

# Opening My Business Again after the COVID-19 Shutdown. Do I Have Liability Insurance Coverage if a Customer Gets This Virus?

April 25, 2020

Author: Randy C. DeLopst, CPCU

**Quick answer: Your Insurance Company's likely response: No or Hell No.**

For a deeper dive into this issue, let's analyze how a Liability insurance policy may respond to a bodily injury claim arising out of COVID-19. Many Liability insurance policies use Insurance Services Office (ISO) policy forms to provide Liability insurance coverage. As such, this is a reasonable place to begin a discussion of how Liability insurance policies respond to COVID-19 claims.

## ISO Liability Insurance Policy Forms

ISO based Commercial General Liability policies start with this basic form:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM, Insurance Services Office, Inc., 2012, Form # CG 00 01 04 13.

To this basic form, ISO or specific insurance company-developed endorsements are added to complete the liability policy that is eventually issued to the policyholder.

Let's start by analyzing the ISO basic policy form described above for the coverage it provides for claims arising out of a virus such as COVID - 19 and expand the analysis from there.

The Exclusions Section B. on page 2 of the Commercial General Liability (CGL) Coverage Form in part states the following:

### 2. Exclusions

This insurance does not apply to:

#### f. Pollution

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured.

This exclusion goes on for 1.25 pages. It is the longest exclusion in the policy form. It is beyond the scope of this article to explain in detail this entire exclusion and the exceptions to it. However, I will explain how this exclusion may impact a COVID-19 bodily injury claim.

Exclusion 2.f. above excludes claims arising out of "pollutants" at or from any premises, site or location. The term "pollutants" is defined in Section V. DEFINITIONS, item 15 on page 15 of the policy form. It states:

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## SECTION V – DEFINITIONS

15. "Pollutants" mean 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.

### Is a Virus a Pollutant?

There are a few court cases that have held a virus is a pollutant.

1. **FLORIDA CASE:** Coxsackie virus from ingesting contaminants in pool water maintained by the insured was barred by the pollution exclusion. First Specialty Insurance Corp. v. GRS Management Associates Inc. Link: <https://law.justia.com/cases/federal/district-courts/florida/flsdce/9:2008cv81356/325335/106/>
2. **INDIANA CASE:** Virological and bacterial agents in drinking water are pollutants. Employers Mutual Casualty, Co. v. DFX Enters., Inc., No. 20D03-9505 (Ind. Super. Ct. Apr. 24, 1997), reprinted in 11 Mealey's Ins.Litig. Rep. No.36, Section G (July 22, 1997)

### Is Bacteria a Pollutant?

There are several court decisions holding that bacteria is a pollutant. These include:

1. **CALIFORNIA CASE:** Fecal coliform and other sewage-borne bacteria in ground water is a pollutant. EAST QUINCY SERVICES DISTRICT, Plaintiff, v. CONTINENTAL INSURANCE CO., Defendant. No. CIV-S-93-1163. Oct. 4, 1994, 864 F. Supp. 976 (E.D. Cal. 1994). Link: <https://casetext.com/case/east-quincy-serv-dist-v-cont-ins>
2. **ILLINOIS CASE:** Legionella bacteria in a hotel's pool and hot tub is a pollutant. Amco Insurance Co. v. Swagat Group, LLC, No. 07-3330, 2010 U.S. Dist. LEXIS 4770 (C.D. Ill. Jan. 20, 2010)
3. **INDIANA CASE:** Virological and bacterial agents in drinking water are pollutants. Employers Mutual Casualty, Co. v. DFX Enters., Inc., No. 20D03-9505 (Ind. Super. Ct. Apr. 24, 1997), reprinted in 11 Mealey's Ins.Litig. Rep. No.36, Section G (July 22, 1997)
4. **MINNESOTA CASE:** Legionella bacteria in the water of an air conditioning system is a pollutant. Michigan Mut. Ins. Co. v. Mitco Inc., No.98-11745 (Minn. Dist. Ct., Aug.27,19991) reprinted in 13 Mealey's Ins.Litig. Rep. No.47. Section G (Oct. 19, 19991)
5. **WISCONSIN CASE:** Listeria bacteria in sandwiches is a pollutant. Landshire Fast Foods of Milwaukee, Inc. v. Employers Mutual Casualty Company, 676 N.W.2d 528 (WI Ct. App. 2004). Link: <https://casetext.com/case/landshire-fast-foods-v-employers-mut-cas>

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6. **WISCONSIN CASE:** Bacteria in well water is a pollutant. Wilson Mutual Insurance Company v. Robert Falk and Jane Falk. Link: <https://www.courtlistener.com/opinion/2769183/wilson-mutual-insurance-company-v-robert-falk/>
7. **WISCONSIN CASE:** Bacteria in the air is a pollutant. Connors v. Zurich American Insurance Co., 872 N.W.2d 109 (Wis. Ct. App. 2015). Link: <https://www.lexisnexis.com/community/case-opinion/b/case/posts/connors-v-zurich-am-ins-co>

## Additional References:

- a) Environmental Coverage Case Law 21st Edition, 2010; pages 126 to 135. Published by Munich Re.
- b) Can Coverage for COVID-19 Be Excluded? Link: <https://www.natlawreview.com/article/can-coverage-covid-19-be-excluded>
- c) Does COVID-19 Fall Under Insurers' Pollution Exclusions? Link: <https://www.law360.com/articles/1258620>
- d) Coronavirus and the CGL. Link: <https://www.independentagent.com/vu/Insurance/Commercial-Lines/CGL/Coverages/BoggsCoronavirusCGL.aspx>
- e) COVID-19 Property & Casualty Insurance Commentary. Link: <https://insurancecommentary.com/?s=covid-19>
- f) International Risk Management Institute: Free COVID-19 Resources: Link: <https://www.irmi.com/free-resources/covid-19-resources#free>

**Given the above court cases, it is reasonable to infer that a liability claim arising from a virus would fall within the province of an ISO CGL policy's Pollution exclusion for the states noted above.**

How would other states rule on this issue? Who knows? However, I believe that insurance companies would quickly deny any liability claim for COVID-19.

## Another Viewpoint

**Does a virus fall within the ISO definition of a "pollutant" in the ISO Commercial General Liability 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

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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.

## The Rest of the Story

**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 liability policy yet. As Mr. Dybdahl's article pointed out, ISO has developed specific exclusion endorsements to kick out coverage for virus claims. One such ISO endorsement is the COMMUNICABLE DISEASE EXCLUSION Endorsement, Insurance Services Office, Inc., 2008, Form # CG 21 32 05 09. This endorsement states:

A. The following exclusion is added to Paragraph 2. Exclusions of Section I – Coverage A – Bodily Injury and Property Damage Liability:

### 2. Exclusions

This insurance does not apply to:

Communicable Disease

"Bodily injury" or "property damage" arising out of the actual or alleged transmission of a communicable disease.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the:

- a. Supervising, hiring, employing, training or monitoring of others that may be infected with and spread a communicable disease;
- b. Testing for a communicable disease;
- c. Failure to prevent the spread of the disease; or
- d. Failure to report the disease to authorities.

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So, if the ISO CGL policy has this ISO Communicable Disease Exclusion 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, 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.

## **What About the ISO Businessowners Policy Form?**

The ISO BUSINESSOWNERS COVERAGE FORM, ISO Properties, Inc., 2009, Form # BP 00 03 01 10, has the same Pollution Exclusion and Definition of "pollutants" as the ISO CGL policy. See Exclusion f.1. on page 34 and Definition F.15. on page 45 of the policy form. There is also a COMMUNICABLE DISEASE EXCLUSION, Insurance Services Office, Inc., 2012, Form # BP 14 86 07 13, which has the same wording as the ISO CGL Communicable Disease exclusion.

Same ISO song, different verse.

## **What About the ISO Commercial Umbrella Liability Policy?**

The ISO COMMERCIAL LIABILITY UMBRELLA COVERAGE FORM, ISO Properties, Inc., 2007, Form # CU 00 01 12 07 has the following Pollution exclusion:

### 2. Exclusions

This insurance does not apply to:

#### i. Pollution

(1) "Bodily injury" or "property damage" which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time;

(2) "Pollution cost or expense".

This exclusion does not apply if valid "underlying insurance" for the pollution liability risks described above exists or would have existed but for the exhaustion of underlying limits for "bodily injury" or "property damage". Coverage provided will follow the provisions, exclusions and limitations of the "underlying insurance".

So, this Umbrella policy will follow form to the underlying ISO CGL policy re the Pollution exclusion.

There is also an ISO Communicable Disease Exclusion Endorsement for the Umbrella policy. It is the COMMUNICABLE DISEASE EXCLUSION, Insurance Services Office, Inc., 2008, Form # CU 21 58 05 09. It has the same wording as the ISO COMMUNICABLE DISEASE EXCLUSION Endorsement, Insurance Services Office, Inc., 2008, Form # CG 21 32 05 09, which was discussed previously.

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## **Non-ISO Liability Policy Forms**

If you are analyzing a Liability 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 Liability 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?

## **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. Viruses or even broader, Microbial Matter, have been insured as defined “Pollutants” for more than a decade on many pollution policies. These policies 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 risks today. Unfortunately for risks that are covered under environmental insurance policies, there is a very good chance the policy was not adequately modified and, as a result, there will be coverage gaps for virus contamination liability claims.

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## **Conclusion**

Your journey to find Liability insurance coverage for virus claims will not be an easy one. It will most likely be an uphill battle with the standard Liability insurance policy forms, endorsements and state case law. If your journey is not a successful one, you will need to look elsewhere for virus Liability 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 including a virus.

## **About the Author**

Randy DeLopst has 35 years of experience as an insurance and risk management consultant. He does not sell insurance. He is the founder and president of Taurus Insurance & Risk Management Consulting, Madison, WI. Prior to founding his own firm in 2013, he was a partner in the second oldest insurance consulting firm in the United States, Risk Resources, Inc., [www.riskresources.net](http://www.riskresources.net), established in 1898.

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.

Client projects include: Managing the Insurance Bid Process, Insurance Program Audits, Insurance Agent/Broker Compensation Review, Expert Witness Work.

Mr. DeLopst is:

- a. recognized as an Expert Witness in Property & Liability Insurance by courts in Wisconsin, Minnesota, and Ohio.
- b. an approved provider and instructor of Continuing Education for Attorneys on Property & Liability Insurance Topics for the Wisconsin & New York Bar Associations.
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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).

Mr. DeLopst is a member of the Society of Risk Management Consultants (SRMC). He has served several terms as a member of the Board of Directors of SRMC and was the Chairman of the Education & Meetings Committee for the International Conferences of this Association for 19 years.

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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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