



Adam Kutinsky  
JD, CPCU  
(248) 762-8644  
adam@kutinsky.com  
[www.kutinsky.com](http://www.kutinsky.com)

# Loss of Income COVID-19 Business Income Coverage

**Business Income Coverage** — commercial property insurance covering loss of income suffered by a business when damage to its premises by a covered cause of loss causes a slowdown or suspension of its operations. Coverage applies to loss suffered during the time required to repair or replace the damaged property. It may also be extended to apply to loss suffered after completion of repairs for a specified number of days. There are two Insurance Services Office, Inc. (ISO), business income coverage forms: the business income and extra expense coverage form (CP 00 30) and the business income coverage form without extra expense (CP 00 32). Business income coverage (BIC) is also referred to as business interruption coverage.

*<https://www.irmi.com/term/insurance-definitions/business-income-coverage>*

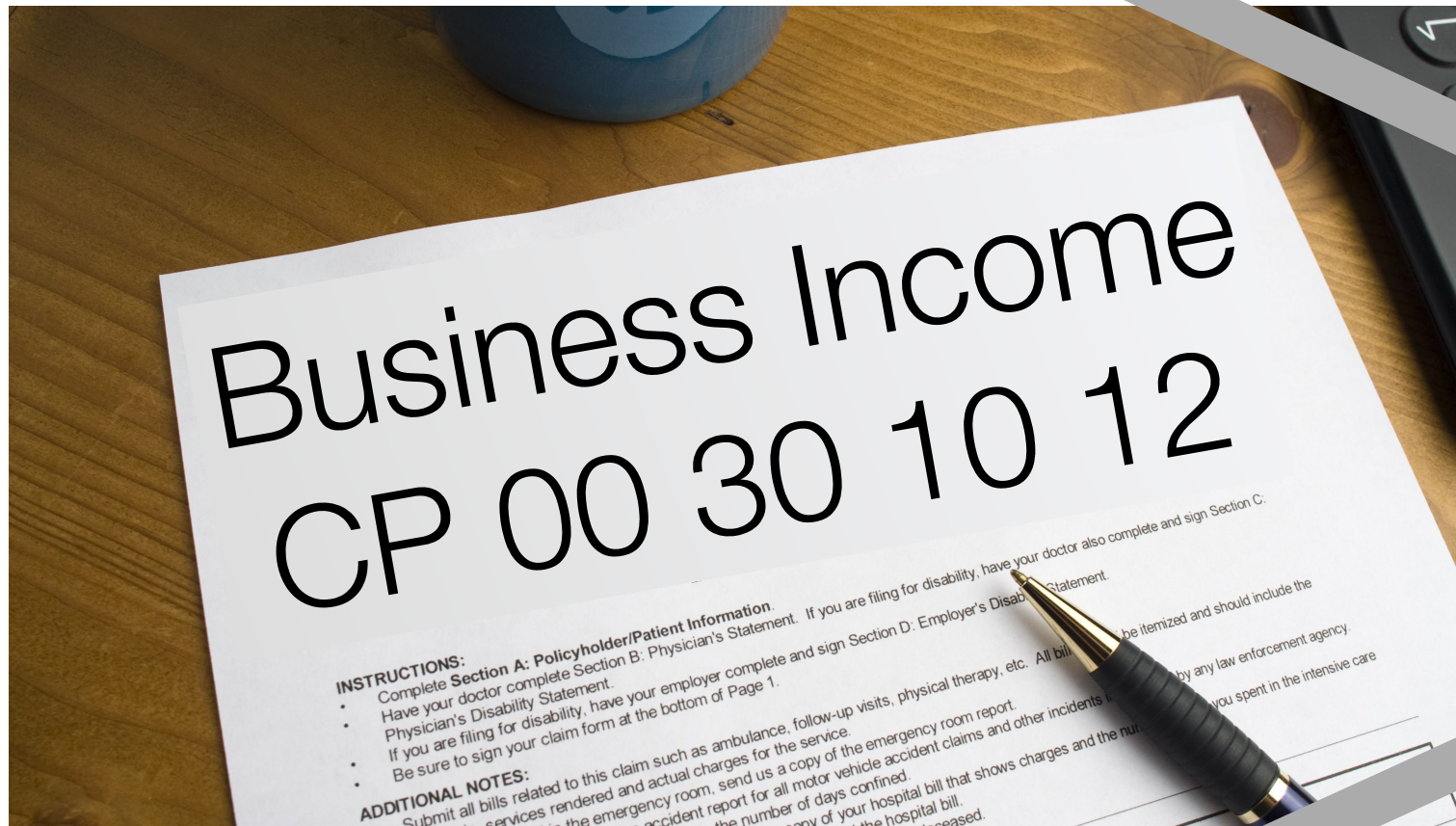
COMMERCIAL PROPERTY COVERAGE FORM  
BUSINESS INCOME (AND EXTRA EXPENSE)  
CP 00 30 © Insurance Services Office, Inc., 2011

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- Insuring Agreement - We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by **direct physical loss of or damage to property at premises** which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. **The loss or damage must be caused by or result from a Covered Cause of Loss.**
- Civil Authority - When a Covered Cause of Loss causes **damage to property other than property at the described premises**, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense **caused by action of civil authority that prohibits access to the described premises**, provided that both of the following apply: (1) **Access to the area immediately surrounding the damaged property** is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and (2) The action of civil authority is taken **in response to dangerous physical conditions** resulting from the damage or **continuation of the Covered Cause of Loss** that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

# Different Approaches to Interpretation of Policy

Insurance Professionals



Attorneys



# Intent of Underwriters

Losses associated with communicable diseases—like those from war or nuclear accident—aren't insurable. The risks are unknowable, preventing the calculation of a premium sufficient to cover the losses if the event occurs.

*David B. Rivkin Jr. and J. Michael Luttig, WSJ, Aug. 17, 2020*

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## Interpretation by Courts

The term "physical damage" includes "loss of access, loss of use, and loss of functionality." *American Guarantee & Liability Ins. Co. v Ingram Micro, Inc.*, 2000 U.S. Dist LEXIS 7299 (DC Ariz)

"Direct physical loss or damage" exists in the absence of tangible injury when government regulations rendered cause "an impairment of function and value" of insured property. *General Mills, Inc, v Gold Medal Ins.*, 2001 Minn App LEXIS 139 (Feb. 6, 2001).

## Civil Authority

### **action of civil authority that prohibits access to the described premises**

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- Access to the area immediately surrounding the damaged property is prohibited by civil authority
- The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage

# The respective legal arguments concerning COVID-19 as causing direct physical loss of or damage to property

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**Plaintiffs allege** that COVID-19 “is a physical substance,” that it “live[s] on” and is “active on inert physical surfaces,” and is “emitted into the air.”

Plaintiffs further allege that the presence of COVID-19 “renders physical property in their vicinity unsafe and unusable,” and that they “were forced to suspend or reduce business at their covered premises.”

Civil authorities in Missouri and Kansas issued orders requiring the suspension of business at various establishments, including Plaintiffs’ businesses. The Closure Orders “have required and continue to require Plaintiffs to cease and/or significantly reduce operations at, and . . . have prohibited and continue to prohibit access to, the[ir] premises.”

**Insurance Company’s** overarching argument is that the Policies provide coverage “only for income losses tied to physical damage to property, not for economic loss caused by governmental or other efforts to protect the public from disease . . . the same direct physical loss requirement applies to all the coverages for which Plaintiffs sue.”

# **Causes of Loss - Special Form “Covered Causes of Loss” means direct physical loss unless excluded or limited in the Policy**

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- Previously Referred to as “All-Risk” - covered unless excluded or limited
- Ordinance or law exclusion (covered later in the policy)
- Fungus and bacteria exclusion (Virus is neither)
- Pollutants
- Acts or Decisions by any person, group or governmental body

**What is the purpose and intent of an exclusion?**

**To remove known risks of loss that the carrier will not assume?**

# The Society for Applied Microbiology Distinctions Between Viruses, Bacteria and Fungi

	Cellular structure?	Prokaryote or eukaryote	Genetic material	Laboratory cultivation	Pathogenic potential
<b>Prions</b>	No	Not applicable	No nucleic acids	Only within living organisms	All mammalian prion diseases are untreatable and fatal
<b>Viruses</b>	No	Not applicable	DNA or RNA	Only within living organisms	Most cause active disease <sup>a</sup>
<b>Chlamydia and rickettsia</b>	Yes	Prokaryotes – parasitic bacteria	DNA in a single chromosome but not in a nucleus	Only within living organisms	Many are human pathogens
<b>Bacteria</b>	Yes	Prokaryotes	DNA in a single chromosome but not in a nucleus	Most of those causing human infection can be grown easily	Despite many being pathogens, most are harmless
<b>Fungi</b>	Yes	Eukaryote	DNA in multiple chromosomes in a nucleus	Most can be grown easily	A few are pathogens but the majority are harmless
<b>Protozoa</b>	Yes	Eukaryote	DNA in multiple chromosomes in a nucleus	The majority are difficult to grow in the lab	A few are pathogens but the majority are harmless

<sup>a</sup>But some may exist in a latent form within the host, causing no obvious disease.

## **Solution to Excluding Risk - Endorsement (ISO 2006)**

### **Exclusion of Loss Due to Virus or Bacteria**

**CP 0140**

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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.

We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

**What about policies that are not endorsed by CP 0140?**

FORMS - FILED

FROM: LARRY PODOSHEN, SENIOR ANALYST

JULY 6, 2006

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-OVBEP 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-OVBEP 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-OVBEP 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.

## Persuasive or not persuasive?

Losses associated with communicable diseases – like those from war or nuclear accident – aren't insurable. The risks are unknowable, preventing the calculation of a premium sufficient to cover the losses if the event occurs.

*David B. Rivkin Jr. and J. Michael Luttig, WSJ, Aug. 17, 2002*

## **Position that COVID-19 virus does not meet requirement of direct physical loss of or damage to property BI Form defined terms**

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- Finished Stock
- Operations
- Period of Restoration
- Pollutants
- Rental Value
- Suspension
- direct physical loss of or damage to property

“If the language is ambiguous, it will be construed against the insurer.”

“In the absence of a defined term, words will be interpreted in accordance with their common dictionary definition”

# **Court Interpretation of Undefined Term**

## **Direct Physical Loss of or Damage to Property**

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**Because the Policies do not define a direct “physical loss” the Court must “rely on the plain and ordinary meaning of the phrase.”** The Merriam-Webster dictionary defines “direct” in part as “characterized by close logical, causal, or consequential relationship.” “Physical” is defined as “having material existence: perceptible especially through the senses and subject to the laws of nature.” “Loss” is “the act of losing possession” and “deprivation.”

**“Plaintiffs have adequately alleged a direct physical loss.** Plaintiffs allege a causal relationship between COVID-19 and their alleged losses. Plaintiffs further allege that COVID-19 “is a physical substance,” that it “live[s] on” and is “active on inert physical surfaces,” and is also “emitted into the air.” COVID-19 allegedly attached to and deprived Plaintiffs of their property, making it “unsafe and unusable, resulting in direct physical loss to the premises and property.”

## **Application of Interpretation to COVID-19**

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Researchers at National Institute of Health studied how long the virus survives in the air and on surfaces and found that the COVID-19 virus can be detected on plastic and stainless steel surfaces for up to three days.

The results suggest that people may acquire COVID-19 after touching contaminated objects.

*<https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days>*

# Michigan Governor's Orders of Civil Authority re COVID-19 Recognizes Scientific Evidence of Physical Manifestation

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- Use best efforts to provide employees and customers access to an alcohol-based hand sanitizer that contains at least 60% alcohol, as recommended by the Centers for Disease Control and Prevention (CDC).
- Use best efforts to provide disinfecting wipes at cash registers and entrance points for customers to disinfect carts and baskets, as well as at other appropriate locations.
- Adopt procedures to meet the environmental cleaning guidelines set by the CDC, including by cleaning and disinfecting frequent touchpoints throughout the day such as point of sale terminals at registers, shopping carts, and shopping baskets.
- Close to the public for sufficient time each night to allow stores to be properly sanitized.

# Virus as Causing Direct Physical Loss - Analogous Cases

## Physical Manifestation and Loss of Use

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*Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (holding that while mere installation of asbestos was not loss or damage, the presence or imminent threat of a release of asbestos would “eliminate[] or destroy[]” the function of the structure, thereby making the building “useless or uninhabitable”); *Lambrecht & Assocs., Inc. v.*

*State Farm Lloyds*, 119 S.W.3d 16, 24–26 (Tex. App. 2003) (noting that while State Farm argued that the losses were not “physical” as they were not “tangible,” the court found that under the “direct language” of the policy allowed for coverage to “electronic media and records” and the “data stored on such media” as “such property is capable of sustaining a ‘physical’ loss”);

*Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (“We are persuaded both that odor can constitute physical injury to property . . . and also that allegations that an unwanted odor permeated the building and resulted in a loss of use of the building are reasonably susceptible to an interpretation that physical injury to property has been claimed.”).

# Coverage for Business Income Loss caused by COVID-19

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- “All-Risk” coverage
- Scientific proof of direct physical loss
- Governmental Order recognizes the science
- Direct physical loss is not defined by policy
- Insurers were made aware of virus risk in 2006
- Insurers were capable of endorsing policies to exclude virus since 2006

## Swarm of New York Restaurants Sue Insurers for COVID-19 Cover

A group of about 50 New York restaurants, ranging from high-end dining establishments to an iconic bagel shop, are suing their insurers for hundreds of millions of dollars in damages in a suit alleging their coronavirus-related business interruption claims were wrongly denied. The restaurants assert they sustained direct physical losses from the pandemic and had to partially reconstruct their properties to adapt to serving customers under restrictive reopening rules.

The suit filed by law firm Jenner & Block LLP in state court in Brooklyn on Monday lists 27 insurers as defendants, including units of major commercial property insurers such as American International Group Inc., Chubb Ltd., Travelers Cos. Inc. and Zurich Insurance Group Ltd. The plaintiffs in the suit, *Abruzzo Docg Inc. d/b/a Tarallucci e Vino et al v. Acceptance Indemnity Insurance Co. et al*, include Danny Meyer's Union Square Café, the Grand Central Oyster Bar, Café Wha? and Ess-a-Bagel.

A similar suit, *Lettuce Entertain You Enterprises Inc. et al v. Employers Insurance Co. of Wausau et al*, was filed in state court in Chicago on Friday.

"Our clients suffered direct physical loss and damage — and hundreds of millions of dollars of losses — as a result of the executive shutdown orders," said Gabriel K. Gillett, a Chicago-based partner at Jenner & Block, in a statement.

**The restaurants argue that they are owed coverage under all-risk commercial property policies** issued by the various insurers for income lost and extra expenses incurred during forced closures and restricted reopening during the COVID-19 pandemic.

Among other things, government-imposed restrictions required the restaurants to make physical alterations when they reopened, the suit alleges.

"They had to physically manipulate tables, chairs, and other equipment into less functional arrangements; install plexiglass or other makeshift barriers to prevent congregation; place markers on the floor or walls to indicate six-feet of separation; and redesign routes for entrance and exit," the suit states.

In addition, the restrictions limit the number of customers who can be served, the suit states.

**The insurers denied claims on the grounds that the policies require "direct physical loss of" or "damage to"** the restaurants to trigger business interruption coverage, the suit states.

"But there is no language in any of the Policies requiring this narrow construction. Under any reasonable interpretation, the terms 'direct physical loss of' or 'damage to' property are much broader and would include detrimental physical effects, like those caused by the Shutdown and Partial Reopening Executive Orders," court papers say.

Scores of restaurants across the United States have sued their insurers in state and federal courts seeking business interruption coverage for COVID-19 losses, but most of the previous suits have been filed by individual businesses or much smaller groups.

[https://www.businessinsurance.com/article/20200804/NEWS06/912335946/Swarm-of-New-York-restaurants-sue-insurers-for-COVID-19-cover?](https://www.businessinsurance.com/article/20200804/NEWS06/912335946/Swarm-of-New-York-restaurants-sue-insurers-for-COVID-19-cover?_hsmi=92829121&_hsenc=p2ANqtz-9vNwQYnuqZcx3waFvZQ11ZysX15gX3XMZaIBO8oZz-r2YtZRTkCmD_8ST5KDL94vaTg-S9vDI3c7pYbjleT7ZtRx4fyQ)

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# **Virus as Not Causing Direct Physical Loss - Analogous Cases Requires a “distinct, demonstrable physical alteration of the property”**

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*Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686 (5th Cir. 14 2011) (No coverage under the civil authority provision of the policy as plaintiffs “failed to demonstrate a nexus between any prior property damage and the evacuation order” when the city issued a mandatory evacuation order prior to the arrival of a hurricane and plaintiffs allegedly suffered business interruption losses);

*United Air Lines, Inc. v. Ins. Co. of State of PA*, 439 F.3d 128, 134 (2d Cir. 2006) (United could not show that its lost earnings resulted from physical damage to its property or from physical damage to an adjacent property when the government shut down the airport after the 9/11 terrorist attacks).

*Hartford Ins. Co. of Midwest v. Mississippi Valley Gas Co.*, 181 F. App’x 465, 470 (5th Cir. 2006) (“The requirement that the loss be “physical,” given the ordinary definition of that term is widely held to exclude alleged losses that are intangible or incorporeal, and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.” (citation omitted)); see also *Ross v. Hartford Lloyd Ins. Co.*, 2019 WL 2929761, at \*6–7 (N.D. Tex. July 4, 2019) (“direct physical loss” requires “a distinct, demonstrable, physical alteration to property” (citing 10A Couch on Ins. § 148:46 (3d ed. 2010)).)

# Michigan Courts and COVID-19

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July 1, 2020  
Lansing, Michigan,

Judge Joyce Draganchuk of Michigan's 30<sup>th</sup> Circuit Court held that the insured's property policy, which provided business interruption coverage, did not cover business losses suffered by the plaintiff—the owner of restaurants.

The plaintiff/insured sought coverage for damages totaling \$650,000—losses allegedly caused by a state closure order that restricted patronage of his restaurants.

The virus did not cause “property damage” to insured property and, even if it did, **a “virus exclusion” in the policy precluded coverage.**

Insurers argue that Covid-19 does not damage property, rather it damages individuals who contract the disease.

Policyholders, citing cases arising in other contexts, have countered that the mere loss of use of covered property constitutes physical damage to that property.

Policies define property damage not only as physical injury to property but also as the loss of property.

Judge Draganchuk stated: “There has to be something that physically alters the integrity of the property . . . There has to be some tangible, i.e., physical, damage to the property.”

She suggested that even if the insured could show that the coronavirus had been physically present in the insured's buildings, that would not be the type of physical injury required to trigger the policy. Responding to the insured's argument that there was physical loss to the building because the government's order effectively prohibited its occupancy, the Judge stated: “That argument is simply nonsense.”

**The judge also pointed to the fact that the policy specifically excluded losses caused by viruses. Judge Draganchuk summarily rejected the plaintiff's argument that the virus exclusion should be disregarded because it was ambiguously written.**

## Assuming coverage, what about damages?

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a. The amount of Business Income loss will be determined based on: (1) The Net Income of the business before the direct physical loss or damage occurred; (2) **The likely Net Income of the business if no physical loss or damage had occurred**, but not including any Net Income that would likely have been earned as a result of an increase in the volume of business due to favorable business conditions caused by the impact of the Covered Cause of Loss