-form "sudden and accidental" to be clear and unambiguous, but barred insurance companies from relying upon it on the basis of misrepresentations it made to regulators. The *Morton* court examined the standard insurance industry explanatory memoranda submitted to state insurance regulators in 1970 concerning the scope of the so-called "sudden and accidental" polluters exclusion added in 1970 to the 1966 "occurrence" policy. The New Jersey Supreme Court determined that the insurance industry,

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[85] Property Lines - PA 10/06, Copyright, American Association of Insurance Services, Inc., 2006, filed in reference to CL 0700 10 06 (emphasis added) (attached hereto as **Exhibit D**). AAIS filed a similarly worded filing in relation to Businessowners' forms. *See* AAIS Businessowners Virus or Bacteria Exclusion, Businessowners – 10/06, filed in reference to BP 0850 10 06 (attached hereto as **Exhibit E**).

[86] The decisions finding coverage under standard-form property insurance policies date from 1957. *See Am. Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957).

through its agents, IRB and the Mutual Insurance Rating Bureau ("MIRB"), represented to state insurance regulators in 1970 that the "sudden and accidental" polluters exclusion merely clarified pre-existing insurance coverage. The Supreme Court found that in 1970 the insurance industry had failed to disclose its intent to restrict coverage for gradual pollution damage. The court determined that, "[h]aving profited from that nondisclosure by maintaining pre-existing rates for substantially-reduced coverage, the industry justly should be required to bear the burden of its omission by providing coverage at a level consistent with its representations to regulatory authorities."[87]

Since *Morton*, policyholders have obtained the concurrence of many more state supreme courts in the Morton rationale. First, in *St. Paul Fire Insurance Co. v. McCormick & Baxter Creosoting Co.*, 923 P.2d 1200 (Or. 1996), the Oregon Supreme Court looked to the insurance industry's regulatory representations as to the meaning of the polluters exclusion, and determined that the exclusion could be interpreted only to exclude "expected and intended" pollution. Even more shocking, the Alabama Supreme Court, in *Alabama Plating Co. v. United States Fidelity & Guaranty Co.*, 690 So.2d 331 (Ala. 1996), reconsidered an earlier anti-policyholder opinion and held that the polluters exclusion is ambiguous in light of the insurance industry's prior statements as to its scope and meaning, and that it must be construed in favor of policyholders. In *Textron, Inc. v. Aetna Casualty & Surety Co.*, 754 A.2d 742 (R.I. 2000), the Rhode Island Supreme Court again reaffirmed the integrity of the regulatory process, holding the industry to representations made in obtaining approval to use the polluters exclusion. Finally, in *Sunbeam Corp. v. Liberty Mutual Insurance Co.*, 781 A.2d 1189, 1195 (Pa. 2001), the Pennsylvania Supreme Court decided that "having represented to the insurance department, a

87 *Id.* at 876.

regulatory agency, that the new language in the 1970 policies – 'sudden and accidental' - did not involve a significant decrease in coverage from the prior language, the insurance industry will not be heard to assert the opposite position when claims are made by the insured policyholders."

Like these courts, this Court should not permit MIC to apply an exclusion obtained through regulatory misrepresentations, and should bar it from relying on the Virus or Bacteria exclusion.

## V. CONCLUSION

For all of the above reasons, the Court should permit UP to file this *amicus curiae* brief, should consider the actual state of the law on whether unusual conditions can cause "physical loss of or damage to property" or "physical loss or damage" to property, and should estop MIC from relying upon the Virus or Bacteria exclusion to deny coverage.

Dated: February 16, 2021

Respectfully submitted,

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**INDEX OF EXHIBITS**
**BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFFS-APPELLANTS**

| Exhibit | Description |
|---|---|
| **A** | ISO Circular, New Endorsements Filed To Address Exclusion of Loss Due to Virus or Bacteria, dated July 6, 2006 |
| **B** | Lucca de Paoli, *et al.*, "Insurance Unlikely to Cushion Coronavirus Losses – But There Are Exceptions," Insurance Journal (March 4, 2020) |
| **C** | Todd C. Frankel, "Insurers knew the damage a viral pandemic could wreak on businesses. So they excluded coverage," Washington Post (April 2, 2020) |
| **D** | Property Lines - PA 10/06, Copyright, American Association of Insurance Services, Inc., 2006, filed in reference to CL 0700 10 06 |
| **E** | AAIS Businessowners Virus or Bacteria Exclusion, Businessowners – 10/06, filed in reference to BP 0850 10 06 |

# EXHIBIT A

ISO Circular

**FORMS - FILED** JULY 6, 2006

**FROM**: LARRY PODOSHEN, SENIOR ANALYST

COMMERCIAL PROPERTY LI-CF-2006-175

# NEW ENDORSEMENTS FILED TO ADDRESS EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

**This circular announces the submission of forms filings to address exclusion of loss due to disease-causing agents such as viruses and bacteria.**

## BACKGROUND

Commercial Property policies currently contain a pollution exclusion that encompasses contamination (in fact, uses the term *contaminant* in addition to other terminology). Although the pollution exclusion addresses contamination broadly, viral and bacterial contamination are specific types that appear to warrant particular attention at this point in time.

## ISO ACTION

We have submitted forms filing CF-2006-OVBEF in all ISO jurisdictions and recommended the filing to the independent bureaus in other jurisdictions. This filing introduces new endorsement CP 01 40 07 06 - Exclusion Of Loss Due To Virus Or Bacteria, which states that there is **no coverage for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease**.

**Note:** In Alaska, District of Columbia, Louisiana*, New York and Puerto Rico, we have submitted a different version of this filing, containing new endorsement CP 01 75 07 06 in place of CP 01 40. The difference relates to lack of implementation of the mold exclusion that was implemented in other jurisdictions under a previous multistate filing.

Both versions of CF-2006-OVBEF are attached to this circular.

* In Louisiana, the filing was submitted as a recommendation to the Property Insurance Association of Louisiana (PIAL), the independent bureau with jurisdiction for submission of property filings.

## PROPOSED EFFECTIVE DATE

Filing CF-2006-OVBEF was submitted with a proposed effective date of January 1, 2007, in accordance with the applicable effective date rule of application in each state, with the exception of various states for which the insurer establishes its own effective date.

Upon approval, we will announce the actual effective date and state-specific rule of effective date application for each state.

## RATING SOFTWARE IMPACT

New attributes being introduced with this revision:

- A new form is being introduced.

## CAUTION

This filing has not yet been approved. If you print your own forms, do not go beyond the proof stage until we announce approval in a subsequent circular.

## RELATED RULES REVISION

We are announcing in a separate circular the filing of a corresponding rules revision. Please refer to the **Reference(s)** block for identification of that circular.

## REFERENCE(S)

LI-CF-2006-176 (7/6/06) - New Additional Rule Filed To Address Exclusion Of Loss Due To Virus Or Bacteria

## ATTACHMENT(S)

- Multistate Forms Filing CF-2006-OVBEF
- State-specific version of Forms Filing CF-2006-OVBEF (Alaska, District of Columbia, Louisiana, New York, Puerto Rico)

We are sending these attachments only to recipients who asked to be put on the mailing list for attachments. If you need the attachments for this circular, contact your company's circular coordinator.

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**Copyright Explanation**

# Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

## About This Filing

This filing addresses exclusion of loss due to disease-causing agents such as viruses and bacteria.

### New Form

We are introducing:

- Endorsement **CP 01 40 07 06** - Exclusion Of Loss Due To Virus Or Bacteria

## Related Filing(s)

Rules Filing CF-2006- OVBER

## Introduction

The current pollution exclusion in property policies encompasses contamination (in fact, uses the term *contaminant* in addition to other terminology). Although the pollution exclusion addresses contamination broadly, viral and bacterial contamination are specific types that appear to warrant particular attention at this point in time.

An example of bacterial contamination of a product is the growth of listeria bacteria in milk. In this example, bacteria develop and multiply due in part to inherent qualities in the property itself. Some other examples of viral and bacterial contaminants are rotavirus, SARS, influenza (such as avian flu), legionella and anthrax. The universe of disease-causing organisms is always in evolution.

Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses.

# Current Concerns

Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case. In addition, pollution exclusions are at times narrowly applied by certain courts. In recent years, ISO has filed exclusions to address specific exposures relating to contaminating or harmful substances. Examples are the mold exclusion in property and liability policies and the liability exclusion addressing silica dust. Such exclusions enable elaboration of the specific exposure and thereby can reduce the likelihood of claim disputes and litigation.

While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.

In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.

# Features Of New Amendatory Endorsement

The amendatory endorsement presented in this filing states that there is **no coverage for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease**. The exclusion (which is set forth in Paragraph B of the endorsement) applies to property damage, time element and all other coverages; introductory Paragraph A prominently makes that point. Paragraphs C and D serve to avoid overlap with other exclusions, and Paragraph E emphasizes that other policy exclusions may still apply.

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

# EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

**A.** The exclusion set forth in Paragraph **B.** applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

**B.** We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

However, this exclusion does not apply to loss or damage caused by or resulting from "fungus", wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.

**C.** With respect to any loss or damage subject to the exclusion in Paragraph **B.**, such exclusion supersedes any exclusion relating to "pollutants".

**D.** The following provisions in this Coverage Part or Policy are hereby amended to remove reference to bacteria:

**1.** Exclusion of "Fungus", Wet Rot, Dry Rot And Bacteria; and

**2.** Additional Coverage - Limited Coverage for "Fungus", Wet Rot, Dry Rot And Bacteria, including any endorsement increasing the scope or amount of coverage.

**E.** The terms of the exclusion in Paragraph **B.**, or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.

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# Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

## About This Filing

This filing addresses exclusion of loss due to disease-causing agents such as viruses and bacteria.

### New Form

We are introducing:

- Endorsement **CP 01 75 07 06** - Exclusion Of Loss Due To Virus Or Bacteria

## Related Filing(s)

Rules Filing CF-2006-OVBER

## Introduction

The current pollution exclusion in property policies encompasses contamination (in fact, uses the term *contaminant* in addition to other terminology). Although the pollution exclusion addresses contamination broadly, viral and bacterial contamination are specific types that appear to warrant particular attention at this point in time.

An example of bacterial contamination of a product is the growth of listeria bacteria in milk. In this example, bacteria develop and multiply due in part to inherent qualities in the property itself. Some other examples of viral and bacterial contaminants are rotavirus, SARS, influenza (such as avian flu), legionella and anthrax. The universe of disease-causing organisms is always in evolution.

Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement

of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses.

# Current Concerns

Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case. In addition, pollution exclusions are at times narrowly applied by certain courts. In recent years, ISO has filed exclusions to address specific exposures relating to contaminating or harmful substances. Examples are the mold exclusion in property and liability policies and the liability exclusion addressing silica dust. Such exclusions enable elaboration of the specific exposure and thereby can reduce the likelihood of claim disputes and litigation.

While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.

In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.

# Features Of New Amendatory Endorsement

The amendatory endorsement presented in this filing states that there is **no coverage for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease**. The exclusion (which is set forth in Paragraph B of the endorsement) applies to property damage, time element and all other coverages; introductory Paragraph A prominently makes that point. Paragraph C serves to avoid overlap with another exclusion, and Paragraph D emphasizes that other policy exclusions may still apply.

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

# EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

**A.** The exclusion set forth in Paragraph **B.** applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

**B.** We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

However, this exclusion does not apply to loss or damage caused by or resulting from fungus. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.

**C.** With respect to any loss or damage subject to the exclusion in Paragraph **B.**, such exclusion supersedes any exclusion relating to "pollutants".

**D.** The terms of the exclusion in Paragraph **B.**, or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.

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# EXHIBIT B

INSURANCE JOURNAL

View this article online: https://www.insurancejournal.com/news/international/2020/03/04/560126.htm

# Insurance Unlikely to Cushion Coronavirus Losses – But There Are Exceptions

Don't look for much relief from insurers to cushion losses from canceled events, travel disruptions and potential medical claims from the deadly Covid-19 virus that's sweeping across the globe.

The world's largest insurers have learned lessons from previous health crises, including the 2003 SARS outbreak. Over the years, they've tightened up their policies, inserting communicable-disease exclusions to prevent potential losses. That means consumers and companies will bear the brunt of the cost for disruptions related to the virus — which has infected 90,000 people and left more than 3,000 people dead.

"While there is a significant risk of disruption, coronavirus-related claims will be low," analysts at Moody's Investors Service wrote in a note on Monday. "Business interruption claims will be limited as these policies commonly exclude outbreaks of infectious disease, and pay out only if physical damage occurs."

Claims from the SARS outbreak ended up spurring some property-casualty insurers to revisit policy language, particularly with "loss of attraction" clauses, according to Gigi Norris, co-leader of Aon Plc's infectious disease task force.

"SARS comes along and the insurers ended up paying some large losses," Norris said. "Since then, there's been a pullback from insurers for providing this kind of coverage."

Below are some of the areas where insurers stand to be affected by the virus.

#### Health Insurance

While most of the industry nervously leafs through policies and counts its exposure, firms offering health insurance policies may get more business.

Companies such as Prudential Plc stand to benefit from the virus's spread as more people seek cover. That was certainly the case back in 2003, when Asia represented a far smaller part of its business.

"Prudential generates almost half its operating profit in Asia and health and protection products are a significant part of its offering," Kevin Ryan, an analyst at Bloomberg Intelligence, wrote in a note. In the first nine months of 2003, when SARS struck, "Prudential reported a 17% rise in new business sales in local currency."

Health insurers in China are also expected to get a helping hand from the government.

"We expect coronavirus-related critical illness claims to be limited because the Chinese government has undertaken to cover the cost of care and treatment for those affected," Moody's said in a note on Monday.

#### Events Insurance

Events are particularly susceptible to an epidemic, and a number of large corporate fairs and conferences have been scrapped or postponed.

"Event cancellation is one area of insurance that may have losses," analysts at Fitch Ratings said in a note on Monday. "The largest event taking place is the Tokyo Olympics in July 2020. Industry experts anticipate coverage of approximately $2 billion for this event."

Informa Plc, which derived more than half of its 2018 revenues from events, has postponed several March and April exhibitions as a result of the virus. The London-based firm has fallen almost 23% so far in 2020, greater than the drop in the benchmark FTSE 100 index.

Mipim, the world's largest property fair, was postponed to later in the year, while the Mobile World Conference in Barcelona was canceled.

"With other companies, like logistics companies if shipments don't come through in the next few weeks, there will probably be some catch-up effect later down the line," said Michael Field, an analyst at Morningstar Inc. "With conferences and sporting events, generally, you've got tight windows and, if you miss them, that could be the end of it for a year or two."

#### Travel Insurance

The cost to insurers from payouts on travel insurance is likely to be minimal. Many travel policies exclude losses caused by epidemics, so unless consumers took out additional disruption cover they won't be able to claim for canceling travel plans, according to a statement on Allianz SE's travel insurance website.

Some insurers, including Allianz and AXA SA, have temporarily waived that condition for certain claims related to coronavirus.

#### Credit Insurance

A slowing economy and lagging consumer spending could lead to higher claims for credit insurance, and the longer the outbreak continues, the bigger the impact could be for firms like Coface SA and Allianz's Euler Hermes.

Allianz, Europe's largest insurer, says the biggest potential risk would be from any bankruptcies in Europe spurred by the virus's spread. Credit insurance protects companies when firm they do business with fail.

“The issue that may affect us is if you have massive bankruptcies in small- and medium-size companies, because we have the world market leader in credit insurance,” Chief Executive Officer Oliver Baete said in an interview with Bloomberg last week, referring to Euler Hermes, which it acquired in 2018.

While Allianz’s credit insurance business isn’t large in Asia, the firm has still been cutting such exposure in China for the past two months, he said.

#### Reinsurance

Reinsurers, firms that provide insurance for insurers, would need the death toll to rise into the hundreds of thousands before they took a big hit, but the effect of a full-scale pandemic would be sizable.

“It’s one of the biggest potential risks they face on a par with a 1-in-200-year hurricane or quake,” said Charles Graham, an analyst at Bloomberg Intelligence.

For instance, about 15% of SCOR SE’s regulatory capital is at risk in the event of a pandemic, but only in an extreme event that would see more than 10 million people die from the virus, according to company filings.

Munich Re has exposure of more than 500 million euros ($556 million) to contingency losses, should all events covered for pandemic be canceled, said Torsten Jeworrek, chief of the firm’s reinsurance unit.

For now, Munich Re’s “risk overall is pretty limited” because few clients include pandemic risks in their reinsurance coverage, Chief Financial Officer Christoph Jurecka said in an interview on Bloomberg Television on Friday. The risks are “easily digestible for us as we speak; if things go south substantially then the situation might change,” he said.

#### Financial Markets

Last month, the S&P 500 Index dropped and U.S. Treasury yields fell amid fears about the coronavirus’ impact. The upheaval in financial markets is likely to have a more material impact on the industry, according to Moody’s analysts.

Insurers such as MetLife Inc. and American International Group Inc. control billions of dollars in investments, pooling the money it takes in from policyholders. These funds come under pressure during bouts of market volatility.

“Significant deterioration in equity markets and widening credit spreads, along with even lower interest rates, will weigh on insurers’ profitability and capitalization,” analysts at Moody’s said in a report. “The expected economic slowdown will also have a negative impact on insurers’ business volumes.”

*–With assistance from Dan Reichl.*

*Photograph: A Chinese worker checks the temperature of a customer as he wears a protective suit and mask at a supermarket in Beijing on Feb. 11, 2020. Photographer: Kevin Frayer/Getty Images*.

**Related:**

- Parametric Insurance Could Offer Hotels Relief from Coronavirus Cancellations
- Handshakes, Buffets Out. Otherwise It’s Insurance Conferences-as-Usual Amid Coronavirus.
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- Re/Insurers to Feel Coronavirus Impact From Financial Market Volatility: Moody’s
- Global Insurers Face Hefty Claims If Coronavirus Forces Olympics Cancellation
- Coronavirus Raises Insurance Questions But Catastrophe-Tested Insurers Are Prepared
- Insurers Rush to Exclude Coronavirus Epidemic from Event-Cancellation Protection
- Coronavirus Leads Companies with Supply Chain Disruptions to Invoke ‘Force Majeure’
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# EXHIBIT C

The Washington Post
*Democracy Dies in Darkness*

# Insurers knew the damage a viral pandemic could wreak on businesses. So they excluded coverage.

Some industry watchers predict 'a tidal wave of litigation' over whether policies should cover losses due to coronavirus closures

By **Todd C. Frankel**

April 2, 2020 at 1:25 p.m. EDT

The forced closure of businesses nationwide because of the novel coronavirus would seem to be the perfect scenario for filing a "business interruption" insurance claim.

But most companies will probably find it difficult to get an insurance payout because of policy changes made after the 2002-2003 SARS outbreak, according to insurance experts and regulators.

SARS, which infected 8,000 people mostly in Asia and is now seen as foreshadowing the current pandemic, led to millions of dollars in business-interruption insurance claims. Among the claims was a $16 million payout to one hotel chain, Mandarin Oriental International.

As a result, many insurers added exclusions to standard commercial policies for losses caused by viruses or bacteria. Now, the added policy language will potentially allow insurance companies to avoid hundreds of billions of dollars in business-interruption claims because of the covid-19 pandemic.

"Insurers realized they would not be able to cover such a broad-scale event," said Robert Gordon, a senior vice president at the American Property Casualty Insurance Association.

Other types of insurance policies may still have to pay out. Personal travel and event cancellation policies are expected to face huge claims from the coronavirus pandemic, according to industry reports. But few successful claims are expected to come from traditional business insurance lines because of the exclusion of virus-related damages.

The insurance industry said that its policies are tightly regulated by state authorities and that the exclusions were necessary given the overwhelming number of claims that can come from a single disease outbreak.

"This is a scale that only the federal government can bridge," said David Sampson, president of the insurance trade group.

A global pandemic presents unique problems for insurers because, Sampson said, "by its very definition, you can't diversify the risk."

But property and casualty insurance companies are facing growing pressure to tap the industry's $822 billion in cash reserves.

Lawmakers in New Jersey, Massachusetts and Ohio are considering forcing retroactive policy changes to cover coronavirus business-interruption claims. Insurers said they object to this move because the additional cost of such claims were not included in policy premiums.

Attorneys said they expect disputes over the precise wording of business insurance policies to generate court fights — similar to the battles with insurers after Hurricane Katrina in 2005, when homeowners and insurance companies fought over whether damages were caused by flooding or wind.

Making the current insurance situation even more complicated are the many different kinds of business insurance policies, some with boilerplate language and others filled with personalized exclusions and endorsements.

“We’re going to see a tidal wave of litigation over the business interruption,” said Ross Angus Williams, an attorney with the Bell Nunnally & Martin firm in Dallas. “It’s really a Wild West situation for a lot of businesses as to whether they’ll have coverage.”

About one-third of U.S. businesses have “business interruption” insurance, which is intended to cover losses from an event that forces companies to suspend or stop operations. Many policies also have “civil authority” clauses that cover losses when a governmental agency stops a business from operating. A common example would be a fire that damages a restaurant and leads the fire marshal to close it down.

But most insurance policies require a physical loss to trigger coverage. A fire. A tornado.

“You can expect to hear, does contamination from a virus cause physical damage?” said Stephen Avila, professor of insurance at Ball State University.

That’s the argument being made by Oceana Grill, a restaurant in New Orleans’s French Quarter that, like every other restaurant in the city, has been ordered to stop offering sit-down service by an emergency declaration from the mayor.

Oceana Grill filed a lawsuit in a local court last month claiming the insurer should be required to pay a business-interruption claim because coronavirus had caused property damage by contaminating surfaces. An attorney for the restaurant did not respond to a request for comment.

A Native American tribe in Oklahoma, the Chickasaw Nation, also has sued insurers claiming that its losses from shuttering its casinos should be covered by its business-interruption insurance.

A well-known restaurant in California’s Napa Valley, the French Laundry, also filed a lawsuit recently making similar claims.

State insurance commissioners are looking into the potential limitations of business insurance coverage for coronavirus-related claims — with differing viewpoints.

“We understand the desire to have coverage in this space,” said North Dakota Insurance Commissioner Jon Godfread, “but many existing policies have specific exclusions to ‘viral pandemics,’ and business disruption coverage is generally triggered by actual physical damage. At this point, a pandemic is not considered physical damage.”

“This is really a contract issue and will ultimately be settled in the courts,” said Mississippi’s insurance commissioner, Mike Chaney.

Christina Haas, a spokeswoman for Delaware’s insurance office, recommended that business owners discuss their policies with insurers.

Avila, the Ball State professor, said the insurance disputes caused by coronavirus shows the need for a government-supported solution, such as a national pandemic insurance program, similar to the National Flood Insurance Program.

Pandemic business insurance — complete with virus coverage — is offered by the broker Marsh.

Interest in its PathogenRx insurance product has exploded in recent weeks — "it's exponential," said Chad Wright, the company's head of risk analytics and alternative risk transfer.

The company began thinking about the problem several years ago and modeled the risks of different diseases. It launched its outbreak insurance in 2018.

A few companies in the hospitality and gaming industries showed interest.

But not a single policy was sold.

*With reporting from Michael Majchrowicz in Fort Lauderdale, Kate Harrison Belz in Chattanooga and Sheila Eldred in Minneapolis.*

# EXHIBIT D

# AMERICAN ASSOCIATION OF INSURANCE SERVICES

## Commercial Properties

## Virus Or Bacteria Exclusion - Filing Memorandum

AAIS has developed and is filing a *mandatory* endorsement for use with the Commercial Properties Program. This new mandatory Virus Or Bacteria Exclusion, CL 0700, is described below.

Property policies have not been, nor were they intended to be, a source of recovery for loss, cost, or expense caused by disease causing agents. With the possibility of a pandemic, there is concern that claims may result in efforts to expand coverage to create recovery for loss where no coverage was originally intended. In light of this possibility, AAIS is filing a Virus Or Bacteria Exclusion that will specifically address virus and bacteria exposures and clarify policy intent.

This endorsement clarifies that loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress is excluded. Avian Flu, SARS, rotavirus, listeria, legionella, or anthrax are examples of disease or illness causing agents addressed by this exclusion but are by no means an exhaustive list.

A copy of CL 0700 10 06 is provided for your review.

This endorsement changes
the policy
**-- PLEASE READ THIS CAREFULLY --**

# VIRUS OR BACTERIA EXCLUSION

## DEFINITIONS

**Definitions Amended** --

When "fungus" is a defined "term", the definition of "fungus" is amended to delete reference to a bacterium.

When "fungus or related perils" is a defined "term", the definition of "fungus or related perils" is amended to delete reference to a bacterium.

## PERILS EXCLUDED

The additional exclusion set forth below applies to all coverages, coverage extensions, supplemental coverages, optional coverages, and endorsements that are provided by the policy to which this endorsement is attached, including, but not limited to, those that provide coverage for property, earnings, extra expense, or interruption by civil authority.

1. The following exclusion is added under Perils Excluded, item 1.:

   **Virus or Bacteria** --

   "We" do not pay for loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress.

   This exclusion applies to, but is not limited to, any loss, cost, or expense as a result of:

   a. any contamination by any virus, bacterium, or other microorganism; or

   b. any denial of access to property because of any virus, bacterium, or other microorganism.

2. **Superseded Exclusions** -- The Virus or Bacteria exclusion set forth by this endorsement supersedes the "terms" of any other exclusions referring to "pollutants" or to contamination with respect to any loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress.

## OTHER CONDITIONS

**Other Terms Remain in Effect** --

The "terms" of this endorsement, whether or not applicable to any loss, cost, or expense, cannot be construed to provide coverage for a loss, cost, or expense that would otherwise be excluded under the policy to which this endorsement is attached.

# EXHIBIT E

# AMERICAN ASSOCIATION OF INSURANCE SERVICES

## Businessowners

## Virus Or Bacteria Exclusion - Filing Memorandum

AAIS has developed and is filing a *mandatory* endorsement for use with the Businessowners Program. This new mandatory Virus Or Bacteria Exclusion, BP 0850 10 06, is described below.

Property coverage has not been, nor was it intended to be, a source of recovery for loss, cost, or expense caused by disease causing agents. With the possibility of a pandemic, there is concern that claims may result in efforts to expand coverage to create recovery for loss where no coverage was originally intended. In light of this possibility, AAIS is filing a Virus Or Bacteria Exclusion that will amend all property coverages provided by this policy to specifically address virus and bacteria exposures and clarify policy intent.

Provisions are added with respect to all property coverages provided by this policy to clarify that loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress is excluded. Avian Flu, SARS, rotavirus, listeria, legionella, and anthrax are examples of disease or illness causing agents addressed by this exclusion but are by no means an exhaustive list.

When fungus or related perils is a defined term, the definition of fungus or related perils is deleted and replaced to remove reference to 'a bacterium' within that definition, but only with respect to Property Coverages.

A copy of BP 0850 10 06 is provided for your review.

# VIRUS OR BACTERIA EXCLUSION

The following provisions are added with respect to all property coverages provided by this policy. All other "terms" of the policy apply, except as amended by this endorsement.

1. When "fungus or related perils" is a defined "term", that definition is deleted and replaced by the following, but only with respect to the Property Coverages provided by this policy.
   "Fungus or related perils" means:

   a. a fungus, including but not limited to mildew and mold;

   b. a protist, including but not limited to algae and slime mold;

   c. wet rot;

   d. dry rot; or

   e. a chemical, matter, or compound produced or released by a fungus, a protist, wet rot, or dry rot, including but not limited to toxins, spores, fragments, and metabolites such as microbial volatile organic compounds.

2. The following exclusion is added under Perils Excluded. It applies to all coverages, coverage extensions, supplemental coverages, optional coverages, and endorsements that are provided by the policy to which this endorsement is attached, including, but not limited to, those that provide coverage for property, earnings, extra expense, or interruption by civil authority.

   **Virus or Bacteria** -- "We" do not pay for loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress.

   This exclusion applies to, but is not limited to, any loss, cost, or expense as a result of:

   a. any contamination by any virus, bacterium, or other microorganism; or

   b. any denial of access to property because of any virus, bacterium, or other microorganism.

3. The Virus or Bacteria exclusion set forth by this endorsement supersedes the "terms" of any other exclusions referring to "pollutants" or to contamination with respect to any loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress.
4. The "terms" of this endorsement, whether or not applicable to any loss, cost, or expense, cannot be construed to provide coverage for a loss, cost, or expense that would otherwise be excluded under the policy to which this endorsement is attached.