Virus and Pollution Exclusions in Coronavirus-Related Business Interruption Claims: Magic Bullet or Major Battleground?

by

John Buchanan and Suzan Charlton
Covington & Burling LLP[1]

Some property/casualty insurers' public statements would suggest that virus and contamination exclusions universally bar coverage for claims arising from the coronavirus pandemic.[2] But not all policies contain such exclusions; and not all such exclusions are created equal. Some so-called virus exclusions may fail to capture the coronavirus unambiguously in their litanies of excluded perils; others may apply only to particular coverage grants; and others may contain exceptions allowing for express virus or pandemic coverage grants. Additionally, doctrines of regulatory estoppel, principles of public policy, or currently pending legislation may render even the broadest virus exclusions unenforceable as written. At the same time, however, policyholders whose policies lack any virus exclusions may still find that their insurers dispute coronavirus-related coverage by relying on their general pollution or contamination exclusions, even with no specific reference to viruses in their insurance contracts.

While we are still in the early days of coronavirus-related coverage litigation,[3] we explore here some of the arguments that policyholders and insurers have asserted to date regarding the application of virus and pollution exclusions to business interruption insurance claims.

I. Virus Exclusions

Some—but far from all—commercial property insurance policies contain exclusions for losses caused by viruses. The exact wordings of such exclusions, and their related definitions, vary. Some address viruses specifically, either alone or as one among other causes of loss such as bacteria, fungi, microbes, or microorganisms. Some expressly exclude SARS-CoV but not SARS-CoV-2. Some exclusions are phrased in terms of "communicable disease" or "pandemic," sometimes without using the word "virus." And some may purport to exclude "pollutants" or "contamination" in a form that is expressly defined to include "virus" as a "pollutant" or "contaminant." In addition, some virus exclusions are framed in anti-concurrent causation language, purporting to apply the exclusion regardless of other causes of loss or whether other causes acted concurrently or in any sequence with the excluded peril.

But not all virus exclusions apply to all losses.

A. Exceptions to Virus Exclusions[4]

Commercial property policies with virus exclusions might contain coverage *inclusions* (often with sublimits) that either expressly or implicitly negate the virus exclusion.

- ***Additional Coverage for Communicable Disease***

For example, some commercial property policies contain a contamination exclusion defining "contaminant" to include "virus"; however, these policies also contain additional coverage extensions for "Communicable Disease Response" coverage and "Interruption by Communicable Disease" coverage. If the coronavirus was actually present at an insured location, and that location is subject to a health authority order, then the policyholder should be entitled to coverage under this endorsement.

Insurers may argue that this coverage extension — which is often sublimited — provides the exclusive line of coverage for COVID-19-related losses. But many Communicable Disease coverage grants do not by their terms limit other coverage grants under the policy. Thus, for example, if the pandemic results in lost revenue or extra expense due to a plant shutdown or supply chain disruptions, business interruption or contingent business interruption coverage may not be subject to the communicable disease sublimits, but only to the policy's overall limits. Similarly, Civil Authority coverage might apply separately, to the extent that the cause of damage is deemed to be "of the type insured" and other requirements of that coverage grant are met.

As one case contesting the contamination/virus exclusion illustrates, policy wording is key. In *Thor Equities, LLC v. Factory Mutual Insurance Co*,[5] Factory Mutual ("FM") issued a commercial property policy with time element coverage that included "Interruption by Communicable Disease." According to the complaint, that policy provides coverage for business interruption due to an order regulating communicable disease and also contains a contamination/virus exclusion that defines contamination as a "condition of property" and includes "virus" among the causes of contamination:

> [A]ny condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold or mildew.[6]

The insured in *Thor Equities* alleges that its losses are covered, not excluded, under this policy wording because the communicable disease coverage grant and the contamination exclusion are mutually exclusive:

> Thor's losses are covered under the other coverages and are not excluded by the Contamination Exclusion because the Contamination Exclusion only excludes costs due to contamination, not losses such as Time Element losses, and *the Contamination Exclusion cannot apply to anything defined as communicable disease because, as neither the Contamination Exclusion nor the communicable disease coverages reference each other*, if the Contamination Exclusion applies to communicable disease the communicable disease coverages are illusory.[7]

Further, the *Thor Equities* plaintiff alleges, coverage is not confined to the Communicable Disease extension, which is sublimited, but extends to all other business

interruption losses, because the contamination exclusion “only applies to costs incurred as a direct result of contamination, not costs incurred as a result of other causes.”[8]

Thus, in policies with distinct property damage and time element coverages, separate communicable disease coverage, and a contamination/virus exclusion that is limited to “conditions of property,” this particular virus exclusion may be limited to property damage losses and not preclude coverage for other elements of the claim.

- ***Additional Coverage for Fungi, Wet Rot, Dry Rot, and Microbes (including Viruses)***

In addition to the FM policy language at issue in *Thor Equities*, virus coverage may exist in other forms. For example, some business property policies contain coverage extensions for “fungi, wet rot, dry rot and microbe coverage,” with a definition of “microbes” that expressly includes viruses. This additional coverage applies to property damage and time element losses, and expressly carves out an exception to the policy’s fungi, wet rot, dry rot and microbe exclusion.[9] Where the virus or microbes are “the direct result of a covered peril” — *i.e.,* all risks other than those that are excluded — property losses and time element losses due to the coronavirus would be covered, though possibly subject to sublimits.

B. Virus Exclusion May Not Apply to All Causes of Loss

- ***Factors other than virus that cause physical loss***

When a loss is caused by something other than a virus, the virus exclusion does not apply: this axiomatic argument appears to lie at the heart of the complaints filed by Minor League Baseball (MiLB) teams, alleging “direct physical loss or damage” due to widespread shutdowns that have prevented them from fielding players and playing games.[10] The plaintiffs’ alleged losses include physical loss and loss of use “to the teams’ ballparks or elsewhere caused by the SARS-CoV-2 virus, the governmental response to it, or the MiLB teams’ inability to obtain players.”[11] Only one of these causes of loss is the virus; two are not; therefore, the plaintiffs assert, coverage still applies.[12]

- ***Civil Authority***

Some civil authority coverage claims may not be subject to virus exclusions. As the recently filed complaint in *Williams PLLC v. Cincinnati Ins. Co.* asserts, “None of the forms [in the insured’s policy] exclude coverage due to a governmental action intended to reduce the effect of the ongoing global pandemic.”[13] Similarly, in another recently filed complaint, Turek Enterprises alleges:

> The Covid-19 virus was not the direct cause of the property damage at issue. The State did not order Plaintiff, or any proposed class member, to suspend its operation because its premises needed to be de-contaminated from the Covid-19 virus. The State issued its Order to ensure the *absence* of the virus, or persons carrying the virus, from the Plaintiff’s premises. And there is no evidence at all that the virus did enter Plaintiff’s property or that it had to be de-contaminated.[14]

And the *Chattanooga* MiLB plaintiffs likewise contend that the governmental response to the pandemic is not itself due to "loss or damage caused by or resulting from any virus…."[15]

In sum, under this theory of coverage, the plaintiffs' losses were directly caused by the actions of a governmental authority, not by the virus. Further, the virus exclusion does not apply to the civil authority coverage, because the governmental closure orders do not require cleanup of viral contamination.[16]

In addition, some civil authority coverage grants extend to "imminent loss." Thus, exclusions that purport to bar coverage for "direct physical loss" or "the actual presence of any … virus" might be ineffective to preclude civil authority coverage where government shutdown orders are imposed to avoid or prevent "loss" or "imminent loss," as opposed to "physical damage."

Under an "all risk" policy, many courts require the policyholder only to demonstrate that its property has in some way been damaged or lost in order to satisfy its burden of proof.[17] If, as many policyholders contend, the inability to use property constitutes "direct physical loss or damage,"[18] and if the policyholder can demonstrate such a loss, then the burden shifts to the insurer to prove that an excluded peril caused that loss. Contamination/virus exclusions that use the phrase "conditions of property" or the word "actual" will present a more challenging burden of proof for insurers. If the exclusion requires the "actual presence of any … virus," the exclusion may be held inapplicable on its face to government orders that are based on merely suspected or imminent viral presence.

C. Regulatory Estoppel

Some policyholders contend that the virus exclusion itself is simply invalid. For example, in *1 S.A.N.T., Inc. d/b/a Town & Country v. Berkshire Hathaway, Inc*.,[19] the plaintiffs assert that principles of regulatory estoppel bar insurers from enforcing the virus exclusion.[20]

Regulatory estoppel is "a form of equitable estoppel whereby insurers are prevented, or 'stopped,' from asserting an interpretation of an insurance policy provision that is contrary to the insurer's explanation of that policy provision to state insurance regulators when the insurer originally sought approval of the policy form from the state department of insurance."[21] Here, the basis for Town & Country's assertion is that the insurance industry, when seeking approval for the new exclusion from state regulators in 2006, misrepresented its scope as merely clarifying rather than curtailing coverage. According to the complaint:

> 49. In their filings with the various state regulators (including Pennsylvania), on behalf of the insurers, ISO [the Insurance Services Office, Inc.] and AAIS [the American Association of Insurance Services] represented that the adoption of the Virus Exclusion was only meant to "clarify" that coverage for "disease-causing agents" has never been in effect, and was never intended to be included, in the property policies.
>
> ….

> 53. The foregoing assertions by the insurance industry (including Defendant), made to obtain regulatory approval of the Virus Exclusion, were in fact misrepresentations and for this reason, among other public policy concerns, insurers should now be estopped from enforcing the Virus Exclusion to avoid coverage of claims related to the COVID-19 pandemic.
>
> 54. In securing approval for the adoption of the virus exclusion by misrepresenting to the state regulators that the virus exclusion would not change the scope of coverage, the insurance industry effectively narrowed the scope of the insuring agreement without a commensurate reduction in premiums charged. Under the doctrine of regulatory estoppel, the court should not permit the insurance industry to benefit from this type of duplicitous conduct before the state regulators.[22]

A key issue in this regulatory estoppel litigation is whether ISO and AAIS did, in fact, misrepresent the coverage the exclusion was meant to "clarify." The complaint alleges that ISO represented, in a July 6, 2006 "Circular," that "property policies have not been a source of recovery for losses involving contamination by disease-causing agents," and that policyholders might try to "expand coverage to create sources of recovery for such losses…."[23] AAIS, in its own filing, similarly represented:

> 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 . . .
>
> 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 . . .[24]

But in fact, as the *Town & Country* complaint asserts, "[b]y 2006, the time of the state applications to approve the Virus Exclusion, courts had repeatedly found that property insurance policies covered claims involving disease-causing agents…."[25]

If the policyholder plaintiffs in *Town & Country* are correct, and the insurance industry representatives' 2006 representations to regulators are shown to be false, then the insurers may be barred from asserting that the exclusion applies to bar coverage for claims involving disease-causing agents, such as the coronavirus.

D. Public Policy Arguments

In at least one jurisdiction that has not formally adopted the regulatory estoppel doctrine, policyholders have instead relied on a public policy theory to overcome virus exclusions, alleging that their commercial property policies provide coverage for business interruption losses and that "any other construction of the language of the policies [is] void as against public policy…."[26]

These Texas policyholders allege that the exclusion is invalid because the insurers procured the state insurance department's approval by representing that the exclusion was narrower than these insurers now claim.[27] They seek discovery regarding "the meaning and scope and intended operation of the Virus exclusion," contending that:

> On information and belief, Defendant made admissions to insurance regulators that the exclusion was meant to apply only for decontamination costs claims, but not for losses from business interruption and civil authority orders.[28]

The insurers in these cases have moved to dismiss the complaints, including the claims based on the public policy argument. According to one insurer motion, public policy is in the insurers' favor, not the policyholders':

> To impose liability retroactively for an excluded peril … does not serve public policy, but would arbitrarily impose an inequitable burden on State Farm and other insurers to cover a risk that their policies explicitly and unambiguously informed policyholders was not covered and for which the insurers did not charge a premium.[29]

The court has not yet ruled on these motions as of this writing.

E. Proposed Legislation

Even if policyholder litigants' regulatory estoppel and public policy arguments were to fail in the courts, state and federal legislatures might nonetheless codify their positions, at least for small businesses. Legislation is currently under consideration in several states and in Congress, the effect of which would be to void virus exclusions and force insurers to pay certain claims under some circumstances.[30] None of the bills has yet passed.

II. Pollution/Contamination and Microbe Exclusions

A. Traditional Exclusions for "Pollutants" or "Contaminants" Omitting the Word "Virus."

If a policy lacks a standard-form virus exclusion that is commonly available in the marketplace, many courts would be reluctant to read the word "virus" into another exclusion where it does not appear.[31] Yet some insurers reportedly have attempted to do just that, arguing that garden variety pollution exclusions, phrased in terms usually reserved for environmental pollution, should apply to viruses, too. Both the case law and the regulatory history of the standard-form virus exclusion suggest that these insurance industry arguments may face stiff headwinds.

In the wake of the SARS pandemic of 2003, the insurance industry, through trade associations such as the Insurance Services Office (ISO) and the American Association of Insurance Services (AAIS), first sought regulatory approval in 2006 to add the virus exclusion (discussed above) to "all risk" commercial property policies, because the pollution exclusion did not expressly encompass viruses. The contemporaneous ISO Circular, as discussed above,

acknowledged exactly this point: that "viral and bacterial contamination," which are not mentioned in the standard pollution exclusion, "appear to warrant particular attention at this time." Thus, because policies with standard pollution exclusions left open the possibility of coverage for viruses, the insurance industry sought regulatory approval to close the door with a specific virus exclusion. Without the virus exclusion, ISO's commercial property policy's "physical loss of or damage to" requirement could be met by viral contamination, and the pollution exclusion would not apply.

This is essentially the plaintiffs' argument in *3 Squares LLC, et al. v. The Cincinnati Insurance Co.*,[32] a coverage case involving a policy that contains no virus exclusion, but only a standard exclusion for pollutants. The policyholders' complaint alleges:

> 15. Prior to the effective date of the Policies, ISO published and made available for use a standard virus exclusion form.
>
> 16. Defendant CIC chose not to include the ISO standard virus exclusion form in the Policies.
>
> 17. Other than reference to a computer virus, the Policies include no exclusion that references the word virus.[33]

Given the lack of an express virus exclusion, and allegations that otherwise meet the basic insuring agreement, the plaintiff policyholders seek a declaratory judgment that their claims (and those of class members with typical claims in common) are covered.

Among other defenses, the insurer in *3 Squares* is expected to raise its "pollutants" exclusion, which is written on standard ISO Form FM 101 05 16, as a defense to coverage. "Pollutants" is defined as "any solid… contaminant," including "substances which are generally recognized in industry or government to be harmful or toxic."[34] "Virus" is nowhere mentioned in this definition. Insurers nevertheless can be expected to argue that the coronavirus is a "solid irritant or contaminant" and that it is "harmful to persons," to support their denials of coverage.[35]

Case law in several states, involving analogous factual situations, supports policyholder arguments that such standard pollution exclusions do not bar coverage for losses caused by or resulting from a virus. In light of the environmental terms in these exclusions (e.g., "release, discharge, escape or dispersal of 'contaminants or pollutants'"), many courts have confined even "absolute" pollution exclusions to claims involving "traditional" environmental pollution, and declined to apply them to claims involving, for example, carbon monoxide, paint fumes, local workplace fumes, or ingestion of lead paint.[36] Under this interpretation, a cause that spreads a virus (such as a sneeze) would fall outside the exclusion.[37]

Some courts, however, have held that pollution exclusions encompass both traditional and non-traditional industrial pollution.[38] Given the stakes of pandemic-related coverage, insurers can be expected to argue that traditional pollution exclusions should be extended to the novel coronavirus, even when their policies otherwise lack express virus exclusions.

B. "Microbe" Exclusions

In its public statements regarding COVID-19, at least one insurer, CNA, has referenced its exclusions for "loss or damage caused by microbes, contaminants, or pollutants, among other perils."[39] A published version of CNA's "microbe" exclusion applies to the "presence, growth, proliferation, spread or any activity of Fungi, wet rot, dry rot or Microbes."[40]

In contrast to the "microbe" exclusion at issue in the *Thor Equities* case discussed above,[41] this version of the CNA exclusion defines "Microbe" without any mention of "virus":

> Any non-fungal microorganism or non-fungal, colony-form organism that causes infection or disease. Microbe includes any spores, mycotoxins, odors, or any other substances, products or byproducts produced by, released by, or arising out of the current or past presence of microbes.

Does the coronavirus that causes COVID-19 qualify as a "microbe" under a definition that is silent about viruses? Though a virus shares some of the characteristics of living things, it is not technically a life form[42]; therefore, it does not fall within the literal scope of the terms "organism" or "microorganism" in this definition of "Microbe." Most standard dictionaries also define "microbe" to mean a "microorganism," i.e., a living thing.[43] Nonetheless, due to the unique characteristics of viruses, usage of these terms may vary. For example, the NIH in its HIV/AIDS glossary says: "Although viruses are not considered living organisms, they are sometimes classified as microorganisms."[44]

In short, the terms "microbe" and "microorganism" may be deemed ambiguous as applied to viruses. Generally accepted principles of policy interpretation would dictate that if these terms appear in an exclusion, they must be construed narrowly—even if they have enjoyed a broader construction when they appeared elsewhere in a coverage grant.[45] Thus, standard rules of construction could result in differing conclusions as to whether the novel coronavirus falls within the term "microbe" or "microorganism," depending on whether the term in question appears in a coverage grant or an exclusion.

III. Conclusion

Coronavirus coverage litigation is in its earliest stages, with interpretation of exclusions and other substantive issues largely undecided. Courts should, of course, apply the rules of insurance contract construction to determine whether and to what extent each virus and pollution exclusion wording, in the context of the policy as a whole, applies to a particular fact pattern. In addition to plain language that unambiguously carves out exceptions allowing coverage in certain circumstances, real-world context—including past drafting and regulatory history and current political considerations—may also play a role in deciding whether or how virus and pollution exclusions should apply to business interruption insurance claims. Regardless of what the insurance industry's current public statements may suggest, these exclusions appear unlikely to provide insurers with a magic bullet against all coronavirus-related coverage claims in the courts.

[1] The views and opinions expressed in this article are those of the authors and shall not be cited or construed as reflecting the views or opinions of Covington & Burling LLP or of any firm client.

[2] *See, e.g.,* Leslie Scism, *Companies Hit by Covid-19 Want Insurance Payouts. Insurers Say No.*, WALL ST. J. (June 30, 2020), https://www.wsj.com/articles/companies-hit-by-covid-19-want-insurance-payouts-insurers-say-no-11593527047 (quoting Chubb Ltd. Chief Executive Evan Greenberg, in an April 2020 earnings call: "The industry will fight this tooth and nail."); *Travelers Letter to New York Property Insurance Policyholders*, TRAVELERS, https://www.travelers.com/about-travelers/covid-19-business-interruption (last visited July 2, 2020) ("[B]usiness interruption losses resulting from these types of events [cancellations, suspensions and shutdowns] do not present covered losses under our property coverage forms. Even if there has been direct physical loss or damage to property, your policy contains a number of exclusions that are likely to apply to business interruption losses. The most important exclusion to note is the exclusion for losses resulting from a virus or bacteria, which would include coronavirus."). *See also* FAIR, https://fairinsure.org/ (last visited July 2, 2020) ("Global pandemic risks are uninsurable. … The losses stemming from such an event were never intended to be protected by a business interruption policy.").

[3] As of the date of this publication, we are aware of just one coronavirus-related coverage decision, from a Michigan state trial court. There the judge, in an oral ruling from the bench, granted an insurer's motion for summary judgment on the ground that the policyholder, a restaurant group, had not alleged any direct physical loss of or damage to property; additionally the judge—apparently misapprehending the burden of proof on exclusions—stated that the policyholder had failed to establish the inapplicability of a virus and bacteria exclusion, which the judge found unambiguous. *See Gavrilides Mgmt. Co. v. Michigan Ins. Co.*, No. 20-2583b, Hearing on Oral Argument (Ingham Cty., July 1, 2020), https://www.youtube.com/watch?v=Dsy4pA5NoPw&feature=youtu.be.

[4] While beyond the scope of this discussion of commercial property and business interruption insurance, we note two additional virus exclusion issues. First, some policies either expressly include or exclude pandemic events. These provisions often contain a list of specifically enumerated "pathogens, mutations, or variations," including "Severe Acute Respiratory Syndrome-associated Coronavirus (SARS-CoV) disease." *See* Complaint, *SCGM, Inc. v. Certain Underwriters at Lloyd's* (S.D. Tex., filed April 3, 2020). When contained in a coverage grant, such a provision may reasonably be interpreted to apply to SARS-CoV-2, on the premise that it is a "variation" of SARS-CoV. Conversely, when such language appears in an exclusion, medical evidence highlighting the distinctions between SARS and COVID-19, and between the viruses that cause them, may lead courts to construe these terms more narrowly, requiring the exact virus to be named in order to be excluded. *See, e.g.,* Shibo Jiang, et al., *A distinct name is needed for the new coronavirus*, The Lancet (Vol 395, March 21, 2020) (coronavirus "is distinct from SARS-CoV in biological, epidemiological, and clinical features. Naming 2019-CoV as SARS-CoV-2 is therefore truly misleading."), https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(20)30419-0.pdf; *see generally, e.g., Affinity Living Grp. LLC v. Starstone Specialty Ins. Co*., No. 18-2376 (4th Cir., May 26, 2020) (interpreting same term "broadly … when used in a provision extending coverage but … more narrowly … when used in a provision excluding coverage.").

Second, general liability insurance policies commonly contain an express exception to the virus exclusion, carving out foodborne illness or human transmission of disease. An example of such an exception is phrased as follows:

> However, this exclusion does not apply to:
> i. any fungi or microbes that are, are on, or are contained in, a good or product intended for bodily consumption; or

ii. microbes that were transmitted directly from person to person.

CNA Paramount General Liability Fungi/Mold/Mildew/Yeast/Microbe Exclusion Endorsement, https://www.bidnet.com/bneattachments?/488376278.pdf. Such exceptions may become important for policyholders facing liability claims by customers or patients, visitors, independent contractors, certain employees, and others alleging that the policyholder caused injury or damage related to COVID-19 or the coronavirus.

[5] *Thor Equities, LLC v. Factory Mut. Ins. Co.*, No. 20-cv-3380, Complaint (S.D.N.Y., filed Apr. 30, 2020).

[6] Complaint ¶ 34, *Thor Equities* (quoting FM policy at 76).

[7] Complaint ¶ 56, *Thor Equities* (emphasis added).

[8] Complaint ¶ 56, *Thor Equities.*

[9] *See, e.g.,* CNA Paramount Business Property Form CNA62648 XX 10-15, http://serff.disb.dc.gov/DownloadPdf.ashx?id=CNAB-130040216.

[10] *Chattanooga Prof'l Baseball LLC v. Phila. Indem. Ins. Co.*, No. 2:20-cv-03032 (E.D. Pa., filed June 23, 2020), *voluntarily dismissed and ordered to be refiled on behalf of each individual defendant* (July 2, 2020); *7th Inning Stretch LLC d/b/a Everett AquaSox v. Arch Ins. Co*., No. 2:20-cv-08161 (N.J., filed July 2, 2020); *Nostalgic Partners LLC d/b/a Staten Island Yankees v. Phila. Indem. Ins. Co*., No. 200700054 (Pa. Com. Pls., Phila. Cty., filed July 7, 2020).

[11] Complaint ¶ 7, 69, *Chattanooga*, No. 2:20-cv-03032 (June 23, 2020 E.D. Pa.); Complaint ¶ 7, 69, *7th Inning Stretch,* No. 2:20-cv-08161 (N.J., filed July 2, 2020).

[12] *See* Jeff Sistrunk, *Minor League Baseball Teams Fight For COVID-19 Coverage*, Law360 (June 23, 2020), https://www.law360.com/articles/1285917/minor-league-baseball-teams-fight-for-covid-19-coverage ("These are three independent factors, all causing physical loss.") (quoting plaintiffs' counsel).

[13] Complaint ¶ 53, *Williams PLLC v. Cincinnati Ins. Co.*, No. 20-cv-02806 (N.D. Ill., filed May 8, 2020).

[14] Complaint ¶ 8, *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-cv-11655 (E.D. Mich., filed June 23, 2020) (emphasis in original).

[15] *See* Complaint ¶ 83, *Chattanooga,* No. 2:20-cv-03032 (June 23, 2020 E.D. Pa.).

[16] *See* Complaint ¶ 47, *Turek*, No. 20-cv-11655 (E.D. Mich., filed June 23, 2020).

[17] *See, e.g., Fajardo Shopping Ctr. v. Sun All. Ins. Co*., 167 F.3d 1, 5 (1st Cir. 1999); *Living Word Bible Church, Inc. v. Travelers*, 2009 WL 2856127 (E.D. La. 2009) (same; citing cases); *Eveden Inc. v. N. Assur. Co*., 2014 WL 952643 (D. Mass. 2014) (same). *But see, e.g., Pentair Inc. v. Am. Guarantee & Liab. Ins. Co.*, 400 F.3d 613, 615 (8th Cir. 2005) (policyholder must still prove loss resulted from covered cause of loss under Minn. law to trigger coverage).

[18] The question of what constitutes "direct physical loss or damage" in the context of the coronavirus is the subject of a companion article in this issue of *Coverage*. [*See* _EDITORS PLEASE INSERT__.]

[19] *1 S.A.N.T., INC. d/b/a Town & Country v. Berkshire Hathaway, Inc.*, No. 2:05-mc-02025 (W.D. Pa., filed June 11, 2020), ECF No. 884.

[20] *See also* Complaint ¶ 83, *Chattanooga* ("T[he] Exclusion does not preclude the Teams' claims for coverage because, among other reasons, it is void, unenforceable, and inapplicable."); Complaint ¶ 10, *Turek* ("[T]he 'virus exclusion' is inapplicable, procured through fraud or misrepresentation, and therefore void.").

[21] *Regulatory Estoppel*, IRMI, https://www.irmi.com/term/insurance-definitions/regulatory-estoppel. *See, e.g., Morton Int'l, Inc. v. General Acc. Ins. Co. of America,* 134 N.J. 1, 75-76, 629 A.2d 831, 874 (1993) (applying regulatory estoppel to bar insurers from applying qualified pollution exclusion inconsistently from representations to insurance regulators)*; Sunbeam Corp. v. Liberty Mutual Ins. Co.,* 781 A.2d 1189, 1192-93 (Pa. 2001) (recognizing doctrine of regulatory estoppel and remanding issue for further evidentiary findings; additionally suggesting that evidence of representations to regulators might establish industry "custom and usage" of disputed terms in qualified pollution exclusion); *Simon Wrecking Co., Inc. v. AIU Ins. Co.,* 530 F. Supp. 2d 706, 714 (E.D. Pa. 2008) (holding that genuine issue of material fact existed as to regulatory estoppel and reserving issue for trial).

[22] Complaint at 10-11, *Town & Country*.

[23] Complaint ¶ 50, *Town & Country*.

[24] Complaint ¶ 51, *Town & Country*.

[25] Complaint ¶ 52, *Town & Country*.

[26] Second Amended Complaint ¶ 46, *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-cv-00461-DAE (W.D. Tex., filed April 27, 2020), ECF No. 8; *see Vizza Wash, LP d/b/a The Wash Tub v. Nationwide Mut. Ins. Co*., No. 5:20-cv-00680-OLG (W.D. Tex., filed June 5, 2020 after removal); *Slusher. Mid-Century Ins. Co.*, No. 5:20-cv-00607-FB (W.D. Tex., filed May 5, 2020).

[27] Plaintiff's Response to Defendant Nationwide's Motion to Dismiss at 8-9, *The Wash Tub*, No. 5:20-cv-00680-OLG (W.D. Tex. June 26, 2020), ECF No. 11.

[28] Plaintiff's Response to Defendant Nationwide's Motion to Dismiss at 9, *The Wash Tub. See also* Complaint ¶ 44, *Turek* ("[T]he standard form virus exclusion is … void as against public policy due to misrepresentation.").

[29] Defendant's Motion to Dismiss Plaintiffs' Second Amended Petition at 2-3, *Diesel Barbershop*, No. 5:20-cv-00461-DAE (W.D. Tex. May 8, 2020), ECF No. 9.

[30] *See* United Policyholders COVID Loss Recovery Initiative, https://www.uphelp.org/covid-loss-recovery-initiative, which tracks bills potentially affecting COVID-19 or pandemic coverage. States that have introduced such bills include Louisiana, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, and South Carolina. Louisiana abandoned its proposed legislation upon adjournment of the 2020 Regular Session on June 1, 2020. The District of Columbia also introduced such a bill as part of an emergency package in April, but these provisions were deferred for potential future consideration and were not included in the final bill that the D.C. City Council passed in May 2020.

Congress is reviewing three federal proposals: the U.S. Pandemic Risk Insurance Act of 2020 (PRIA), H.R. 7011, 116th Cong. (introduced May 26, 2020); the Business Interruption Insurance Coverage Act of

2020, H.R. 6494, 116th Cong.; and the Never Again Small Business Protection Act of 2020, HR 6497, 116th Cong. All three have been referred to the House Committee on Financial Services.

[31] *See generally, e.g., Pan American World Airways v. Aetna Cas. & Sur. Co.,* 505 F.2d 989 (2nd Cir. 1974) (construing exclusion narrowly because "[v]arious exclusionary terms in use or being considered for use prior to the present loss would have excluded the loss had they been employed.")

[32] *3 Squares LLC v. Cincinnati Ins. Co.*, No. 1:20-cv-02690 (N.D. Ill., filed May 4, 2020).

[33] Complaint at 5, *3 Squares,* No. 1:20-cv-02690 (N.D. Ill. May 4, 2020).

[34] Complaint, Exhibit 1, ISO Form FM 101 05 16 at 39 of 40, *3 Squares*, ECF No. 1-1. The full exclusion reads as follows:

> any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, asbestos, chemicals, petroleum, petroleum products and petroleum by-products, and waste. Waste includes materials to be recycled, reconditioned or reclaimed. "Pollutants" include but are not limited to substances which are generally recognized in industry or government to be harmful or toxic to persons, property, or the environment regardless of whether injury or damage is caused directly or indirectly by the "pollutants"….

[35] At least one policy form of which we are aware contains such an expansive definition of "pollution and/or contamination" that literally *anything* could fall within the exclusion:

> (a) seepage of, or pollution and/or contamination by, anything, including but not limited to, any material designated as a 'hazardous substance' by the United States Environmental Protection Agency or as a 'hazardous material' by the United States Department of Transportation, or defined as a 'toxic substance' by the Canadian Environmental Protection Act for the purposes of part II of that Act, or any substance designated or defined as toxic, dangerous, hazardous or deleterious to persons or the environment under any other law, ordinance or regulation; and
>
> (b) the presence, existence, or release of anything which endangers or threatens to endanger the health, safety or welfare of persons or the environment.

Complaint, Exhibit A, ICAT Form SCOL 234 (07 09), Seepage and Pollution Exclusion Endorsement, *Alan Surure MD PA v. Certain Underwriters at Lloyd's London*, Filing No. 107829860 (Fla. Cir. Ct., Miami-Dade Cty., filed May 21, 2020), https://www.crowell.com/files/Alan-Serur-Complaint.PDF. In connection with this language, a Beazley underwriter has been quoted as saying, "Anything could be considered a pollutant if it's in the wrong place at the wrong time." Brooke Smith, *Pollution Protection*, Canadian Underwriter (Nov. 3, 2018), https://www.canadianunderwriter.ca/features/pollution-protection/. It remains to be seen whether a court would agree with an insurer's argument that its exclusion is so broadly and vaguely worded that it renders illusory the protection against most of the ordinary perils for which property policies are purchased.

[36] *See, e.g.,* **California**: *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205 (Cal. 2003) (absolute pollution exclusion applies to releases of pollutants into the environment and not to claim arising out of the presence of poisons inside an apartment); **District of Columbia:** *Richardson v. Nationwide Mut. Ins. Co.*, 826 A.2d 310 (D.C. 2003) (pollution exclusion worded in terms of "byproducts of industrial pollution" did not apply to injuries arising from alleged carbon monoxide poisoning allegedly caused by a malfunctioning furnace in an apartment complex), *vacated pursuant to settlement*, 844 A.2d 344 (D.C. 2004); **Illinois:** *Am. States Ins. Co. v. Koloms*, 687 N.E.2d 72, 82 (Ill. 1997) (pollution "exclusion applies only to those injuries caused by traditional environmental pollution"); **Maryland:** *Clendenin Bros., Inc. v U.S. Fire Ins. Co.*, 889 A.2d

387, 398-98 (Md. App. 2006) (exclusion does not apply to welding fumes: "We conclude . . . that the current construction of the total pollution exclusion clause drafted by Insurer was not intended to bar coverage where Insureds' alleged liability may be caused by non-environmental, localized workplace fumes."); **New Hampshire:** *Weaver v. Royal Ins. Co.*, 674 A.2d 975, 977 (N.H. 1996) ("While courts freely apply the pollution exclusion to environmental contamination, they are generally unwilling to hold that its scope reaches other pollution-related injuries."); **New York:** *Belt Painting Corp v TIG Ins. Co.,* 795 N.E.2d 15, 20 (N.Y. 2003) ("the terms used in the exclusion to describe the method of pollution—such as 'discharge' and 'dispersal'—are terms of art in environmental law used with reference to damage or injury caused by disposal or containment of hazardous waste") (internal quotes omitted); **Ohio:** *Andersen v. Highland House Co.*, 757 N.E.2d 329, 330 (Ohio 2001) (holding that "[c]arbon monoxide emitted from a malfunctioning residential heater is not a 'pollutant' under [an absolute] pollution exclusion of a commercial general liability policy," and noting that "the genesis of the pollution exclusion" was to address environmental pollution); **Pennsylvania:** *Lititz Mut. Ins. Co. v. Steely*, 785 A.2d 975 (Pa. 2001) (absolute pollution exclusion did not extend to injuries from ingestion of lead paint).

[37] *See Johnson v. Clarendon Nat. Ins. Co.,* 2009 WL 252619, at *12 (Cal. App. Feb. 4, 2009) (unpub.) ("Does a policyholder pollute the environment by sneezing and passing a virus to their neighbor? A layperson would not reasonably interpret the exclusionary language to apply to the above scenarios.").

[38] *See, e.g.*, **Colorado:** *Mountain States Mut. Cas. Co. v. Roinestad*, 296 P.3d 1020, 1024-25 (Colo. 2013) (applying pollution exclusion to cooking grease dumped into sewer); **Florida:** *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1138 (Fla. 1998) (applying "absolute" pollution exclusion to fumes from an indoor ammonia spill, as well as spraying of chemical insecticide); **Nebraska:** *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 635 N.W.2d 112, 120, 123 (Neb. 2001) (applying absolute pollution exclusion to xylene fumes, because the "pollution exclusion, though quite broad, is unambiguous" and "does not specifically limited excluded claims to traditional environmental damage"); **Virginia:** *TRAVCO Ins. Co. v. Ward,* 715 F. Supp. 2d 699, 716 (E.D. Va. 2010) (under Virginia law, pollution exclusion applies to release of household pollutants and is not limited to "traditional environmental pollution"); *PBM Nutritionals, LLC v. Lexington Ins. Co*., 283 Va. 624, 636, 724 S.E.2d 707, 714 (2012) ("In the instant case, none of the pollution exclusion endorsements reference any terms such as 'environment,' 'environmental,' 'industrial,' or any other limiting language suggesting that the exclusions are limited to 'traditional' rather than 'indoor' pollution.").

[39] *See* https://www.cna.com/web/wcm/connect/9f6a1393-65be-4c99-80ab-54b5cfd4da2a/Notice-to-NY-Commercial-Policyholders.pdf?MOD=AJPERES.

[40] Complaint, Exhibit B, *Ungarean v. CNA*, No. 60-20-6544, (Pa. Com. Pls., Phila. Cty., filed June 5, 2020), ISO Form SB-147083-B (Ed. 07/09), https://www.classaction.org/media/ungarean-v-cna-et-al.pdf.

[41] *See* text at n. 6, above.

[42] *See, e.g.*, Virus, https://www.britannica.com/science/virus ("Viruses should not even be considered organisms, in the strictest sense, because they are not free-living; i.e., they cannot reproduce and carry on metabolic processes without a host cell."); University of Bergen, Centre for Geobiology, What are microorganisms?, https://www.uib.no/en/geobio/56846/what-are-microorganisms#:~:text=Technically%20a%20microorganism%20or%20microbe,generally%20classified%20as%20non%2Dliving. ("The term microorganisms does not include viruses and prions, which are generally classified as non-living. . . . Most virologists consider them non-living, as they do not meet all the criteria of the generally accepted definition of life. For instance, most viruses do not respond to changes in the environment, which is a definitive trait for living organisms. In addition, viruses can replicate themselves only by infecting a host cell. They therefore cannot reproduce on their own.").

[43] *E.g.*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/microbe (defining "microbe as "microorganism"); Cambridge English Dictionary, https://dictionary.cambridge.org/us/dictionary/english/microbe ("a very small living thing, esp. one that causes disease, and which is too small to see without a microscope"). As the Merriam-Webster entry for "microbe" explains (at https://www.merriam-webster.com/dictionary/microbe), "A hint of the Greek word *bios*, meaning 'life', can be seen in *microbe*. Microbes, or *microorganisms*, include bacteria, protozoa, fungi, algae, amoebas, and slime molds."

[44] *See* https://aidsinfo.nih.gov/understanding-hiv-aids/glossary/456/microorganism.

[45] *See, e.g., Affinity Living Grp. LLC v. Starstone Specialty Ins. Co.*, No. 18-2376 (4th Cir., May 26, 2020) (interpreting same term "broadly … when used in a provision extending coverage but … more narrowly … when used in a provision excluding coverage.").