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ATTORNEYS FOR AMICUS CURIAE

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Chattanooga Professional Baseball LLC d/b/a Chattanooga Lookouts et al.,	)	Case No. 2:20-cv-01312-DLR
)	
Plaintiffs,	)	UNITED POLICYHOLDERS’ MOTION FOR LEAVE TO FILE <i>AMICUS CURIAE</i> BRIEF IN SUPPORT OF PLAINTIFFS’ RESPONSE IN OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS
v.)	
National Casualty Co., et al.,)	
)	
Defendants.)	

Amicus Curiae, United Policyholders (“UP”) respectfully moves the Court to grant it leave to file the attached *amicus curiae* brief in support of the Response in Opposition (the “Teams’ Brief”) of Chattanooga Professional Baseball LLC d/b/a Chattanooga Lookouts, et al. (the “Teams”) to the Motion To Dismiss (the “Motion To Dismiss”) of National Casualty Company, et al. (the “Insurance Companies”). In support of this motion, UP states:

MOVANT’S INTEREST

UP is a non-profit 501(c)(3) organization founded in 1991 that is a voice and an information resource for insurance consumers in Arizona and throughout the United

States. 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.

UP assists Arizona businesses and residents through its three programs: *Roadmap to Recovery*TM (disaster recovery and claim help), *Roadmap to Preparedness* (insurance and financial literacy and disaster preparedness), and *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. These resources have been educating Arizona policyholders since the 2003 Aspen Fire, where UP was active in directly assisting impacted communities north of Tucson. Along with wildfire assistance, UP hosts a COVID Loss Recovery Library at www.uphelp.org/covid. This resource provides guidance, advocacy support, and information to facilitate fair claim payouts for Arizona businesses and furthers UP's overarching consumer help initiative.

UP advances policyholders' interests in courts across the United States by filing *amicus curiae* briefs in cases involving important insurance principles. UP has filed *amicus curiae* briefs on behalf of policyholders in more than 450 cases throughout the United States, including numerous cases before the United States Supreme Court, United States Courts of Appeal (including the United States Court of Appeal for the Ninth Circuit), and the courts of the State of Arizona. See, e.g., Amicus Curiae Brief of United Policyholders in Support of Plaintiffs/Counterdefendants/Appellants and in Support of Reversal, filed Mar. 23, 2020, in *Adir Int'l, LLC v. Starr Indem. & Liab. Co.*, No. 19-

56320 (9th Cir.); *Amicus* Brief on Behalf of United Policyholders in Support of Plaintiffs/Appellees, filed May 28, 2004, in Glanton v. AdvancePCS Health, L.P., No. 04-15328 (9th Cir.) (on appeal from the United States District Court for the District of Arizona); *Amicus* Brief of United Policyholders, filed Aug. 30, 2017, in Duepner v. Government Employees Ins. Co., No. CV-17-0216-PR (Ariz.); Brief of *Amicus Curiae* United Policyholders in Support of Petition for Review, filed Dec. 22, 2016, in Sobieski v. American Std. Ins. Co., No. CV-16-0253-PR (Ariz.); *Amicus* Brief of United Policyholders, filed Sept. 25, 2012, in Nardelli v. Metropolitan Group Prop. & Cas. Ins. Co., No. CV-12-0180-PR (Ariz). Given its decades of experience, UP is uniquely suited to provide context to the application of standard-form property insurance wording to the issues in this case, including context surrounding the manner by which the insurance industry drafts such wording and secures state approval to sell insurance policies containing such wording. Here, UP seeks to ensure this Court has that full factual context before it when addressing the Motion To Dismiss.

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

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.

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 the Motion To Dismiss will affect not only the parties, but Arizona 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 Motion To Dismiss. It is thus critical that, in ruling on the Motion To Dismiss, this Court has the full factual record before it.

Pursuant to Fed. R. Civ. P. 7 and L.R. Civ 7.2, UP moves for leave to file an *amicus curiae* brief narrowly focused on the insurance regulatory issues in this case.

CONCLUSION

UP and the nationwide policyholders whose interests it represents have a vital interest in this proceeding due to the importance of the issue of whether insurance companies can enforce the Virus or Bacteria exclusion as argued by the Insurance Companies or whether the Insurance Companies will be bound by what their agents represented to insurance regulators in 2006. 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 the Motion To Dismiss.

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.

WHEREFORE, UP respectfully moves this Court to grant it leave to file the proposed *amicus curiae* brief in support of the Teams' Response in Opposition to the Motion To Dismiss of the Insurance Companies.

DATED this 19th day of October, 2019.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 2020, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmitted a Notice of Electronic Filing to the following:

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Chattanooga Professional Baseball)	Case No. 2:20-cv-01312-DLR
LLC d/b/a Chattanooga Lookouts)	
et al.,	)	(PROPOSED)
	)	<i>AMICUS CURIAE BRIEF OF</i>
Plaintiffs,	)	UNITED POLICYHOLDERS IN
	)	SUPPORT OF PLAINTIFFS’
v.	)	RESPONSE IN OPPOSITION
	)	TO DEFENDANTS’ MOTION
National Casualty Co., et al.,	)	TO DISMISS
)	
Defendants.	)	(ORAL ARGUMENT REQUESTED)

I. STATEMENT OF INTEREST

UP is a non-profit 501(c)(3) organization founded in 1991 that is a voice and an information resource for insurance consumers in Arizona and throughout the United States. 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.

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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.

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II. SUMMARY OF ARGUMENT

This case 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"). ISO and AAIS, on behalf of the Insurance Companies, sought and obtained regulatory approval to sell insurance policies containing this exclusion.

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.

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 the Insurance Companies) to policyholders (including the Teams), with the latter having no further ability to negotiate its terms.

UP submits that, given these facts, and to preserve the integrity of the insurance regulatory process, the Insurance Companies must be estopped from enforcing the Virus or Bacteria Exclusions.

III. ARGUMENT

In its efforts to be a true friend to the Court, UP attempts not to repeat topics in the parties' briefs, but instead sets forth the broader factual context of how ISO and AAIS drafted and secured regulatory approval for 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.¹ The insurance industry drafting organizations will draft the change.² 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.³ 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.⁴

For present purposes, two points are critical. First, once approval is obtained, the standard form is sold throughout the United States, ordinarily with no ability of individual policyholders to negotiate changes.⁵ 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 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

¹ Id. at 849-50.

² Id. at 850.

³ Id. at 851.

⁴ Id. at 851-52.

⁵ Id. at 851.

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.**⁶

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.*⁷

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.

As set forth in the Teams' Brief (at 9), 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

⁶ Id. at 852-53 (emphasis added).

⁷ See Id. at 851-54.

or damage to property. This was no secret in the insurance industry; indeed, anyone reading one of these decisions would soon learn of the rest.⁸

The insurance industry, through its ratings organizations, its claims handlers, its coverage counsel, and its employees reading trade journals, was aware of the score of decisions cited in the Teams' Brief. 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.⁹

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

⁸ 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).

⁹ 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”).

SARS coronavirus in the early 2000s; indeed, this was the primary motivation for ISO and AAIS to draft the Virus or Bacteria Exclusion in 2006.¹⁰ As set forth in the Washington Post, in relation to coverage for COVID-19 claims:

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.¹¹

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

¹⁰ 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).

¹¹ 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).

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.”¹² 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 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.¹³

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

¹² ISO Circular, at 2 of 13 (attached hereto as Exhibit A).

¹³ Id. at 7 of 13 (emphasis added).

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 anthrax are examples of disease or illness causing agents addressed by this exclusion but are by no means an exhaustive list.¹⁴

As shown above and at length in the Teams’ Brief, 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 1957,¹⁵ and had continued

¹⁴ 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**).

¹⁵ The decisions cited in the Teams’ Brief (at 9 n.1) 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).

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, particularly for policies intended to cover all risks except those identified by an enumerated exclusion.¹⁶ 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. Contrary to the Insurance Industry’s Statements, Other Regulatory Filings Prove the Standard-Form Policy Language Covers Infusion of Property with Viruses.

Other insurers’ regulatory filings further demonstrate ISO and AAIS inappropriately avoided regulatory scrutiny in 2006. In 2009, for example, Greater New York Mutual Insurance Company, Insurance Company of Greater New York, INSCO, and Strathmore Insurance Company (GNYM), as individual insurers, sought approval in New York to make the ISO Virus or Bacteria exclusion “optional” rather than “mandatory,” so that they could issue policies to certain classes of policyholders without that exclusion.¹⁷ These GNYM filings directly contradict the statements of ISO and

¹⁶ See, e.g., C.H. Leavell & Co. v. Fireman’s Fund Ins. Co., 372 F.2d 784, 787 (9th Cir. 1967) (holding “all risks” policies provide coverage unless specifically excluded).

¹⁷ GNYM Explanatory Memorandum – Response to Objection 1 Dated 4-30-2010, at 1 ¶ 4 (May 4, 2010) (“GNYM May 2010 Memo”) (attached hereto as Exhibit F).

AAIS and demonstrate insurers were quite aware that their standard-form property insurance policies covered loss or damage from viruses and other disease-causing agents.

The New York state insurance regulator objected to GNYM's proposal for an optional virus or bacteria exclusion because it could lead to rate discrimination. The issue arose because ISO and AAIS had not accounted for any rate reduction with their new exclusion, given their false assertion that the exclusion would not reduce coverage. In response to New York's objection, GNYM proposed "loss characteristics" it might use when determining if the exclusion should be applied.¹⁸ These characteristics included whether there had been a "historical report of an event which may or may not have resulted in loss involving sickness (including death) arising out of an insured's clients' (and/or any other person to whom the insured's clients' have contact) exposure to disease or infection while on the insured's premises or due to contact with the insured's operations, employees; or products," or losses arising "from the action or order of a civil authority to close the insured's operation in order to limit public exposure to such contagion, sickness and death," among other things, such as whether a prior event is traced to an insured restaurant's "improper food handling practices, storage or sanitation infractions or improperly cooked ground beef."¹⁹

¹⁸ GNYM Explanatory Memorandum – Response to NYSID Objection Dated 6/16/10, at 3-4 (August 2, 2010) ("GNYM Aug. 2010 Memo") (attached hereto as Exhibit G).

¹⁹ Id. at 3 ¶ 6 to 4 ¶¶ 1-5 (attached hereto as Exhibit G).

In 2010, GNYM provided a further “Explanatory Memorandum” expressly describing the coverage that exists for “pandemic” diseases like COVID-19 in the absence of an exclusion for virus or bacteria. GNYM anticipated potential losses “to fall largely in Business Personal Property (‘stock’) and Business Interruption/Time Element coverage segments,” and “some isolated risks.”²⁰ GNYM even provided examples of communicable diseases that spread in restaurants and hotels that may create covered property insurance losses. GNYM acknowledged that a “pandemic” loss from “contagious disease” could involve a wide variety of vectors that lead to physical loss or damage to insured property and cause insured business interruptions.²¹ Those could include disease “transmitted to third parties via ingestion or some other direct contact to an insured’s products,” or by a “Typhoid Mary,” or “spread through a HVAC system in any selected Apartment or Condo Building,” or even through impact on a business’s supply chains, including “vendors of supplies.”²² All of these statements contradict the 2006 assertions by ISO and AAIS – and the Insurance Companies’ assertions before this Court – that standard form property policies are not intended to respond and do not respond to losses involving dangers of communicable disease.

Not only did GNYM point out how claims like those involving COVID-19 could be covered by policies without viral exclusions, they admitted their policyholders reasonably expect this coverage and would never willingly part with it: “[W]e do not

²⁰ GNYM May 2010 Memo, at 1 ¶ 3 (attached hereto as Exhibit F).

²¹ Id. at 1 ¶ 4.

²² Id. at 1 ¶¶ 4-5.

anticipate that any of our insured's [sic] will voluntarily request this exclusion; some (habitational risks) because it would never enter their minds as a problem for which they would voluntarily reduce coverage; others (restaurants) because they feel that such an event is well within the realm of possible fortuitous occurrences and should be covered should such an event arise."²³ Yet, in 2006, ISO and AAIS forced this change on all of their policyholders and used misrepresentations to make it happen.

In fact, in a remarkable supplemental explanation proposing a method for rating and charging this new "coverage," GNYM pointed out that this coverage for virus contamination it proposed was essentially "created" by omitting an exclusion the rest of the industry had stated was not a restriction.²⁴ This reveals the truth that the rest of the industry tried to suppress, namely that COVID-19 type losses would have been covered if the new exclusions had not been approved by regulators.

In a still later Explanatory Memorandum Response to NYSID Objection Dated 6/16/10, the GNYM insurers confirmed that the purpose of the ISO exclusion was to eliminate coverage for virus and bacteria contamination that policyholders and courts would have otherwise expected to exist. In short, the ISO explanation was misleading: "The ISO action was taken specifically for the purpose of eliminating the potential for the courts to expand the definition of property damage to include this exposure."²⁵ As shown above, courts had already taken that step, so the industry's effort was duplicitous.

²³ Id. at 1 ¶ 7.

²⁴ Id. at 1 ¶ 9.

²⁵ GNYM Aug. 2010 Memo, at 1 ¶ 3 (attached hereto as Ex. G).

GNYM further explained that selective application of the exclusion could not be “discriminatory” because the New York regulator had been successfully fooled by ISO’s misstatements, and “apparently agreed with ISO’s position and did not require a ‘give back’ on any Loss Cost or indicated there should be any associated rate differential due to the application of the exclusion.”²⁶

IV. CONCLUSION

For all of the above reasons, the Court should permit UP to file this *amicus curiae* brief, should consider the full regulatory history of the Virus or Bacteria Exclusion, and should estop Defendant Insurers from relying upon that exclusion to deny coverage to the Teams.

Dated: October 19, 2020

Respectfully submitted,

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²⁶ Id., at 1 ¶ 4, 3 ¶ 2.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 2020, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmitted a Notice of Electronic Filing to the following:

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EXHIBIT A



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-OVBEP
- State-specific version of Forms Filing CF-2006-OVBEP (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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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- OVBBER

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 micro-organism 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 micro-organism 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 supercedes 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

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.](#)
- [Fitch Sees Only 'Modest Impact' on U.S. P/C Insurance from Coronavirus](#)
- [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'](#)
- [Coronavirus Led to Cancellation of Telecoms Meeting, but Insurance Cover Is Excluded](#)
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EXHIBIT C

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.

Updated October 14, 2020

Coronavirus: What you need to read

The Washington Post is providing some coronavirus coverage free, including:

The latest: Live updates on coronavirus

Coronavirus maps: Cases and deaths in the U.S. | Cases and deaths worldwide

What you need to know: Vaccine tracker | Coronavirus etiquette | Summertime activities & coronavirus | Hand sanitizer recall | Your life at home | Personal finance guide | Make your own fabric mask | Follow all of OUR coronavirus coverage and sign up for our free newsletter.

Newsletter: Sign up for **What Day Is It?**, our new 7-day email series that will help you recover your sense of time during the pandemic

How to help: Your community | Seniors | Restaurants | Keep at-risk people in mind

Have you been **hospitalized for covid-19**? Tell us whether you’ve gotten a bill.

[Sign in to join the conversation](#)

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.

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.

CL 0700 10 06

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.

BP 0850 10 06

EXHIBIT F

EXPLANATORY MEMORANDUM – RESPONSE TO OBJECTION 1 DATED 4-30-2010

The chief object of this filing is to submit a Company Exception to ISO State Exception Rule A.6.

Currently, this ISO rule imposes a Mandatory application of a Virus and Bacteria Exclusion CP 01 78 to the coverage afforded by the ISO Commercial Property Coverage Form. The ISO initial filing of this endorsement indicated that the exclusion was appropriate due to "pandemic" exposure to loss which was not anticipated in the standard coverage forms or in development of the loss costs for Commercial Property. Therefore, we assume that this Exclusion is deleting coverage across the entire NY Commercial Fire and Allied book written by the ISO member companies that utilize the ISO product, unless modified by such a Company exception.

Because the application of this Exclusion is to Commercial Property, we anticipate losses to fall largely in Business Personal Property ("stock") and Business Interruption/Time Element coverage segments. We also anticipate that it will not affect large segments of GNY's current book, but rather solely to some isolated risks.

The GNY Insurance Companies wishes to make this endorsement CP 01 78 Optional on individual risks rather than Mandatory on a panacea basis. Because the GNY Insurance Companies is largely a niche market of habitational business, we feel that our exposure to this type of loss ("pandemic") is minimal, since such contagious disease is largely is transmitted to third parties via ingestion or some other direct contact to an insured's products. While it is possible that some type of disease (airborne Legionnaires Disease, for example) could spread through a HVAC system in any selected Apartment or Condo Building, it is highly unlikely that it would spread throughout a vast proportion of the apartments and condominiums across NYC that we insure.

While GNY does write some business in the restaurant classifications and we acknowledge that some exposure is inherent in such classifications due to the "Typhoid Mary" or contagious disease hazard (as some saw in the Hepatitis B exposure via a green onion vector some years ago), we feel such exposure is minimal since we do not write large concentrations of these risks in the same locales who could potentially use the same vendors of supplies. We do not write "chain" restaurants utilizing the same suppliers.

For all of the above reasons, we believe application of this Exclusion is appropriate on occasion, only to certain individual risks which sell or distribute products to the public. Additionally, GNY's underwriting management feels that such an endorsement would be considered imposed on a restaurant account only if the risk presented with claim history indicative of recent incident and loss control with little remediation.

Therefore, to answer your specific questions, we do not anticipate that any of our insured's will voluntarily request this exclusion; some (habitational risks) because it would never enter their minds as a problem for which they would voluntarily reduce coverage; others (restaurants) because they feel that such an event is well within the realm of possible fortuitous occurrences and should be covered should such an event arise.

We anticipate that the Company will impose this exclusion on such individual risks that present with recent loss history of this type of claim and loss control that would give us concerns of an on-going nature (cavalier attitude of management regarding implementation of hand washing procedures by food handling staff); i.e., we would impose attachment of this Exclusion in accordance with prudent supportable underwriting analysis of risk (since the variables involved could be of substantial scope). We do not anticipate imposing this exclusion on any specific classification (though restaurants are probably the most likely to experience such events) or across large segments of our book of business, since we do not feel the exposure to loss is very high in any segment of our existing Commercial Property book (though we acknowledge the possibility for Apartments, Condominiums and Office/Retail Buildings to experience such an event).

Because of the broad scope of the potential events which may occur, we feel that it is largely impossible to create a rule which takes in every aspect of exposure to communicable disease. Is it possible to simply indicate something in your proposed revision of our rule to state "This Exclusion will be applied on a case-by-case basis to risks which present with recent loss history which in the underwriters judgment indicates a potential higher than average exposure to loss"?

As indicated, our main object of this filing is to remove the carte blanc application of this Exclusion and not deny coverage to the majority portion of our book.

EXHIBIT G

EXPLANATORY MEMORANDUM
RESPONSE TO NYSID OBJECTION DATED 6/16/10

RE: Company amendment to ISO Additional Rule A.6. EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

We are filing to amend the above-captioned ISO Rule A.6. as it applies to the attachment of ISO endorsement CP 01 78 and as further explained in our response to your objection dated 4-30-10. The current filed and approved ISO rule applies this exclusion to all CP policies. We desire to amend this rule to apply it only on a Company discretionary basis.

Our revised rule would allow this endorsement to be applied only to such accounts that are otherwise acceptable, but are rendered unacceptable due to disclosed loss history which presents incidence of exposure to this type of contamination or infectious disease hazard.

It is not an unusual practice for carriers to utilize the flexibilities of the ISO product to exclude certain exposures that present an unacceptable exposure to loss, especially a type of loss which is unanticipated in the exposures assumed in the historical definition of the terms of the coverage forms. The ISO action was taken specifically for the purpose of eliminating the potential for the courts to expand the definition of property damage to include this exposure.

As indicated in our previous response to your earlier objection, we wish to remove ISO's panacea application of this exclusion to all Commercial Property policies, so that it applies only to a select few risks which have shown known exposure to loss. We feel that application of this exclusion to such accounts is not Unfairly Discriminatory, since the majority of our accounts have never presented with this type of a loss. If an account did present with such a loss, then it would only be prudent to assume that the statistical probability of their experiencing another loss is of higher potential (given the nature of such bacterial and viral contamination) in comparison to the balance of our book which has little or no exposure and consequently little or no probability, regardless of classification, but as application to operations.

Unfair Discrimination

In your objection 1 dated 6-17-10, you indicated that you object to the application of the ISO Exclusion to individual risks, as follows:

We note your proposal to apply the Virus and Bacteria Exclusion on an optional basis because the company feels that the risk is minimal. If the company chooses to impose this exclusion on individual risks, this could be considered unfairly discriminatory.

Where an endorsement is optional and has the effect of either broadening or limiting coverage, there should be a rate effect associated with it. To do otherwise may result in a rate that could be unfairly discriminatory to some insureds.

Our response is that we believe you are interpreting the definition of Unfair Discrimination without reference to the basis of our selection process and without regard to the basis for determining a Discriminatory Practice as defined by the Insurance Code of the State of New York.

A practice is deemed **Unfair** Discrimination under the NY Insurance Code only if the basis for the practice is one which is defined as any of the following:

1. Under §2606: Race, Color, Creed, National Origin, Or Disability;
2. Under §2607: Sex or Marital Status;
3. Under §2608: Mental Disability.

See Attachments. We have not included any references under § 4424, since this section of the Code applies to Health Insurance Underwriting as applicable to Individuals only.

EXPLANATORY MEMORANDUM

RESPONSE TO NYSID OBJECTION DATED 6/16/10



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Therefore, we find no evidence in the Insurance Code of New York which would support your objection that the application of this Exclusion is Unfairly Discriminatory. The Commercial Property Checklist cites §2606, §2607 and §2608 and the application of an exclusion on the basis of disclosed Loss History does not come under the basis of any of these sections that define Discrimination.

The application of this exclusion to an account showing corresponding loss history for this exposure is no more Unfairly Discriminatory than removing coverage for certain types of Property in the Open under the Additional Property Not Covered endorsement (for which there has been no filed loss cost credit) for certain Named Perils.

Therefore, we request that you submit to us the citation from the NY Insurance Code which supports your allegation that the analysis of Loss History is deemed a Discriminatory practice.

Unfair Discrimination and Rate Differential:

The voluntary market assumes an underwriting selection process; however, that selection process is tempered by imposition of regulations which prohibit *Unfair* application of rate differentials (one would assume to any group or class of risks of similar characteristics based on the prohibited characteristics noted in the statutes §2606, §2607 and §2608).

We have not done so. Therefore, we conclude that if a single Commercial Property risk has already exhibited a higher potential for loss, as shown in a disclosed loss history, that such an exposure would necessarily be appropriate to be excluded in order to maintain the integrity of a rate which does not include in its promulgation an element representing such loss.

The standard industry definition of *Unfair Discrimination* is reflected in Professor C. Arthur Williams, Jr. succinct definition as it applies to unfairly discriminatory insurance rates as follows:

“An insurance rate structure will be considered to be unfairly discriminatory: if allowing for practical limitations, there are premium differences that do not correspond to expected losses and average expenses or if there are expected average cost differences that are not reflected in premium differences”

This excerpt is taken from *Insurance, Government, and Social Policy*, The S.S. Huebner Foundation for Insurance Education, C. Arthur Williams, Jr., Chapter 11, Price Discrimination in Property and Liability Insurance, 209-242.

We have not submitted for review any factor or rating basis on which the application of the Exclusion would render this filing to be supporting a Unfairly Discriminatory rate, since ISO has stated their position in their Circular (noted below) as not being anticipated in the promulgation of their Loss Costs and we have based our imposition of the Exclusion on disclosed historical losses.

Since the basis of our application of the Exclusion is based on Losses, the definition above would **not** deem the practices Unfairly Discriminatory.

No Unfair Discrimination in Rate Differential Based on ISO Historical Data and Reference Material

In ISO Reference Filing CF-2006-OVBEF (Forms) and CF-2006-OVBER (Rules) the NYSID approved the use of CP 01 78 and allowed attachment of this form to all CP policies. These filings were announced to companies in Circular LI-CF-2007-027 - NEW YORK - FORMS AND RULES TO ADDRESS EXCLUSION

EXPLANATORY MEMORANDUM RESPONSE TO NYSID OBJECTION DATED 6/16/10

OF LOSS DUE TO VIRUS OR BACTERIA AMENDED AND APPROVED; ADVISORY NOTICE TO POLICYHOLDERS FURNISHED as approved by the NYSID as filed.

In its Explanatory Memorandum which details the cause and effect of the application of this Exclusion, ISO states:

“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.

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.” See attachment LI CF 2006 175 under Supporting Documentation.



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li cf 2006 175.pdf

The NYSID Analysts who reviewed this filing apparently agreed with ISO's position and did not require a “give back” on any Loss Cost or indicated there should be any associated rate differential due to the application of the exclusion. Neither is there evidence that the NYSID required that criteria for the application of the noted exclusion whose effect is to limit coverage against such potential threats to expand the definition of property damage.

Since ISO assigned no rate increment for the application of the Exclusion endorsement, there is no basis for the assertion that there is Unfair Discrimination in the application of rate differential, since the coverage was never intended as an inclusion to begin with.

RATE DETERMINATION FOR EXCLUSION ENDORSEMENT:

We therefore conclude since you approved the above ISO filing that you are in agreement with us that since there is no basis included in the ISO analysis which would support any increment of a Commercial Property Loss Cost representing this exposure, that application of any credit or rate differential is not appropriate as any credit to premium on application of this Exclusion endorsement.

CRITERIA FOR APPLICATION OF EXCLUSION ENDORSEMENT TO POLICIES:

In response to your stated Objection 1 in your letter dated 6-17-10, we hereby submit revised Company Exception Page NY CP EXC 1 01/10 ed. This revision includes criteria under which the noted endorsement CP 01 78 will be applied to selected policies.

Risk Characteristics For Application of Exclusion (CP 01 78):

1. Historical report of an event which may or may not have resulted in loss involving sickness (including death) arising out of an insured's clients' (and/or any other person to whom the insured's clients' have contact) exposure to disease or infection while on the insured's premises or due to contact with the insured's operations, employees; or products.

EXPLANATORY MEMORANDUM
RESPONSE TO NYSID OBJECTION DATED 6/16/10

2. Such claim or loss must arise from the action or order of a civil authority to close the insured's operation in order to limit public exposure to such contagion, sickness and death; or
3. Such historical event or incident can arise from the action of the insured to close the insured's operation in order to limit public exposure to such contagion, sickness and death due to the insured's prudent expectation that such an event is likely to occur.
4. Account will be considered acceptable upon submission of clearance by civil authority governing type of business insured operates or through certification by duly authorized Public Health or contagious disease expert.
5. Issues described under paragraphs 1 through 3 above may be waived if proximate cause of the incident/event is traced to vendor or supplier of the insured with which the insured has severed its relationship and/or if the insured was proven not to have contributed to the incident.
6. Issues described under paragraphs 1 through 3 above may not be waived if the insured is a restaurant and the proximate cause of the incident/event is traced to improper food handling practices, storage or sanitation infractions or improperly cooked ground beef.

RISK CHARACTERISTICS DETERMINING WHEN EXCLUSION IS NOT APPLIED:

Application of the Exclusion is determined solely on the above-noted criteria (“**Risk Characteristics For Application of Exclusion**”). Coverage provided by omission of the exclusion is therefore otherwise written freely and without restriction.

Premium Determination When Exclusion is NOT Attached:

Apply the Factor in the Table below against the combined Building, Business Personal Property or Business Income including/without Extra Expense adjusted premium for the location after application of all other modification factors.

Grade	Exposure	Charge
High	Restaurants/Hotels/Grocery or Food Product Manufacturers with Products Liability exposure; No prior loss history.	Factor: .025
Medium	Buildings (lessors') with high traffic Restaurant, Grocery or Retail exposures; No Questionable Loss Control pertaining to cleaning of ventilation systems; No prior loss history.	Factor: .015
Low	All other Classifications; No prior loss history.	Flat: \$25

We have attempted to collect raw countrywide data with the assistance of our reinsurers; however, they inform us that they have no experience to share.

We have no company loss history on this exposure on which to base any charge; however, have done our best to reflect both your concerns and the exposure to loss. We plan on reviewing the performance of this coverage over the next three years and will re-assess if credible experience is collected at that juncture.

We believe the above responds to your objection and respectfully request your disposition or comment.

EXPLANATORY MEMORANDUM – RESPONSE TO OBJECTION 1 DATED 4-30-2010

The chief object of this filing is to submit a Company Exception to ISO State Exception Rule A.6.

Currently, this ISO rule imposes a Mandatory application of a Virus and Bacteria Exclusion CP 01 78 to the coverage afforded by the ISO Commercial Property Coverage Form. The ISO initial filing of this endorsement indicated that the exclusion was appropriate due to "pandemic" exposure to loss which was not anticipated in the standard coverage forms or in development of the loss costs for Commercial Property. Therefore, we assume that this Exclusion is deleting coverage across the entire NY Commercial Fire and Allied book written by the ISO member companies that utilize the ISO product, unless modified by such a Company exception.

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Because of the broad scope of the potential events which may occur, we feel that it is largely impossible to create a rule which takes in every aspect of exposure to communicable disease. Is it possible to simply indicate something in your proposed revision of our rule to state "This Exclusion will be applied on a case-by-case basis to risks which present with recent loss history which in the underwriters judgment indicates a potential higher than average exposure to loss"?

As indicated, our main object of this filing is to remove the carte blanche application of this Exclusion and not deny coverage to the majority portion of our book.