

## Insurance Recovery During the COVID-19 Pandemic: Navigating Your Policy's Microbe and Pollution Exclusions

By Adrian Azer, Stephen Raptis and Brittany Parks

As corporate policyholders continue to submit claims to their insurers for business interruption and related losses sustained from the COVID-19 pandemic, insurers appear to be denying such claims routinely where the policies at issue contain exclusionary language specific to viruses — whether in stand-alone virus exclusions or other types of exclusions. As an initial matter, the mere inclusion of the word “virus” in any policy exclusion does not mean that the exclusion applies to COVID-19-related losses. The specific wording of the exclusion and context are critical. This article does not address virus-specific exclusions, but a more detailed discussion of such exclusions can be found [here](#).

But even when the policies at issue do not contain virus-specific exclusions, insurers have looked to other exclusions — including microbe exclusions and pollution exclusions — as bases for denial. This article addresses microbe and pollution exclusions commonly found in commercial property policies, and explores several arguments that policyholders may employ to overcome these denials.

Importantly, the specific wording of these exclusions varies, sometimes significantly, from policy to policy, and even seemingly minor wording differences may have a meaningful impact on the policyholder's best arguments for overcoming their insurers' denials. Although we discuss actual exclusionary language excerpted from common policy forms, it is merely illustrative. Careful attention to the specific language of individual policies is required to formulate the policyholder's most effective arguments for coverage.

### The Microbe Exclusion

Microbe exclusions typically purport to preclude coverage for loss or damage caused by the presence of microbes or by a governmental order directing a policyholder to remove microbes from its premises. For example, one common form of microbe exclusion provides that “this Policy excludes loss or damage directly or indirectly caused by or resulting from [...]”

Fungi, Wet Rot, Dry Rot and Microbes,

- (1) The presence, growth, proliferation, spread or any activity of Fungi, wet rot, dry rot or Microbes, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy;
- (2) Any government or regulatory directive or request that the Insured or anyone acting under the Insured's direction or control test for, monitor, clean up, remove, contain, treat, detoxify or neutralize any Fungi, wet rot, dry rot or Microbes.<sup>1</sup>

“Microbe” is thereafter defined as: “[a]ny 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.”<sup>2</sup>

<sup>1</sup> See CNA Policy Form No. G300709A.

<sup>2</sup> *Id.*

Other policies utilize similar language in purporting to exclude coverage for “Fungi.” For example:

This insurance does not apply to loss or damage:

- . which is fungus;
- . which is in anyway attributed to the presence of fungus; or
- . caused by or resulting from fungus,<sup>3</sup>

“Fungus” is thereafter defined as any “mildew, mold or other fungi;” “other microorganisms;” or “any mycotoxins, spores, or other by-products of the foregoing” or any “colony or group of any of the foregoing.”<sup>4</sup>

Although insurers have relied on these and similar exclusions to deny coverage for COVID-19-related losses, we believe that the language of these exclusions does not support such denials because COVID-19 is a virus, and the definitions of “microbe” and “fungus” do not make any specific references to “viruses.” While insurance law varies from state to state, fundamental principles of insurance policy interpretation require that language in policy exclusions be construed narrowly, and that any limitations to coverage be expressed clearly.<sup>5</sup> Additionally, where an exclusion is ambiguous, a court must adopt the interpretation that favors the policyholder.<sup>6</sup> If insurers intended microbe and/or fungus exclusions to include viruses, they had an obligation to expressly identify viruses among the specific agents being excluded.

Illustrative of this concept, many insurers have specifically included viruses in their microbe exclusions.<sup>7</sup> These exclusions demonstrate that the insurance industry contemplated including viruses like COVID-19 within the scope of microbe exclusions, and in some cases made a knowing decision not to include them. Their decision to include viruses in some microbe and fungi exclusions but not others demonstrates clearly that they intended to include viruses in the scope of the exclusions only when they were expressly identified in the exclusions.<sup>8</sup>

Likewise, viruses are not encompassed within other terms commonly incorporated in definitions of “Microbe” and “Fungi,” such as “microorganism.” By definition, “microorganisms” are “living” beings. Most virologists,

---

<sup>3</sup> See Chubb Policy Form No. 17-02-3069

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., *Nutmeg Ins. Co. v. Clear Lake City Water Auth.*, 229 F. Supp. 2d 668, 676 (S.D. Tex. 2002) (noting that “[p]olicy exclusions are to be narrowly construed” and that “an intent to exclude coverage must be expressed in clear and unambiguous language”) (citing *National Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co., Inc.*, 811 S.W.2d 552, 555 (Tex. 1991)).

<sup>6</sup> See, e.g., *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998).

<sup>7</sup> For instance, CNA policy form number CNA62641XX contains a microbe exclusion and defines “microbe” as any “virus.” Similarly, CNA policy form number CNA75504XX contains a “Fungi or Other Organic Pathogens” exclusion and includes “viruses (whether or not a microorganism)” in the definition of “other organic pathogens.” Moreover, Chubb endorsement form number 11-02-1102 excludes coverage for “biological agents,” meaning any “viruses or other pathogens (whether or not microorganisms).”

<sup>8</sup> See, e.g., *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1002–06 (2d Cir. 1974) (where policy language exists in the marketplace that makes limits on coverage clear and an insurer does not utilize similar language, the insurer cannot later argue that the limiting language applies to its policy).

however, consider viruses to be “non-living.”<sup>9</sup> In particular, viruses do not embody the traits of living organisms because they do not respond to changes in the environment and cannot reproduce on their own (*i.e.*, they can only replicate themselves by infecting a host cell).<sup>10</sup>

## The Pollution Exclusion

Exclusions for “Pollutants” or “Contaminants” (referred to collectively here as “pollution exclusions”) also are common in commercial property policies, and also have been relied by certain insurers in denying coverage. Pollution exclusions often utilize language akin to:

. . . this Policy excludes loss or damage directly or indirectly caused by or resulting from any of the following . . . :

The release, discharge, or dispersal of toxic or hazardous substances, **Contaminants or Pollutants**, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical loss or damage covered by this policy; unless the contamination is itself caused by covered physical loss or damage of property insured by this Policy for the following Causes of Loss;

Fire; lightning; explosion; wind or hail; smoke; direct impact of vehicle, aircraft or vessel; strike, riot or civil commotion; vandalism or malicious mischief; Equipment Breakdown; leakage or accidental discharge of fire protection equipment; collapse; falling objects; weight of snow, ice or sleet; theft; sudden and accidental discharge, leakage, backup, or overflow of liquids or molten material from confinement within piping, plumbing systems, tanks, equipment or other containment located at the insured location;<sup>11</sup>

Policies containing pollution exclusions typically define “contaminants” and/or “pollutants.” Although there are often important variations in these definitions, they tend to include: “[a]ny solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, fumes, acids, alkalis, chemicals, and waste.”<sup>12</sup>

Much like the microbe and fungi exclusions discussed above, the definition of “pollutant” in this definition does not include viruses. Again, this omission suggests that the insurers did not intend for the exclusion to encompass viruses.<sup>13</sup>

Moreover, many jurisdictions have held that similar pollution exclusions, often in other types of insurance policies, apply only to traditional, industrial-type pollutants or contaminants.<sup>14</sup> Many of these courts have found

---

<sup>9</sup> See, *e.g.*, University of Bergensis, Centre for Geobiology, *What Are Microorganisms?* (2010), <https://www.uib.no/en/geobio/56846/what-are-microorganisms>; see also Merriam-Webster, ‘Virus’ vs. ‘Bacteria’ *The key differences between two common pathogens*, <https://www.merriam-webster.com/words-at-play/virus-vs-bacteria-difference> (viruses are not living organisms and only grow and reproduce inside of the host cells they infect).

<sup>10</sup> *Id.*

<sup>11</sup> See Union Insurance Company Policy Form No. CP 00 10 10 12 (based on 2011 ISO form).

<sup>12</sup> *Id.*

<sup>13</sup> See *Pan Am. World Airways, Inc.*, 505 F.2d at 1002–06.

<sup>14</sup> See *Am. States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 494 (Ill. 1997) (holding that the pollution exclusion “applies only to those injuries caused by traditional environmental pollution”); 33-193 Appleman on Insurance Law &

that the drafting history of the exclusion reveals an intent on the part of the insurance industry to so limit its application.<sup>15</sup> Accordingly, these courts have declined to apply pollution exclusions to naturally-occurring substances such as carbon monoxide,<sup>16</sup> manure,<sup>17</sup> and sand, dirt/dust, or silica.<sup>18</sup>

Finally, courts consistently construe insurance policies “to give a reasonable meaning to each provision” of the policy and to “avoid a construction which renders portions of a contract meaningless, inexplicable or mere surplusage.”<sup>19</sup> Thus, where a policy contains both a pollution exclusion and a microbe exclusion, there is a strong argument that the pollution exclusion was not intended to include substances like bacteria and viruses because there would have been no need to include the microbe exclusion if the pollution exclusion was intended to apply to naturally-occurring, disease-causing agents. Therefore, to interpret the pollution exclusion to encompass viruses would render the microbe exclusion duplicative and, therefore, meaningless.<sup>20</sup>

## **Conclusion**

Many policyholders will have compelling arguments for avoiding application of microbe and pollution exclusions in their property policies to their COVID-19-related losses. However, the best arguments to pursue often will turn on specific nuances in policy language and legal authority from other contexts. When in doubt, policyholders should consult with experienced, policyholder-side coverage counsel.

---

Practice Archive § 193.01 (2nd 2011) (explaining that pollutants found in “traditional” cases of environmental liability include “leaching landfills, releases at oil refineries, damages imposed by CERCLA or in other industrial contexts”).

<sup>15</sup> *Id.* at 489.

<sup>16</sup> See *Am. States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 494 (1997) (finding that the accidental release of carbon monoxide due to a broken furnace did not constitute the type of traditional environmental pollution contemplated by the pollution exclusion).

<sup>17</sup> See *Country Mut. Ins. Co. v. Hilltop View, LLC*, 2013 IL App (4th) 130124, ¶ 34 (finding that manure and related odors at the policyholder’s confinement hog farm did not constitute traditional environmental pollution, distinguishing the situation from cases applying the pollution exclusion to “nonnaturally occurring chemicals” such as perchloroethylene).

<sup>18</sup> See *Hanover Ins. Co. v. Superior Labor Servs.*, No. 11-2375, 2016 U.S. Dist. LEXIS 162480, at \*52 (E.D. La. Nov. 23, 2016) (finding that the insurer could not establish that the pollution exclusion unambiguously precluded coverage for claims alleging exposure to sand, dirt/dust, and silica).

<sup>19</sup> See, e.g., *Day v. Allstate Indem. Co.*, 2011 WI 24, ¶27, 332 Wis. 2d 571, 585, 798 N.W.2d 199, 206.

<sup>20</sup> See, e.g., *Westport Ins. Corp. v. VN Hotel Grp., LLC*, 513 F. App’x 927, 932 (11th Cir. 2013) (finding that if “bacteria” was considered a “pollutant,” then the fungi/bacterial exclusion would be rendered “meaningless”).