

# **Property Insurance Coverage for COVID19 aka Coronavirus (Where the Hell is My Business Interruption Coverage?)**

**Author: Randy C. DeLopst, CPCU**

In the face of the biggest global business shut down in history, insurance buyers will be looking for possible insurance recoveries to off-set their losses. In the following pages, let's look at the coverage provided under the typical property insurance policy for losses arising from a virus. Many property insurance policies use Insurance Services Office (ISO) policy forms to provide property insurance coverage. As such, this is a reasonable place to begin a discussion of how property insurance policies respond to claims arising out of a virus such as COVID19.

## **The Short Version of this Article**

For a property insurance policy to provide coverage for claims arising out of a virus like COVID19, the following conditions must exist:

1. The state where the claim occurs must be one where courts would hold that the presence of a virus on insured property is "direct physical loss or damage". Some states do and some states don't. If the actual presence of the virus on the property is not verified, it will be very difficult to show there was a "direct physical loss".
2. The virus must be physically present on the Covered Property for loss of Business Income & Extra Expense and Dependent Properties coverages to be triggered. It is very difficult to confirm the actual presence of a virus on a property. There are no simple tests. For Civil Authority coverage, the virus must be on property other than the properties at the described insured premises.
3. The state where the claim occurs must be one where courts would hold that a virus was not a "pollutant" under the policy's Pollution exclusion. Some states probably would and some probably wouldn't. Is there any case law on whether or not a virus is a "Pollutant" in property insurance policies? I could not find any such cases.
4. The policy does not have any separate exclusions for viruses, microbes, microorganisms, microbial matter, microscopic organisms, biological agents, contamination or similar terms. Such policy exclusions would probably exclude coverage for virus claims.

You will most likely need to look to the Environmental Impairment/Pollution (EIL) insurance market for reliable property coverage for virus claims. This EIL policy will need to clearly state that coverage is provided for virus claims and be adapted for indoor use.

For those who want to dig a little deeper into the reasons for why a property policy is not reliable for a contamination- driven cause of loss like a virus, hang on to your hats, ingest lots of caffeine and read on.

## **ISO Policy Forms**

ISO based property policies usually start with these basic forms:

- BUILDING AND PERSONAL PROPERTY COVERAGE FORM, Insurance Services Office, Inc., 2011, Form CP 00 10 10 12

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- BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM, Insurance Services Office, Inc., 2011, Form CP 00 30 10 12
- CAUSES OF LOSS – SPECIAL FORM, Insurance Services Office, Inc., 2011, Form # CP 10 30 10 12
- COMMERCIAL PROPERTY CONDITIONS, ISO Commercial Risk Services, Inc., 1983, 1987, Form CP 00 90 07 88

To these basic forms, ISO or specific insurance company-developed endorsements are added to complete the property policy that is eventually issued to the policyholder.

Let's start by analyzing the ISO basic policy forms described above for the coverage they provide for claims arising out of a virus such as COVID19 and expand the analysis from there.

The Insuring Agreement in Section A. on page 1 of the Building and Personal Property Coverage Form states the following:

### A. Coverage

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

When a virus has been found on Covered Property, has the Covered Property suffered direct physical loss or damage? This is the first legal hurdle a policyholder must overcome to get coverage for a virus claim. Note, these examples are for contaminants other than a virus. But, to get to the question: Is virus contamination a direct physical loss? You need to start with court cases like the following.

### **State court decisions favoring yes, contamination is "direct physical loss or damage"**

1. **Connecticut.** Yale University v. Cigna Ins. Co., 224 F.Supp.2d 402, 412-13 (D.Conn.2002): Plaintiff sustained its burden of demonstrating that it suffered "physical loss of or damage to property" as required under policy by alleging presence of asbestos and lead contamination in buildings. Link: <https://law.justia.com/cases/federal/district-courts/FSupp2/224/402/2489948/>

2. **Massachusetts.** Matzner v. Seaco Ins. Co., No. 96-0498-B, 1998 WL 566658, \*3 (Mass. Super. Aug. 12, 1998). The Court held that carbon monoxide contamination constitutes direct physical loss even though it did not produce tangible damage to the structure of the insured property. Link: <https://casetext.com/case/matzner-v-seaco-insurance-company>

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3. **New Jersey.** Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co., 406 N.J. Super. 524, 543 (App. Div. 2009) The court held property can be physically damaged without structural alteration when it loses its essential functionality. Link: <https://casetext.com/case/wakefern-food-v-liberty-mutual-fire-ins-co>

4. **Oregon.** Farmers Ins. Co. v. Trutanich, 858 P.2d 1332 (Or. Ct. App. 1993) The court held the property in question to have been physically damaged by noxious odors emanating from methamphetamine laboratory in neighboring apartment unit. Link: <https://www.courtlistener.com/opinion/1154793/farmers-ins-co-v-trutanich/>

### State court decisions favoring no, contamination is not “direct physical loss or damage”

1. **Florida.** Mama Jo's, Inc. v. Sparta Ins. Co., 17-CV-23362-KMM, 2018 WL 3412974, at \*9 (S.D. Fla. June 11, 2018), The court held there was no direct physical loss when construction debris and dust from road work required the insured to clean its floors, walls, tables, chairs, and countertops. The court held that "cleaning is not considered direct physical loss". Link: <https://www.cozen.com/news-resources/publications/2020/property-insurance-coverage-issues-associated-with-covid-19>

2. **Michigan.** Universal Image Productions, Inc. v. Chubb Corp., 703 F.Supp.2d 705, 709, 710 (E.D.Mich.2010): Intangible harms, such as pervasive odor, mold and bacterial contamination, and water damage, did not constitute physical loss. Link: <https://www.courtlistener.com/opinion/2512716/universal-image-productions-inc-v-chubb-corp/>

3. **Ohio.** Mastellone v. Lightning Rod Mut. Ins. Co., 175 Ohio App.3d 23, 40-41, 2008 Ohio 311, 884 N.E.2d 1130 (2008). The court affirmed a lower court's ruling that dark staining from mold did not constitute "physical loss" where plaintiff's expert testified that mold could be removed from wood surface by bleaching and chemically treating affected areas. Link: <https://casetext.com/case/mastellone-v-lightning-rod-mut-ins>

**For this article, let's assume the presence of a virus is direct physical loss or damage to Covered Property.**

This brings up a relevant point that will affect Business Income & Extra Expense, Business Income from Dependent Properties and Civil Authority coverages. If insured covered property, or property other than property at described insured premises for Civil Authority coverage, did not experience a discharge or release of a virus on the property itself, then there has been no physical damage or loss to such property. ISO property insurance forms will not respond. Policyholders must be able to prove to the insurance company that there has been a physical loss to covered property. It appears that almost all of the “lockdowns” and business closings that are occurring are preventative measures. As such, there is probably no coverage for these situations.

Even if a property has had a release or discharge of COVID19 on its premises, once the property has been sanitized or remediated, it is ready to resume operations. Any loss of Business Income or Extra Expense coverage terminates. These coverages usually have deductibles of 24 to 72 hours before coverage begins. The policyholder has a duty to mitigate a claim as soon as possible. So, the time before a property can be sanitized or remediated is probably short.

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Business closings ordered by Civil Authority create other insurance issues. Civil Authority coverage is found under the ISO Business Income and Extra Expense form in Section A.5.a., page 2 of the form. It applies only to physical damage to property other than property at the described premises in the Declarations. This other property must be within 1 mile of the insured premises.

So, the NBA's shutdown of arenas all over the country because a few of the players have tested positive for COVID19 will be a problem for trying to invoke the Civil Authority coverage. This coverage is very restrictive anyway. It only provides coverage for 4 weeks after the date of the Civil Authority action and there is a 72 hour deductible before coverage begins.

What about ISO Business Income from Dependent Properties coverage? You got it. The same issues described previously will also affect this coverage. Why is a supplier or customer of a policyholder being shut down? Has COVID19 been found on their premises? In addition, where is the supplier or customer located? What is the covered Territory in the policyholder's ISO Business Income from Dependent Properties coverage form? Does it provide coverage for supplier or customer locations in China, Japan, South Korea, etc.?

The ISO BUSINESS INCOME FROM DEPENDENT PROPERTIES LIMITED INTERNATIONAL COVERAGE endorsement, Insurance Services Office, Inc., 2011, Form CP 15 01 10 12, and the EXTRA EXPENSE FROM DEPENDENT PROPERTIES LIMITED INTERNATIONAL COVERAGE Endorsement, Insurance Services Office, Inc., 2011, Form CP 15 02 10 12, provide coverage for foreign locations.

The ISO BUSINESS INCOME FROM DEPENDENT PROPERTIES – BROAD FORM Endorsement, Insurance Services Office, Inc., 2011, Form CP 15 08 10 12, only covers loss of Business Income, not Extra Expense. I cannot find an ISO EXTRA EXPENSE FROM DEPENDENT PROPERTIES endorsement form. This ISO form leaves something to desired, namely, coverage for Extra Expenses.

Back to the matter at hand, there are no specific Virus, Microorganism or Contamination exclusions in the basic ISO Causes of Loss form. However, there is a Pollution exclusion on page 4 that reads:

## Section B. Exclusions

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

I. Discharge, dispersal, seepage, migration, release or escape of "pollutants" unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the "specified causes of loss". But if the discharge, dispersal, seepage, migration, release or escape of "pollutants" results in a "specified cause of loss", we will pay for the loss or damage caused by that "specified cause of loss".

Exclusion, I., does not apply to damage to glass caused by chemicals applied to the glass.

There is no definition of "pollutants" in Section G. Definitions of the Causes of Loss policy form.

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However, the term “pollutants” is defined in Section H.2. on page 16 of the Building and Personal Property Coverage Form. It reads:

H.2. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

**Does a virus fall within the ISO definition of a “pollutant” in the Building and Personal Property Coverage Form? No, according to one expert on pollution insurance.**

Noted pollution insurance expert, David Dybdahl, President of American Risk Management Resources Network, LLC. in Middleton, Wisconsin, does not think so. He has this spin on the answer:

“ISO needed to add separate exclusions for fungi and bacteria to stop the “toxic mold” claims that were hitting carriers in the early 2000's. To do that ISO added a separate Fungus and Bacteria exclusion because its definition of what constituted a “pollutant” was not tight enough to reliably deny losses arising from the biological contaminants fungi and bacteria.

In his line of thinking, if the standard ISO definition of pollutant in property and liability insurance policies was not strong enough to eliminate fungus and bacteria-driven losses, then it's not strong enough to exclude viruses either. Further evidence that the ISO standard pollution exclusion is ineffective at excluding a virus-driven loss is provided by special endorsements used in the ISO property and liability policies that specifically exclude any claims arising out of a virus. If microbes were obviously “pollutants” there would be no need for separate fungi/bacteria/virus exclusions in insurance policies.

**States where courts interpreted the Pollution Exclusion narrowly and might hold a virus was not a pollutant.**

**1. Arizona.** *Keggi v. Northbrook Property and Casualty Ins. Co.* 13 P.3d 785 (Ariz. App. 2000). Bacteria not a pollutant. Link: <https://www.courtlistener.com/opinion/2585297/keggi-v-northbrook-property-and-cas-ins/>

**2. Arkansas.** *Minerva Enterprises v. Bituminous Cas. Co.*, 851 S.W.2d 403 (Ark. 1993), Pollution exclusions are only meant to "prevent persistent polluters from getting insurance coverage for general polluting activities...and was never intended to cover those who are not active polluters but had merely caused isolated damage by something that could otherwise be classified as a `contaminant' or `waste.'" Link: <https://www.courtlistener.com/opinion/1471185/minerva-enterprises-inc-v-bituminous-cas-corp/>

**3. California.** *MacKinnon v. Truck Ins. Exchange*, 31 al. 4th 635, 642 n. 1 (Aug. 14, 2003). The court concluded that the pollution exclusion is limited to excluding coverage for “traditional environmental harms” and does not extend to all injuries that merely involve, in one way or another, a toxic substance. Link: <https://casetext.com/case/mackinnon-v-truck-ins-exchange>

**4. Connecticut.** *Allstate Ins. Co. v. Barron*, 848 A.2d 1165 (Conn. 2004), Smoke inhalation is not pollution. Link: <https://caselaw.findlaw.com/ct-supreme-court/1471908.html>

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**5. Illinois.** In re Liquidation of Legion Indemnity Company, 2015 IL App (1st) 140452 (Ill. App. Ct. Nov. 10, 2015). Mold is not a pollutant in CGL:Link: <https://www.courtlistener.com/opinion/3173525/in-re-liquidation-of-legion-indemnity-company/>

**6. Louisiana.** Doerr v. Mobil Oil Corporation, 774 So.2d 119 (La. 2000); On December 19, 2000, the Supreme Court ruled 4-3 that such exclusions are only meant to apply to “active polluters”. Link: <https://casetext.com/case/doerr-v-mobil-oil-corporation-1>

**7. Maine.** Nautilus Ins. Co. v. Jabar, 188 F.3d 127 (1st Cir. 1999). The court ruled that the Pollution exclusion was ambiguous as applied to claims by office workers who were exposed to toxic fumes from a contractor’s operations because “an ordinarily intelligent insured could reasonably interpret the pollution exclusion clause as only applying to environmental pollution.” Link: <https://www.casemine.com/judgement/us/59147f30add7b0493445d552>

**8. Maryland.** Sullins v. Allstate Ins. Co., 667 A.2d 617 (Md. 1995). Indoor lead exposures not excluded. Link: <https://casetext.com/case/sullins-v-allstate-ins-co>

**9. Massachusetts.** Western Alliance Ins. Co. v. Gill, 686 N.E.2d 997, 999 (Mass. 1997). Pollution exclusion should be interpreted as applying to industrial pollution, not carbon monoxide fumes. Link: <https://casetext.com/case/western-alliance-insurance-company-v-gill>

**10. Montana.** Enron Oil Trading and Transportation Co. v. Underwriters of Lloyd's of London, No. CV-90-122 (D. Mt. April 16, 1996), aff'd, 132 F.3d 526 (9th Cir. 1997). An exclusion for "contamination" was held inapplicable to allegations that insured adulterated product, holding that this is an environmental term of art that should be limited to a discharge of pollutants into the environment. Link: <https://casetext.com/case/enron-oil-trading-v-underwriters-of-lloyds>

**11. New Jersey.** Nav-Its, Inc. v. Selective Ins. Co. of America, 869 A.2d 829 (N.J. 2005). The court declared that the history of such exclusions makes clear that their intent is to only preclude coverage for traditional environmentally-related damages, such as CERCLA claims. Link: <https://caselaw.findlaw.com/nj-supreme-court/1208392.html>

**12. New York.** Belt Painting Corp. v. TIG Insurance Company, 2003 N.Y. LEXIS 1745. Paint solvent fumes are not a pollutant. Link: <https://caselaw.findlaw.com/ny-court-of-appeals/1084513.html>

**13. Ohio.** Andersen v. Highland House Company, 757 N.E.2d 329 (2001). The court concluded that the exclusion should be restricted to traditional environmental contamination. It held that it plainly could not apply to claims for carbon monoxide emitted from a malfunctioning residential heater. Link: <https://casetext.com/case/andersen-v-highland-house-co>

**For this article, let’s assume the standard ISO Pollution exclusion does not exclude coverage for claims arising out of a virus.**

Hold on a minute. We are not done building the property policy yet. As Mr. Dybdahl’s article pointed out, ISO has developed specific exclusion endorsements to kick out coverage for virus claims. For

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property policies, there is the EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA Endorsement, ISO Properties, Inc. 2006, CP 01 40 07 06. It states:

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.

The title of this exclusion is misleading since it excludes any claim arising out of a microorganism, not just a virus or bacteria. Isn't that just like ISO? Caveat Emptor. You need to carefully read every policy form and endorsement.

So, if the ISO property policy has this Exclusion of Loss Due to Virus or Bacteria endorsement, BINGO, there is no coverage for virus claims. Well, never say never, but this sure looks like a daunting exclusion to overcome. At the very least, an insurance company would likely fight tooth and nail to deny a virus claim. So, a policyholder best be prepared to fight for several years and incur substantial legal fees to pursue a virus claim under this circumstance.

### **Non-ISO Property Policy Forms**

If you are analyzing a property policy that does not use ISO policy forms, then you would of course carefully review the entire policy paying particular attention to the following sections or components of the policy:

a. Exclusions. Do the exclusions match the exclusions in ISO forms or does the form contain additional or broader exclusions. There could be specific exclusions for viruses, microbes, microorganisms, microbial matter, microscopic organisms, biological agents, communicable disease, contamination or similar terms. Such policy exclusions would exclude coverage for virus claims.

b. Definitions. Do the definitions match those in the ISO forms? Is the wording for the definition of “pollutants” broader than ISO? Definitions can function as exclusions. If the definition of “pollutants” includes any of the terms described in item 1 above, the result would be to exclude virus claims through the pollution exclusion. Some policies might grant a nominal sublimit for pollution claims as a way to restrict coverage for virus claims. What is the definition of Coverage Territory? Are foreign locations covered for Business Income from Dependent Properties?

c. Any separate standalone endorsements. These endorsements could contain additional exclusions, coverage restrictions or limitations that could affect coverage for virus claims.

Lastly, you need to research the legal environment in the state that has jurisdiction over the property policy in question. What kind of court decisions could have an effect on the interpretation of whether the policy will respond to a virus claim?

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For example, a Wisconsin court case can provide insight on whether an ISO Pollution exclusion could exclude coverage for a claim arising out of a virus. In *Landshire Fast Foods of Milwaukee, Inc. v. Employers Mutual Casualty Company*, 676 N.W.2d 528 (WI Ct. App. 2004), a Wisconsin appellate court held that *Listeria* bacteria that contaminated sandwiches was a “pollutant” under the ISO wording of the policy’s Pollution exclusion. The Wisconsin Supreme Court did not hear the appeal and as a result, this appellate decision stood as case law in the state.

Given this case, it is reasonable to infer that a property claim arising from a virus would also fall within the province of an ISO property policy’s Pollution exclusion in Wisconsin.

## **What is the Solution?**

Relying on a judge, appellate court or Supreme Court to spin the wheel of fortune on coverage determinations involving a contamination event of some sort is no way to structure an insurance program. It is a much better idea to find coverage in an insuring agreement.

The only place where there is coverage for a loss caused by contamination in the insuring agreement is in the world of environmental insurance policies. Most environmental insurance policies have the word “liability” in their title. That leads many insurance practitioners into believing the policy only covers liability and that is wrong.

For the past few decades environmental insurance policies insuring buildings have had the ability to insure on site clean-up cost required by governmental authority or based upon the advice of a qualified environmental consultant including emergency response costs, post-loss restoration costs of those properties, business interruption and extra expenses, if the loss was caused by the release, escape or presence of defined pollutants. Viruses or even broader, Microbial Matter, have been insured as defined “Pollutants” for more than a decade on many site pollution policies. These policies also insure against third party liability and provide defense costs.

After over thirty years of continuous availability, this insurance product is in place on much less than 5% of commercial buildings today. Unfortunately for the buildings that are covered under environmental insurance policies, there is a very good chance the policy was not adequately modified for indoor use and, as a result, there will be coverage gaps for virus contamination.

## **Conclusion**

Your journey to find property insurance coverage for virus claims will not be an easy one. It will most likely be an uphill battle with the standard property insurance policy forms, endorsements and state case law. If your journey is not a successful one, you will need to look elsewhere for virus property insurance coverage for clients. You will most likely need to look to the Environmental Impairment/Pollution (EIL) insurance market for affirmative coverage for virus and other biological contamination claims. The EIL policy will need to clearly state that coverage is provided for virus claims. Keep in mind most environmental insurance policies were never designed for indoor use, they need to be modified to function properly for indoor contamination cause by microbes.



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His areas of expertise include insurance coverage analysis, and the design and implementation of effective insurance and risk management programs for corporations, associations, governmental entities and non-profit organizations.

In addition, Mr. DeLopst is:

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Mr. DeLopst is a graduate of the University of Wisconsin-Madison Business School. He has both a Bachelor's Degree and an MBA with majors in Risk Management and Insurance. Since 1978, he has held the professional designation of Chartered Property and Casualty Underwriter (CPCU).

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Mr. DeLopst has taught insurance topics at the University of Wisconsin-Madison Business School. He has conducted seminars for the Society of Risk Management Consultants, <http://www.srmcsociety.org>, and for other professional organizations on various insurance and risk management topics.

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